ABSTRACT

Looking Forward: What are the Implications of *Windsor* on Section 2 of the Defense of Marriage Act (DOMA)?

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In *US v. Windsor* (2013) the Supreme Court ruled that Section 3 of DOMA violates the Fifth Amendment Equal Protection Clause, meaning the federal government can no longer refuse to recognize same-sex marriages that are deemed legal under state law. Some scholars argue *Windsor* foreshadows the inevitable demise of Section 2 of DOMA, which currently permits a state to both define marriage as between one man and one woman and to refuse to recognize same-sex marriages consecrated outside its boundaries. On the contrary, in this thesis I will argue that Section 2 of DOMA is perfectly consistent with both constitutional and legal precedent, as well as the decision made in *Windsor*. Furthermore, *Windsor* has no dire implications on a state's right to define marriage when one considers principles of federalism.

LOOKING FORWARD: WHAT ARE THE IMPLICATIONS OF *WINDSOR* ON SECTION 2 OF THE DEFENSE OF MARRIAGE ACT (DOMA)?

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TABLE OF CONTENTS

CHAPTER 1

Introduction

History of DOMA

In 1993 the Hawaii Supreme Court in *Baehr v. Lewin* set the foundation for what would become one of the most contentious social debates in U.S. history. In *Baehr*, the Hawaii Supreme Court decided that the "failure of the state to issue marriage licenses to same-sex couples violated the equal rights clause" of the Hawaii State Constitution (Knauer 436). This decision set off alarm-bells across the country causing many states to believe that they would be forced to recognize Hawaiian same-sex marriages. As a result, following the decision in *Baehr*, "forty-two states took steps to prohibit same-sex marriage, whether by statute or constitutional amendment" (Knauer 437). In addition, *Baehr* was the impetus for the creation of the now highly controversial Defense of Marriage Act (DOMA) legislation.

The United States Congress enacted DOMA in 1996 because of fears held by the majority of Congressmen that their respective state governments would be forced to recognize Hawaiian same-sex marriages. The Act was passed with minimal opposition in the House of Representatives by a vote of 342 to 67 and the Senate by a vote of 85 to 14 (*Section Three of the Defense of Marriage Act* 961). After passing through Congress with little debate, President Clinton signed the bill "with no talk of a veto" (*Section Three of the Defense of Marriage Act* 961). DOMA was not only supported by an overwhelming bipartisan majority in Congress, but also by a large number of Americans.

In fact, at the time DOMA was passed, "at least 70% of the voters were opposed" to the idea of same-sex marriage (*Section Three of the Defense of Marriage Act* 963). The entire process of introducing and passing DOMA took a total of just "four and one-half months," and took place during "the height of the federal election campaign season – including the presidential election campaign – of 1996" (*Section Three of the Defense of Marriage Act* 963). The ease with which DOMA passed into law during such a politically charged time implies that the majority of Americans viewed this Act as a political necessity. Furthermore, the lack of debate suggests that few people questioned DOMA's constitutionality.

DOMA contains two operative sections, Sections 2 and 3, that have an impact on same-sex marriage. Section 2 is as follows:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. (*Who Decides?* 148)

Section 2 defines the relationship between the states and is referred to as the "horizontal provision" in that it solely addresses the law regarding interstate recognition of same-sex marriages (*Who Decides?* 148). Section 2 of DOMA also has been referred to as the neutrality provision because it does not contain any positive language creating substantive policy. Section 2 declares, "no state…shall be required to give effect" to marriages outside of its established sovereignty; thus, Section 2 does nothing to ban the possibility of legalizing and/or recognizing same-sex marriages. Section 2 instead leaves this issue to be resolved by the states. Section 3, on the other hand, is much more substantive in its reach.

Section 3 addresses the vertical relationship between the states and the federal government and creates a federal definition of marriage for the purpose of granting federal marital benefits. Section 3 is as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

Unlike Section 2, Section 3 takes a substantive position on the marriage debate by declaring that only marriages between one man and one woman will be recognized under federal law. This section is a "place-holder" until Congress determines that the country is ready for a change in marital policy (*Section Three of the Defense of Marriage Act* 956). It is argued that Section 3 does "not attempt to forbid a future recognition of same-sex marriage," rather it "primarily preserves the authority of the federal Congress to decide the marriage-recognition-in-federal-law issue against the intrusion by the states" (*Section Three of the Defense of Marriage Act* 957).

The two operative sections within DOMA are meant to answer the question of who decides the marriage debate. Section 2 preserves horizontal federalism by allowing states to decide whether and to what extent to legalize and/or recognize same-sex marriages. Furthermore, Section 2 protects states from being compelled by the federal government and/or sister-states to act in a particular way regarding the marriage debate. Section 3, on the other hand, preserves vertical federalism by protecting the federal government from compulsion from the states when deciding who will receive federal marital benefits.

Despite the ease with which DOMA passed Congress, both sections of the Act have come under intense attack over the past decade. As social views on homosexuality and same-sex marriage have changed, so have views on legislation that enable the states or the federal government to define marriage as being between only one man and one woman. These new views eventually led to the case of *United States v. Windsor*, which decided that Section 3 of DOMA was unconstitutional.

A deeper analysis will be applied to the *Windsor* decision later on, but for now only the impact it had on Sections 2 and 3 of DOMA will be discussed. *Windsor* involved a lesbian couple, Edith Windsor and Thea Spyer, who had their marriage recognized by New York state law. Thea Spyer died in 2009, and before her death had left her estate to her spouse Edith Windsor. However, because federal law did not recognize their marriage, the federal government required Edith Windsor to pay $363,053 in estate taxes (*United States v. Windsor* 3). This charge would not have been applied had the federal government legally recognized their marriage, which Section 3 prohibited the federal government from doing. The *Windsor* Court struck down Section 3 both on equal protection grounds and because it deviated from federalist principles. Justice Kennedy states, the "principal purpose [of Section 3] is to impose inequality…" and that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal" (*United States v. Windsor* 22). In addition, Section 3 deviated from the "usual tradition of recognizing and accepting state definitions of marriage" by creating "two contradictory marriage regimes within the same State…" (*United States v. Windsor* 20, 22).

The *Windsor* decision was a major victory for same-sex marriage advocates by dismantling a key piece of DOMA, thereby forcing the federal government to recognize same-sex marriages that have been legalized by the states. However, while the Court declares Section 3 unconstitutional, it leaves Section 2 untouched and in constitutional limbo. The majority opinion makes this clear with their second to last sentence which states, "this opinion and its holding are confined to those *lawful marriages*" (*United States v. Windsor* 26, emphasis added). Those "lawful marriages" refers to marriages already recognized by the states and declares that the federal government is only required to recognize this category of same-sex unions. The Court muddies their thoughts on Section 2 even more by emphasizing a state's right to define marriage. The majority opinion dedicates substantial attention to a state's authority over domestic relations and attacks Section 3 as departing "from this history and tradition of reliance on state law to define marriage" (*Winsor* 19). In sum, although Section 3 is declared unconstitutional, the Court remained silent on the constitutionality of Section 2. The majority places a significant emphasis on a state's right to define marriage as they see fit, but appear to also come out against laws that limit marriage to only one man and one woman; thus, states are left in limbo as to whether they will be forced to recognize out-of-state same-sex marriages and/or legalize same-sex marriage altogether.

Despite this ambiguity, both sides of the marriage debate have been quick to use *Windsor* to support their side of the argument. For instance, a Texas Federal District Court in *DeLeon v. Perry* used *Windsor* to declare Texas' traditional definition of marriage unconstitutional. The Court in *DeLeon* focuses on *Windsor's* use of the word "dignity" and its concept of equality. *DeLeon* states, "Texas cannot define marriage in a

way that denies it citizens…the 'same status and dignity' to each citizen's decision" (36). Moreover, *DeLeon* cites an Ohio district court that stated that the only "purpose served by treating same-sex married couples differently than opposite-sex married couples is the same improper purpose that failed in *Windsor*…'to impose inequality' and to make gay citizens unequal under the law" (29).

Federal courts have also used *Windsor* to support the constitutionality of legislation that defines marriage as being between only one man and one woman. A Louisiana Federal District Court in *Robicheaux v. Caldwell* emphasized *Windsor's* focus on federalist principles in declaring the constitutionality of Louisiana's traditional definition of marriage. *Robicheaux* states, "*Windsor* repeatedly and emphatically reaffirmed the longstanding principle that the authority to regulate the subject of domestic relations belongs to the states…" (17 – 18). *Robicheaux* again references *Windsor* when it states that federalism "remains a vibrant and essential component of our nation's constitutional structure" (31).

As the Court in *Robicheaux* notes, "*Windsor* does little more than give both sides…something to hope for" (9). The decision in *Windsor* has left federal courts unsure about the impact *Windsor* was intended to have on Section 2 and on state marital policies in general. In addition, *Windsor* has left state governments that choose not to recognize and/or legalize same-sex marriages anxious about whether or not they will be forced to do so in the future. In light of this confusion, it needs to be decided what impact, if any, should *Windsor* have on the constitutionality of Section 2 and on states that define marriage as being between only one man and one woman.

Despite some scholars claiming that *Winsor* foreshadows the inevitable demise of Section 2 of DOMA, Section 2 is perfectly consistent with both constitutional and legal precedent as well as the decision made in *Windsor*. Some scholars also claim that *Windsor* suggests the downfall of traditional state marital definitions, and as a result the collapse of Section 2. However, when Windsor, constitutional precedent[1], and principles of federalism are considered it is clear that none of these have dire implications on a state's right to define marriage as being between only one man and one woman.

Overview of Relevant Landmark Cases to the Same-Sex Marriage Debate

Before analyzing the constitutionality of Section 2 and a state's power to define marriage as being between only one man and one woman, the relevant case law to the same-sex marriage debate will be discussed. This list is by no means exhaustive, but does acknowledge landmark decisions that have had a significant impact on the same-sex marriage debate. More analysis will be devoted to the majority of these cases later on, but for now only a brief summary will be provided for each case.

Loving v. Virginia, decided on June 12, 1967, is the first landmark case in the same-sex marriage debate. *Loving* involved a Virginia antimiscegenation statute that prohibited any type of interracial marriage. Mildred Jeter and Richard Loving, two Virginia residents, were an interracial couple that were married in the District of Columbia. Upon returning to Virginia, they were issued an indictment charging them with violating Virginia's prohibition of interracial marriages. The Court ruled in favor of the couple striking down the Virginia statute as a violation of the Equal Protection Clause

[1] Specifically, constitutional precedent regarding the Due Process and Equal Protection Clauses will be considered in this thesis.

and Due Process Clause of the Fourteenth Amendment. The Court explained that there is "no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" (*Loving v. Virginia* 12). *Loving* also became the first case to make marriage a fundamental right protected by the Due Process Clause (Pull 26). *Loving* states, the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and that the "freedom of choice to marry [may] not be restricted by invidious racial discriminations" (12). *Loving* thus established that state marriage laws cannot discriminate based upon race, and that the right to marry is a fundamental right protected by the Due Process Clause.

Loving has become a commonly cited case by same-sex marriage advocates in the same-sex marriage debate. Supporters of same-sex marriage analogize the use of race in *Loving* to sexual orientation and its use in marital laws today. They argue that love is love, and to bar two people who love each other because of their sexual orientation is analogous to prohibiting two people from marrying each other because of differences in race.

The next relevant case to the same-sex marriage debate is *Bowers v. Hardwick* decided on June 30, 1986. *Bowers* involved a homosexual man who was charged with violating a Georgia statute that criminalized sodomy by "committing that act with another adult male in the bedroom of his home" (186). *Bowers* did not address the constitutionality of sodomy laws in general, but instead focused on whether the "Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy…" (190). *Bowers* found that no such fundamental right existed in the Constitution. *Bowers*

stated that the criteria in determining whether a fundamental right exists involves whether the liberty is "implicit in the concept of ordered liberty" or "deeply rooted in the Nation's history and tradition" (191, 192). *Bowers* declared that it was "obvious…that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy" (192).

Bowers was a major loss for those who wished to see same-sex marriage one day legalized in the United States. If the right to engage in consensual sodomy is not protected by the Constitution, then how could one argue that same-sex marriage, the institution that would protect this sexual activity, be legalized? This was the predicament faced by same-sex marriage advocates at the time, and persuaded many to believe that the legalization of same-sex marriage may be a lost cause.

Romer v. Evans, decided on May 20,1996, is the next landmark case to the marriage debate. *Romer* involved an amendment to the Colorado Constitution, titled "Amendment 2," which would preclude "all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships" (620). The Court decided that Amendment 2 violated the Equal Protection Clause. Justice Kennedy stated that Amendment 2 withdrew from "homosexuals, but no others, specific legal protection from the injuries caused by discrimination" and forbade "reinstatement of these laws and policies" (*Romer v. Evans* 627). Moreover, Kennedy struck down Amendment 2 because it placed a "special disability" upon the LGBT community by forbidding them safeguards enjoyed by other citizens (*Romer* 631). Lastly, Kennedy believed that the disadvantage placed on the LGBT community was

"born of animosity toward the class of persons affected," and that Amendment 2 lacked a "rational relationship to legitimate state interests" (*Romer* 634, 632).

Romer, like *Loving,* is another case that is frequently referenced by same-sex marriage advocates. First, many same-sex marriage advocates focus on Kennedy's emphasis that Amendment 2 placed a "special disability" upon the LGBT community "alone". Advocates point out that traditional marriage laws create the same effect by denying one specific group access to the institution of marriage and the benefits that come along with it. Furthermore, advocates believe that Kennedy's application of the rational basis test in *Romer* would dismantle traditional marriage laws. Similar to Amendment 2, they believe that traditional marriage laws are "born of animosity" and lack any "rational relationship to legitimate state interests". In short, they believe that Kennedy and similar minded justices on the Court would strike down traditional marriage laws for the same reasons enunciated by the majority in *Romer*.

Lawrence v. Texas, decided on June 26, 2003, is another relevant case to the same-sex marriage debate. *Lawrence* involved two males who had engaged in consensual sodomy and violated a "Texas statute forbidding two persons of the same sex" from engaging in "certain intimate sexual conduct" (558). The Court ruled that the Texas sodomy statute prohibiting same-sex relations violated the Due Process Clause of the Fourteenth Amendment. Kennedy explained that a state should be cautious when trying "to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects" (*Lawrence v. Texas* 567). Kennedy believed that adult persons should be allowed to define their own relationships and what they would entail. Kennedy stated, it "suffices for us to acknowledge that adults may

choose to enter upon this relationship in the confines of their homes," and that expression of sexual intimacy is "but one element in a personal bond that is more enduring" (*Lawrence* 567). As a result of sexual intimacy being apart of this enduring "personal bond," the "liberty protected by the Constitution allows homosexual persons the right to make this choice" in how they will express themselves.

There are several important ideas to take note of in *Lawrence*. First, new hope was given to same-sex marriage advocates in that *Lawrence* declared that a state could not regulate sexual activity within the confines of the home. The logical hurdle of legalizing an institution that would allow illegal activity to occur no longer existed. Moreover, the majority chose not to utilize the Equal Protection Clause in its decision. The Court acknowledges that it is a "tenable argument," but refuses to address it directly because of the questions that might be raised about "whether a prohibition would be valid if drawn differently…to prohibit the conduct both between same-sex and different-sex participants" (*Lawrence* 575). In other words, the Court did not use the Equal Protection Clause in order to ensure the expansive nature of the opinion. Had the Court used the Equal Protection Clause the states could have challenged the Court by creating a statute that outlawed sodomy between both homosexuals and heterosexuals. As a result of this concern *Lawrence* used the Due Process Clause in order the hinder states from controlling a "personal relationship that…is within the liberty of persons to choose without being punished as criminals" (*Lawrence* 567). Using the Due Process Clause ensured the protection of all adults from the power of the states, regardless of sexual orientation, when engaging in consensual activity within the confines of the home.

The next relevant case in the same-sex marriage debate is *Goodridge v. Department of Public Health*, which was decided on November 18, 2003 by the Massachusetts Supreme Judicial Court. The Massachusetts Court decided on the constitutionality of the state's marriage laws that only recognized marriages between one man and one woman. The court found Massachusetts's marriage laws in violation of the Equal Protection Clause of the state's constitution.

The majority states:

> In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance -- the institution of marriage – because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understating of the invidious quality of discrimination. (*Goodridge v. Department of Public Health* 9)

The court placed a substantial emphasis on the tangible and intangible benefits that were being denied to same-sex couples but granted to heterosexual couples. The court stated that "limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality" protected by the Massachusetts Constitution. In addition, the court rejected every rational reason proposed by the state for defining marriage as between only one man and one woman. The court, recognizing the effect its decision would have on marital policy, decided that the meaning of marriage must be redefined in order to conform to its decision. The court stated, "we construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others" (*Goodridge* 14).

Although this case was decided in the Massachusetts Supreme Judicial Court and did not create constitutional precedent, it is important to take note of because it was the first case to find a constitutional right to marry another person of the same-sex. The

Massachusetts Supreme Judicial Court utilized, for the first time in a legal setting, the rationale that had been promoted by same-sex marriage advocates for some time. Specifically the court analogized race to sexual orientation and referenced *Loving* as a major reason for overturning its state's traditional marriage laws. Furthermore, the court utilized the same rationale used in *Romer* to strike down Amendment 2. The court directly referenced *Romer* stating that the Massachusetts marriage laws "[identify] persons by a single trait and denies them protection across the board" (*Goodridge* 10). In addition, the court used the rational basis test utilized in *Romer* and focused on the animosity that the state's law created towards the LGBT community. The court argued that the Massachusetts marriage law "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect" (*Goodridge* 10).

The last landmark case relevant to the same-sex marriage debate is *United States v. Windsor*. The facts of the case and the reasoning for the decision are discussed above; thus, for the sake of brevity, only the case's impact on the same-sex marriage debate will be discussed here. *Windsor's* emphasis on the dignity of same-sex couples as well as its utilization of the Equal Protection Clause should be the primary focus when considering the marriage debate. Same-sex marriage advocates argue that Kennedy's opinion could easily have been written for overturning a state law defining marriage as being between only one man and one woman. In fact, Justice Scalia argued this same idea in his dissent. Scalia stated, "the view that *this* Court will take on state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion" (*Windsor* 22). He goes on to provide an example of how easy this would be stating:

> ~~DOMA's~~ *This state law's* principal effect is to identify a subset of ~~state sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but no other couples, of both rights and responsibilities (*Windsor* 23).

In sum, *Windsor* provides for what many believe is the foundation for legalizing same-sex marriage nationwide in the near future.

Opponents of same-sex marriage, on the other hand, argue that the federalist principles enunciated in *Windsor* should be the real focus of the opinion. They argue it is only because of the federalist principles enunciated by the majority that Section 3 was able to be overturned on equal protection grounds. They believe that had the majority not established the state's constitutional powers over domestic relations then Section 3 could have potentially withstood constitutional scrutiny.

The structure for the rest of the thesis in proving the constitutionality of Section 2 and traditional marriage laws is as follows. Chapter two will show that the Due Process Clause does not protect a fundamental right to marry another person of the same-sex and establish the correct understanding of the fundamental right-to-marry. Chapter three will argue that traditional marriage laws do not violate the Equal Protection Clause. Chapter four will contend that states refusing to recognize out-of-state same-sex marriages do not violate the Full Faith and Credit Clause. Moreover, chapter four will illustrate that Section 2 conforms to and advances historically recognized federalist principles. Lastly, chapter five will analyze the future of marriage in the Supreme Court and in the United States in general.

CHAPTER 2

Due Process Clause

Introduction

The Due Process Clause is the linchpin of any argument in favor of or against same-sex marriage. Many proponents of same-sex marriage argue that this clause confers a fundamental right to marry another person of the same-sex. If, as same-sex marriage proponents claim, the Due Process Clause protects this right, significant problematic issues will occur since traditional marital laws will be subject to strict scrutiny. This means that states only recognizing traditional marriages would be required to show a compelling interest and that the means utilized are narrowly tailored to achieve this interest. This demanding standard of proof could potentially pose problems for traditional marital laws were there a fundamental right to marry another person of the same-sex. The importance of discovering whether such a right exists is apparent, but unfortunately this debate has been approached from the wrong perspective by both sides of the aisle; thus, it is necessary to correct this misperception before moving on and identifying whether a fundamental right to marry another person of the same-sex exists within the Due Process Clause.

The Due Process Clause argument has too often been confused with the sociological and philosophical argument of "what is marriage." For instance, advocates for same-sex marriage argue that marriage is about the love shared between two people and that sexual orientation should be irrelevant. Working from this egalitarian definition

they assume that all people are included in the right to marry. On the other hand, opponents of same-sex marriage believe that marriage can exist between only one man and one woman. As a result of this view on marriage, same-sex couples cannot be included in the right to marry because they cannot participate in a "real" marriage in the first place. Both of these arguments miss the mark in that they address "what marriage is" instead of what the fundamental right to marry means and/or entails. The Constitution cannot help answer "what marriage is," but it can define what aspects of marriage are protected from intrusion by both the state and federal governments. This is how the due process question should be approached. Instead of asking what the definition of marriage is, the question should be, "what rights are subsumed within the fundamental right to marry?" When the rights subsumed within the right to marry are identified, only then is it possible to answer whether there exists a fundamental right to marry another person of the same-sex.

Identifying the rights subsumed within the right to marry is a difficult task because of the abstract nature of marriage. Furthermore, the Constitution does not explicitly address marriage and the Court has yet to give an explanation of what the fundamental right to marry means. Nevertheless, looking at past case law dealing with marriage provides a foundation to help answer what protections are subsumed within the right to marry. In order to create this foundation, case law dealing directly and indirectly with marriage will be examined to identify what characteristics of marriage the Court views worthy enough to be protected. These characteristics will then be used to define what the fundamental right to marry means as well as what the right does not mean. Additionally, these characteristics will also establish the boundaries placed upon the

states when regulating marriage. In the end, this approach will answer whether the Due Process Clause confers a fundamental right to marry another person of the same-sex.

Cases dealing directly and indirectly with marriage from 1790 – 2010 reveal four main characteristics of marriage: History and tradition, marriage's importance to society and its connection to the family, broad state power over marriage, and marital privacy. The following cases are broken up into four categories based upon what characteristic of marriage they exemplify.

History & Tradition

Meister v. Moore (1877) involved a property dispute between the alleged common law wife and biological family of the deceased. *Meister*, in ruling in favor of the alleged common law wife, emphasized the personal importance of marriage describing it as "a thing of common right" (81). *Meister* asserted that marriage pre-existed the states pointing out that "statutes in many of the States…regulate the mode of entering into the contract, but they do not confer the right" (78). In other words, the Court's statements suggest that marriage is a part of the common law because the state does "not confer the right" in the first place. Additionally, the Court contends that marriage is a "common right"; thus, it should be a part of the common law.

The landmark case of *Reynolds v. United States* was decided a year later in 1878. George Reynolds, a practicing Mormon, was indicted for violating a federal law that prohibited bigamy in federal territories. In upholding the law prohibiting bigamy the Court emphasized the history and tradition against the practice. The Court stated, "polygamy has always been odious among the northern and western nations of

Europe…" and "from the earliest history of England polygamy has been treated as an offence against society" (*Reynolds v. United States* 164).

Almost fifty years later *Meyer v. Nebraska* (1923) was decided. *Meyer* was a substantive due process case involving a teacher who was convicted of violating a law that "prohibited any person from teaching…in any language other than English, or teach any modern language other than English to students who had not passed eighth grade" (*The Constitutional Right to Marry* 298). The Court used history and tradition to reverse the conviction of the teacher. The Court stated:

> Without doubt, [liberty] denotes…the right of the individual to contract, to engage in any of the common occupations of life…to *marry*, establish a home and bring up children…and generally to enjoy those privileges *long recognized at common law* as essential to the orderly pursuit of happiness by free men (*Meyer v. Nebraska* 399, emphasis added)

The phrase "long recognized at common law" points directly to the utilization of history and tradition. "Long recognized" implies that an idea or concept has been acknowledged for a long duration of time (i.e. history). "Common law" relies upon custom and precedent, which suggests that the rights the Court referred to were long-established beliefs or practices (i.e. tradition). Although this case did not directly involve marriage, the Court used the history-and-tradition standard to indicate that the right to marry was a constitutionally protected right.

Griswold v. Connecticut (1965) struck down a Connecticut statute that banned the use or abetting the use of contraceptives. In their opinion the Court stated that marital intimacy is granted a constitutional right to privacy *because* of history and tradition. The Court stated, "we deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system" (*Griswold v. Connecticut* 486). In this

statement the Court explicitly references the historical and traditional standard by justifying the existence of a constitutional right by observing that it pre-existed a number of important national symbols such as the Bill of Rights.

Loving v. Virginia (1967), as discussed previously, concerned an interracial couple that was convicted of violating Virginia's antimiscegenation statute. The Court utilized history and tradition in explicitly declaring for the first time that marriage was a constitutionally protected right. The Court stated that the "freedom to marry has *long been recognized*" in American society (*Loving* 12, emphasis added). In discerning that the right to marry has "long been recognized" the Court makes use of history and tradition in much the same way that *Griswold* did in finding a right to privacy for marital intimacy.

A little over a decade later *Zablocki v. Redhali* (1978) was decided. *Zablocki* involved a Wisconsin man who had sued because the state would not allow him to marry due to the fact that he was behind on his child support payments. In their decision the Court "confirmed and applied the tradition-and-history standard for defining unwritten fundamental constitutional rights" (*The Constitutional Right to Marry* 327). The Court applied this standard by citing "no less than fifteen precedents going back ninety years to establish the…fundamental interest in marriage." (*The Constitutional Right to Marry* 327).

The last case to be looked at in this category is *Windsor v. United States* (2010). The *Windsor* Court struck down Section 3 of DOMA, which defined marriage as one man and one woman for the purposes of handing out federal benefits. Justice Kennedy utilized the history-and-tradition standard to justify the state's role in regulating marriage.

Kennedy stated, "the significance of state responsibilities for the definition and regulation of marriage dates to the *Nation's beginning*," and DOMA departs from the "*history and tradition* of reliance on state law to define marriage" (*Windsor* 18, 19).

The overarching theme of these cases is their reliance on history and tradition in order to establish fundamental rights and/or to protect constitutional principles. In addition, these cases reveal that the right to marry is found in history and tradition and is "older than the Bill of Rights" (*Skinner v. Oklahoma* 486). These cases confirm the idea that marriage pre-existed the state and that the right to marry has "long been recognized" in American society (*Loving* 12). Moreover, that the use of history and tradition is an acceptable tool when finding whether or not a fundamental right exists or whether a constitutional principle has been violated.

Marriage's Importance to Society & Connection to the Family

The following cases will reveal the Court's view that marriage is connected to the family and holds an important place in society. The first case in this category is *Reynolds v. United States*. *Reynolds* highlighted the importance of marriage and its relation to society in upholding a law that prohibited bigamy. *Reynolds* stated, "upon it [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties…" (165).

Maynard v. Hill (1888) involved a man named David who left his family to move out west to start a new life. Upon moving out west, David met a woman and obtained a legislative divorce from the territorial legislature dissolving his first marriage. Soon after obtaining his divorce David entered into a new marriage. Years later after David's death a dispute developed between David's first and second wife over who should receive his

land. David's first wife argued that the divorce granted by the territorial legislature was invalid, and therefore she should receive his property. The Court in *Maynard* ruled against the first wife highlighting marriage's importance and potential impact on society in supporting its decision. *Maynard* stated that marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress…" (211).

In 1923 *Meyer v. Nebraska* associated the right to marry to a traditional family lifestyle. The Court connected these two institutions when it stated, "to marry, *establish a home and bring up children…"* (*Meyer* 399, emphasis added). The court viewed the right to marry as "closely connected to the traditional home into which children were born and in which they would be reared" (*The Constitutional Right to Marry* 299).

Almost twenty years later the landmark case of *Skinner v. Oklahoma* (1942) was decided. *Skinner* struck down an Oklahoma law that "provided for the involuntary sterilization of any person convicted of a felony involving moral turpitude for a third time" (*The Constitutional Right to Marry* 300). In striking down the Oklahoma law *Skinner* directly connected procreation and marriage. The Court stated, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage *and* procreation are fundamental to the very existence and survival of the race" (*Skinner v. Oklahoma* 541, emphasis added). The Court linked marriage to procreation again in *Griswold v. Connecticut* when the Court stated:

> The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family – a relation as old and as fundamental as our entire civilization – surely does not show that the Government was meant to have the power to do so (495).

As was noted earlier the Court in *Griswold* overturned a Connecticut statute that banned the use or abetting the use of contraceptives for married adult couples; thus, by ruling against a statute that sought to control the procreation decisions of married couples the Court explicitly links the two concepts together.

Before moving on to the next case in this category the assertion that marriage and procreation are directly linked should be further defended. It may appear that this link was destroyed in *Griswold* by granting married persons the ability to prevent conception. However, this would be a misunderstanding of *Griswold's* opinion. Although *Griswold* allowed married couples to not have children, the Court still struck down a state statute that infringed upon the general right to procreate. Having a right to participate also includes the right to choose not to participate as well; thus, the Connecticut statute that interfered with a married couple's decision about whether or not to have children infringed upon the general right to procreate just like the statute in *Skinner*. Understanding that the right to procreate also includes the right *not to* procreate corrects the supposed impact some believe *Griswold* had on the link between procreation and marriage. The correct understanding of *Griswold* and *Skinner* clearly shows a link between procreation and marriage, and that any state statute that infringes upon the right and/or decision to procreate simultaneously infringes upon the right to marry.

Loving in its short one page statement on marriage added some insight into the connection between marriage and society. The Court asserted that marriage is essential to ordered liberty and society. The Court made this idea clear when they stated that marriage is one of the "vital personal rights essential to the *orderly pursuit* of happiness by free men" (*Loving* 12, emphasis added).

In *Boddie v. Connecticut* (1971), decided almost five years later, the Court overturned a state statute that required indigent persons seeking a divorce to pay filing and service fees. In both the majority opinion and the dissent the Court acknowledged the importance of marriage to society. The majority stated, "marriage involves interests of basic importance in our society" (*Boddie v. Connecticut* 376). Justice Black in his dissent expresses the same idea. Black stated, "The institution of marriage is of peculiar importance to the people of the States" (*Boddie* 389). *Zablocki*, decided seven years later, would reaffirm the ideas expressed in *Boddie*. *Zablocki* tied marriage to future generations and the impact that marriage could potentially have on society citing *Maynard*, *Skinner,* and *Loving* in its decision.

This category of cases reveals the Court's explicit belief that marriage has a significant impact on society and is intimately connected to the family. The Court believes that there is something unique about marriage that is not found in any other social institution. In addition, the Court holds a broad view of what activities are connected to the family most likely to ensure the greatest protection possible for this societal institution. These activities include procreation, contraception, family relationships, and child rearing.

Prior to moving on to the next category of cases it is necessary to note the suggested differences that the Court sees between naturally formed families and state created families. Families are afforded great protection by the Court, but with the evolving views on family currently occurring in society it may be confusing as to what families are eligible to receive these protections. The following case is dated, but it provides discussion and viewpoints that are still very relevant in today's society.

In *Smith v. Organization of Foster Families for Equality and Reform* (1977) the Court upheld New York procedures for removing foster children from foster homes with less procedural protection than afforded biological parents. Justice Brennan, author of the majority opinion, stated, "the usual understanding of 'family' implies biological relationships" (*Smith* 843). However, he goes on to declare that biological relationships alone do not determine the existence of a family. The "importance of familial relationship…stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children" (*Smith* 844).

Despite his broad view of family Brennan still points out a number of distinctions that exist between biological and foster families. The foster family, unlike the biological family, "has its source in state law and contractual agreements. The individual's freedom to marry and reproduce is 'older than the Bill of Rights" (*Smith* 845). In addition, the liberty interest in family privacy finds its privacy protections "not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition'" (*Smith* 845). In sum, Brennan determined that despite whatever emotional ties may be present in foster families whatever is created finds its "origins in an arrangement in which the State has been a partner from the outset" (*Smith* 845). He believed that since the foster family relationship is not natural it does not fall under the protections of past cases dealing with familial relationships.

State's Power Over Marriage

The next category of cases involve the state's broad power over marriage. The first case to be looked at is *Meister v. Moore*. *Meister* maintained the presumed

constitutionality of state marital policies. *Meister* states that "there is always a presumption that the legislature" in enacting marital policies has no intention in taking away common-law rights "unless it be plainly expressed" (79). In addition, *Meister* recognized the state's interest in regulating marriage and that "it is the policy of the State to encourage" marriage (81). The idea pronounced in *Meister* that the state has an expansive power over marriage was reaffirmed the next year in *Pennoyer v. Neff* (1878). *Pennoyer* stated, "the State…has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved" (*The Constitutional Right to Marry* 293).

Reynolds v. United States implicitly implies the broad marriage power that states have when governing over their respective citizens. This is seen by the Court's willingness in *Reynolds* to make a fundamental right like religious liberty "subordinate to the historically-justified exercise of legislative power to define and regulate marriage for the good of society" (*The Constitutional Right to Marry* 295). The Court's action of placing the institution of marriage above such a coveted right like religious liberty speaks volumes to the broad power that the Court believes the state should possess when regulating marriage.

Maynard v. Hill reaffirmed the state's power over marriage that was pronounced a little over ten years earlier in *Meister*. The Court in *Maynard* ruled against the first wife arguing that because of marriage's importance and potential impact on society the state has an interest in regulating the institution. Since marriage creates "the most important relation in life" and has "more to do with the morals and civilization of a people than any

other institution," the Court recognized that it "has always been subject to the control of the legislature" (*Maynard* 205).

The next significant case in this category does not occur for another seventy-nine years in the case of *Loving v. Virginia* (1967). *Loving* was the first case "in more than 175 years to directly pass on the constitutional validity of a marriage law," and was the first case "in which the Supreme Court invalidated a marriage law" (*The Constitutional Right to Marry* 304 – 305). The long period of time between cases involving a state's power over marriage and the fact that this was the first state marital policy to be struck down in the Court's 178 year history has several implications. First, it shows the reverence and care that the Court takes when striking down marital policies. Second, it suggests that a state marital policy should be a gross injustice against its citizens, such as invidious racial discrimination, before considering striking it down. In short, the Court should give states the benefit of the doubt when evaluating marital policy unless a gross violation of constitutional rights is made explicitly clear.

In *Boddie* the Court recognized in both the majority opinion and the dissent the state's interest in regulating marriage because of its importance to society. The majority stated, "marriage involves interests of basic importance in our society"; thus, it is not surprising that "States have seen fit to oversee many aspects of that institution" (*Boddie v. Connecticut* 376). In Justice Black's dissent this same idea is expressed. Black stated, "It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States" (*Boddie* 389). Black elaborated further on this idea stating:

> The States provide for the stability of their social order…and for the needs of children from broken homes. The States, therefore, have particular interests in the

> kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages (*Boddie* 389).

Boddie, although it overturned a state statute related to marriage, still asserts the state's power over marriage. Both the majority and the dissent justify this power because of the potential impact that marriage can have society and the state's interest in the wellbeing of the family.

In *Califano v. Jobst* (1977) the Court upheld a statute that allowed Congress "to terminate a dependent child's social security benefits upon the marriage of the child if her or his spouse is permanently disabled" (*The Constitutional Right to Marry* 328). Congress in this instance used marriage as a classification to deny a government benefit. Although this case ruled on a statute passed by the federal government it still has important implications for a state's power over marriage. It suggests that at the very least "that the right to marry does not have the same status as other rights that have been deemed fundamental" (*The Constitutional Right to Marry* 328 – 329).

In *Zablocki* the Court for only the second time in its history struck down a state statute that directly regulated marriage (*The Constitutional Right to Marry* 323). Although a fundamental right was being infringed upon the Court did not apply the compelling interest test. The Court recognized that the Wisconsin statute "significantly interfered" with the fundamental right to marry, but applied a "critical examination" to the "state interests advanced in support of the classification" instead of strict scrutiny (*Zablocki* 382). This implies the Court's belief that deference should be given to states when evaluating the constitutionality of state marital policies. This is made clear by the Court's recognition that a fundamental right was being infringed upon yet all the justices applied either a "lower standard of judicial scrutiny, or…a more flexible

application…than what normally applies to laws that infringe upon fundamental rights" (*The Constitutional Right to Marry* 326).

Almost ten years later *Turner v. Safley* (1987) was decided by the Court. *Turner* involved a Missouri Division of Correction mandate that inmates could only marry with the approval of the prison superintendent. The Court for only the third time in history struck down the state marital regulation, although the Court was split 5-4 on the type of analysis to be applied (*The Constitutional Right to Marry* 329). Although the Court invalidated the Missouri marital regulation, "the Court went out of its way to note that other more reasonable marriage regulations are not unconstitutional"; thus, the Court wanted to ensure that no one interpreted their decision as a disapproval of the states regulating marriage (*The Constitutional Right to Marry* 332).

The last case in this category is *Windsor v. United States*. Despite striking down Section 3 Kennedy still emphasized the state's power over marriage. Citing *Sosna v. Iowa* Kennedy asserted that the "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States" (*Windsor* 16). Kennedy explained further that the "definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities'" (*Windsor* 17). Lastly, Kennedy expressed that in order to respect the idea that "there is no federal law of domestic relations" the federal courts "as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction" (*Windsor* 17).

Although this was an equal protection case, it appears the whole foundation for the opinion rested on the fact that the federal government was interfering with a historically recognized state power. This can be found in multiple places throughout Kennedy's opinion. First, Kennedy explicitly stated the importance of the state's domestic powers in the Court's decision when he asserted that the "State's power in defining marital relations is of central relevance in this case" (*Windsor* 18). Secondly, Kennedy declared that the federal government "throughout our history, has deferred to state law policy decisions with respect to domestic relations" (*Windsor* 17). Kennedy also argued that DOMA "rejects the long established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State" (*Windsor* 18). Lastly, Kennedy pointed out that New York chose to impart upon a certain class "a dignity and status of immense import," which the federal government chose to demean (*Windsor* 18).

With this foundation set Kennedy attacked Section 3 of DOMA from a federalist viewpoint stating:

> By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law, but unmarried for the purpose of federal law, thus diminishing the stability and predictability…the State had found…proper to acknowledge and protect (*Windsor* 22).

Without this foundation of federalism supporting his opinion, Kennedy arguably would have been unable to apply the rationale that he did in this case. It appears that Kennedy was only able to apply equal protection because of the power and legitimacy granted to the state when defining marriage. If the state's power over marriage were minimal or superseded by the federal government then it would have mattered little that there existed

"two contradictory marriage regimes within the State"; thus, without two contradictory marriage regimes there would have been little reason to bring up equal protection concerns.

All these cases demonstrate the Court's belief that the state has a broad power over marriage and should be given the benefit of the doubt when their policies come before the Court. The state's power over marriage in every case discussed in this section was grounded in the importance of the family to society and in turn marriage's potential societal impact. As a result the unique position marriage has in society, the Court believes it reasonable to defer to the states in most instances when they legislate on marriage. This deference is evidenced by the fact that from the conception of the Court until 2010 only three state policies that directly regulated marriage were struck down. In addition, in *Zablocki* and *Turner* the Court went to great lengths to convey the importance of allowing states the ability to continue to regulate marriage despite overturning state marital policies. Furthermore, both these Courts chose carefully the level of scrutiny they applied in order to ensure that a state's power over marriage was not diminished as a result of their respective decisions. This careful attention to the level of scrutiny applied is seen when *Zablocki* chose not to apply strict scrutiny despite recognizing that a fundamental right had been infringed upon. Additionally, this caution was seen by the *Turner* Court in that although they all agreed on the invalidity of the state marital policy, split 5-4 on what analysis to apply (*The Constitutional Right to Marry* 330). In sum, the Court holds the state should have a broad power over marriage because of its potentially large societal impact and should be deferred to unless a gross injustice has explicitly occurred.

Marital Privacy

The idea that marital privacy was encompassed within the right to marry was first introduced in *Griswold*. *Griswold*, however, only introduced a general right to privacy and didn't elaborate on how far this personal privacy standard extended. The Court only stated that the right to privacy is "older than the Bill of Rights…our political parties, [and] older than our school system" (*Griswold* 486). Moreover, *Griswold* argued that the state is prohibited from disrupting the "traditional relation of the family" (*Griswold* 495). Future cases would expand on this general right to privacy eventually extending it to all activities relating to marriage.

The expansion of the right to privacy began in *Roe v. Wade*. The Court struck down the statute by placing an emphasis on the right to "personal privacy"; thus, the Court extended the right to "personal privacy" to having an abortion. The Court declared that "personal privacy" only includes "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" (*Roe* 152). In addition, the Court connected "personal privacy" to "activities relating to marriage," which included procreation, contraception, family relationships, and child rearing (*Roe* 152 – 153).

Decided that same year was *Paris Adult Theatre I v. Slaton* (1973), which upheld a suit to enjoin an adult theatre from exhibiting a film that the Georgia Supreme Court deemed obscene. The adult theatre argued that the enjoinment violated their right to "personal privacy." The Court rejected this argument reaffirming their view established in *Roe* for deciding what activities are protected under "personal privacy." The Court stated, "This privacy right encompasses and protects the personal intimacies of the home,

the family, marriage, motherhood, procreation, and child rearing" (*Paris Adult Theater I* 65).

Zablocki the next year continued to expand the "personal privacy" standard by explicitly linking it to the institution of marriage. The Court in *Zablocki* did so by citing "at least seven privacy decisions that had identified marriage as one of the personal rights sheltered by the privacy doctrine" (*The Constitutional Right to Mary* 327). Although *Zablocki* does little to clarify what activities related to marriage fall under this protection, the Court still implies that there is something unique about the institution of marriage that deserves protection under the right to "personal privacy."

The last case in this category is *Lawrence v. Texas* (2003). *Lawrence* had a significant impact on the "personal privacy" standard by expanding it to all consenting adults as opposed to just married couples. As previously noted, *Lawrence* involved two males who had engaged in consensual sodomy and violated a "Texas statute forbidding two persons of the same sex" from engaging in "certain intimate sexual conduct" (558). The Court struck down the statute as a violation of the Due Process Clause of the Fourteenth Amendment. Kennedy stated that the Texas statute touches "upon the most private human conduct, sexual behavior, and in the most private of places, the home" (*Lawrence* 567). In addition, Kennedy declared that the Texas statute sought "to control a personal relationship that…is within the liberty of persons to choose without being punished as criminals" (*Lawrence* 567). In sum, Kennedy struck down the statute because it infringed upon the right to "personal privacy" by attempting to define and regulate private relationships that were taking place in the home. Kennedy stated, "It suffices for us to acknowledge that adults may choose to enter upon this relationship in

the confines of their homes and their own private lives and still retain their dignity as free persons" (*Lawrence* 567).

Roe, Paris Adult Theatre I, Zablocki, and *Lawrence* all expanded on the idea of marital privacy that was established in *Griswold*. These cases extended marital privacy beyond married couples to all people engaging in activities that have "some extension to activities relating to marriage" (*Roe* 152). These activities include procreation, contraception, family relationships, and child rearing. Although this right to privacy is quite broad, *Roe* and *Paris Adult Theatre I* both established that the right to "personal privacy" only includes "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" (*Roe* 152). The expanded view on marital privacy came to fruition in *Lawrence* when the Court extended the right to all consenting adults by striking down a statute forbidding sodomy between same-sex persons.

Analysis of Case Law: What is the Fundamental Right to Marry?

These four characteristics of marriage can be used to reveal what rights are entailed within the right to marry and what this looks like in practice. As a result of discovering what the right to marry entails it will be possible to place boundaries on the state's broad power over marriage. However, it is still unclear what foundation the right to marry rests upon. In other words, *why* is marriage a fundamental right? This question must be answered before answering what the right to marry entails. If a misconception exists about why marriage is a fundamental right then any answer to what the right to marry entails will be fruit from a poisonous tree. The following are common arguments regarding what foundations the right to marry rests upon.

The history and tradition argument is one of the more common arguments supporting why marriage is a fundamental right.[2] Although history and tradition are utilized in numerous opinions dealing with marriage, any right defined solely by history and tradition "gives little guidance as to its constitutional boundaries, especially if social practice surrounding that right is highly dynamic" (Pull 47). Traditions surrounding marriage have changed often and do not serve as a useful guide in discovering what the right to marry entails. History and tradition are more useful for guiding states when legislating on marital policy than helping to establish the boundaries of the fundamental right to marry.

Another purported reason arguing for why marriage should be viewed as a fundamental right is because of personal freedom. Two personal freedom arguments are commonly advanced: 1) Marriage is essential to happiness and 2) marriage is an expressive source.[3] Those who believe marriage is essential to happiness reference *Meyer* when it stated that marriage is "*essential* to the orderly pursuit of happiness by free men" (399). While happiness is important, the pursuit of it cannot support a fundamental right. The pursuit of happiness cannot support persuading the government to officially recognize one's marriage "any more than it can support a fundamental right to a government provided Corvette" (Pull 48). Furthermore, this understanding of marriage would take away a great deal of the state's power to regulate marriage, which the Court has recognized as an essential duty. There is an endless list of activities relating to marriage that a couple could consider "essential" to their pursuit of happiness; thus, if

[2] *See* Pull at 47
[3] *Id.* 47

this was the standard the Court used almost every state marital regulation would be struck down as impeding on the pursuit of happiness.

The second argument under the category of personal freedom is that marriage is an expressive source. Many argue that marriage is important because it allows a couple to express their love and commitment to their community, friends, and family. While this aspect of marriage may be important, the government "is not constitutionally required to provide a forum for expression of ordinary messages; why should an expression of commitment to another person be any different?" (Pull 49). Some may contend that marriage is different because of the social implications that it has. However, this view is correct only if one assumes that *all* people believe in the same social implications of marriage. Some may view marriage as just another way to receive government benefits, while others may view it as the most sacred institution that they will ever participate in. In other words, marriage cannot be elevated to a higher level of expression because of the differing views that people have on marriage; thus, since marriage is no different than any other form of expression this cannot be the reason why it is considered a fundamental right.

The right to "personal privacy" is also a popular argument for why marriage is a fundamental right. This idea of linking privacy to marriage began in *Griswold* and is often referenced to in order to support this viewpoint. However, *Griswold* dealt with a couple who was *already* married and "had nothing to say about entry into marriage or the boundaries of marriage" (Pull 53). In addition, the "claim of a *privacy* right to *public* marriage is contradictory on its face" (Pull 53). How can somebody argue for public recognition while using the right to privacy as the basis of his or her argument? This line

of thinking "is problematic…because the right to marry is an associational right traditionally governed by the body-politic, while the right to privacy is an individual right with which the body-politic traditionally cannot interfere" (Ridge 85).

The last argument for why marriage is a fundamental right is the economic viewpoint. Justice O'Connor in *Turner* "noted that marriage is often the only way of accessing certain government benefits" (Pull 54). However, government benefits cannot justify a fundamental right to marriage unless those "benefits *themselves* are already fundamental rights" (Pull 54). Just because marriage is used as a medium to distribute benefits "does not turn it into a fundamental right any more than the fact that fishing licenses are used to distribute benefits makes a fishing license a fundamental right" (Pull 54). The benefits argument is more applicable to the Equal Protection Clause, which will be discussed later, but has no effect on the Due Process Clause.

The problem with each of these arguments discussed above is that they all fail to either place boundaries on the state's marital power and/or do not fully explain why the right to marry is protected. Whatever rationale is used to explain why marriage is a fundamental right must encompass the emphasis that the Court places on marital and personal privacy as well as acknowledge the broad power the state has over marriage. This can be achieved by defining the right to marry as having the right to a personal-marriage supplemented by legal-marriage. Only by delineating a personal and legal marriage can all four characteristics of marriage the Court has viewed worthy enough to protect be accounted for. This understanding then places clear boundaries on the states while at the same time allowing them a broad power over marriage.

Personal marriage refers to a relationship between two people both of whom understand marriage "to require certain behavior of themselves and which they both understand to grant certain legitimate expectations regarding the behavior of the other spouse" (Pull 62). In other words, personal marriage allows couples to define what their marriage means and what their relationship will entail. This could include decisions regarding gender roles, child rearing, and reproduction. This type of marriage finds its support in many cases dealing with marriage and privacy. *Griswold*, *Roe*, *Paris Adult Theatre I*, and *Lawrence* all recognize family/household autonomy and a sphere of family life protected from intrusion by the state. The overarching theme of these cases is that there is an understood sphere of privacy when it comes to relationships between two consenting adults. Basically, this view allows two people to put into practice their understanding of what marriage requires of them and what it means. Personal marriage essentially means the "right to have one's own views about marriage" (Pull 77).

Personal marriage appears to have a broad definition, but it is important to emphasize that personal marriage deals *only* with "the individual interests in domestic relations" and is distinct from the "social interest in the family and marriage as social institutions" (Pull 62). In other words, individuals are allowed to construct their marriage however they please, but the state has the power to regulate activities involving the "social interest in the family and marriage as social institutions" (Pull 62). This is how legal marriage supplements personal marriage, by regulating activities involved with marriage and the family that could have an impact on society and its interests. Legal marriage refers to a "certain relationship between people that the government recognizes as having particular consequences different from the consequences attached to a

relationship between random strangers or between a parent and child" (Pull 63). Basically, legal-marriage acts as a type of invisible hand helping to create the ideal environment for marriage and the family by legislating policies that produce the best results for society.

As was noted in the four characteristics of marriage, the Court has recognized the importance of marriage and family to society and their potential societal impact. As a result, the Court has acknowledged that the state has an interest in regulating marriage as well as a broad power when doing so. The principles that form legal-marriage can be found throughout marital case law. *Meister* recognized that the state may "regulate the mode of entering into" marriage (81). *Reynolds, Maynard,* and *Boddie* established the connection between family and society and its potential impact on societal interests. *Califano*, *Turner*, and *Windsor* asserted that the state has the right to regulate marriage as it best sees fit so long as it does not infringe upon other constitutional principles such as equal protection. Despite this broad power, the state does not have unlimited power and is restrained by the characteristics of marriage that the Court has recognized as off limits (e.g. personal and marital privacy). In sum, legal-marriage is consistent with past case law encompassing the belief enunciated by the Court that the state has a broad power to regulate marriage because of the institution's societal impact. In addition, legal-marriage does not confer an unlimited power upon the state. The state is not allowed into the privacies of the home that have been recognized by the Court.

Viewing the right to marry as the right to a personal marriage supplemented by legal marriage is an understanding that balances the interests of the individual and of the state. Throughout marital case law the Court consistently recognized the privacy of

individuals when participating in consenting relationships and the autonomy of the family within the home. At the same time the Court also recognized marriage's impact on society. As a result, the Court conferred upon the state a broad power to regulate this important institution. This view of the right to marry emphasizes the "family life/privacy aspect of marriage" found throughout the Court's jurisprudence on marriage and the family (Pull 84). In addition, "it allows the state flexibility as it tries to design legal institutions that will maximize social welfare," which conforms to the idea enunciated by the Court that the state has an interest in regulating marriage because of its impact on society. Personal marriage supplemented by legal-marriage allows individuals the privacy guaranteed to them by the Constitution while simultaneously allowing the state to regulate marriage as it sees best fit for society.

In addition to encompassing all four of the characteristics of marriage found in marital case law this viewpoint also protects American citizens from activist courts and state governments. American citizens wish to participate in marriage with as little government interference as possible. This viewpoint places a large wall between citizens' marriages and the government by categorizing the right to marry as a negative liberty. A negative liberty bans "state action that coercively affects individual choices" (Pull 84). In other words, the state is not allowed to infringe upon the right to marry and is constrained by the boundaries placed upon it by the nature of the right.

In addition to taking away substantive power from the states, classifying the right to marry as a negative liberty also allows the Court "to avoid taking sides in the cultural debate over the meaning of legal-marriage" (Pull 84). Since negative liberties prevent state action the courts are only required to say when a state action has crossed the line.

The courts would no longer "need to precisely describe the boundaries of the liberty"; thus, the danger of courts taking on the de facto role of the legislature by creating marital rights and redefining marriage would be negated (Pull 82).

Conclusion: Is there a Fundamental "Right to Mary" Another Person of the Same-Sex?

In light of past case law and the correct understanding of the right to marry one can conclude that the Due Process Clause *does not* create a fundamental right to marry another person of the same-sex. This may seem contradictory in light of the seemingly broad definition of the right to marry argued for above, but it must be emphasized that personal marriage only deals with "individual interests in domestic relations" (i.e. procreation, child rearing, and gender roles). The state still has a concern in the "social interest in the family and marriage as social institutions"; thus, if a state believes allowing two people of the same-sex will negatively impact this "social interest" then the state may prohibit such relationships from being recognized. The state in this instance would not be prohibiting private activity, such as same-sex relations; rather it would be enforcing a definition of marriage it believes is best for its "social interest in the family and marriage as social institutions."

Some may argue that asserting that a state can define marriage as only between one man and woman contradicts the private nature of personal-marriage. They may assert that a state prohibiting certain couples from marrying is the textbook definition of intrusion into the personal life of a citizen. This view, however, is a misunderstanding of the cases examined dealing with personal and marital privacy. All those cases (*Griswold, Roe, Skinner*, and *Lawrence*) involved the state prohibiting conduct that was personal in nature. For instance, the statutes in *Griswold* and *Skinner* involved the state making

procreative decisions for its citizens. In addition, *Lawrence* dealt with a statute that attempted to control the sexual behavior of its citizens in the privacy of their own homes. Defining marriage as only between one man and one woman does nothing to control the personal lives of its citizens like the statutes struck down by the Court. Texas, who currently defines marriage as only between one man and one woman, does not prohibit its citizens from entering into same-sex relationships. In addition, Texas does not prohibit same-sex sexual activity or same-sex partners from adopting and creating a family. In other words, Texas does nothing to control any *private aspect* of a same-sex couple's life by defining marriage as they do.

Some may also assert that if personal-marriage means one should be able to define their own marriage then legal-marriage should conform to personal marriage. However, "there is no general obligation for the law to conform itself to an individual's desires" (Pull 78). It has been repeated over and over that the Court has recognized that the state has an interest in regulating marriage because of the institution's societal impact. As a result, if a state's duly elected officials decide that a certain marital arrangement will negatively impact the "social interest in the family and marriage as social institutions" then according to the case law examined the state has that right. It cannot be forgotten when analyzing this viewpoint of the right to marry that legal-marriage *supplements* personal-marriage. Legal-marriage creates the boundaries or the rules of what legally constitutes a marriage. If legal-marriage were forced to conform to every view of personal-marriage then the state's recognized power over marriage would be frivolous.

The case law dealing directly and indirectly with marriage reveal four main characteristics of marriage: 1) the right to marry is found in history and tradition and

predates the Constitution 2) marriage is connected to the family and has a major impact on society 3) the state has a broad range of power to regulate marriage and 4) the activities relating to marriage are subsumed within the right to privacy. These characteristics help to develop what the fundamental right to marry means. The right to marry means a right to a personal marriage supplemented by legal marriage. Personal marriage acknowledges that citizens have complete control over the "individual interests in domestic relations" such as procreation, child rearing, and family relationships. Legal marriage grants the state permission to create the boundaries of marriage because of their "social interest in the family and marriage as social institutions" so long as they do not infringe upon other constitutionally protected rights. In light of this understanding of the fundamental right to marry, the Due Process Clause does not protect the right to marry another individual of the same-sex.

Although under the Due Process Clause there is no fundamental right to marry another person of the same-sex, this does not mean that all state laws defining marriage as only between one man and one woman are constitutional. Admittedly, there are persuasive arguments, not based on the Due Process Clause, for why state statutes that define marriage as being only between one man and woman are unconstitutional. One argument in particular has taken the country by storm and poses a real, substantial threat to traditional marital policies nationwide. This will be looked at in the upcoming chapter.

CHAPTER 3

Equal Protection Clause

Introduction

The Equal Protection Clause argument in support of same-sex marriage has become quite commonplace among scholars and circuit courts across the country.[4] Although there are a number of reasons this line of reasoning has been so successful of late in overturning traditional marriage laws, there are a couple of arguments in particular that have gained a considerable amount of traction amongst the courts.

First, courts have rejected the argument that there exists any rational basis for limiting marriage to only one man and one woman. For instance, the 7th Circuit in its decision whether a rational basis existed for Indiana and Wisconsin's traditional marriage laws stated:

> To return to where we started in this opinion, more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation. As we have been at pains to explain, the ground[s] advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible. (*Baskin* and *Wolf* 38)

Goodridge also decided that Massachusetts's marriage laws did "not meet the rational basis test for…equal protection" and rejected all three legislative rationales (10).

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[4] *See* Strasser, Mark. *The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protections*. Westport: Praeger Publishers, 1999. 39 – 45; *Bostic v. Schaefer*. No. 14-1167. United States Court of Appeals for the Fourth Circuit. 2014.; *Baskin v. Bogan* and *Wolf v. Walker*. Nos. 14-2386 to 14-2388. United States Court of Appeals for the Seventh Circuit. 2014.

Equal protection cases have also advanced the argument that traditional marriage laws are a form of invidious discrimination intended to cause harm against a particular class of people. Comparing traditional marriage laws to anti-miscegenation statutes is used to support this line of reasoning. Courts specifically reference *Loving* when utilizing this rationalization. For example, the court in *Goodridge* stated:

> In this case, as in *Perez* and *Loving,* a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance - - the institution of marriage - - because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving,* history must yield to more fully developed understanding of the invidious quality of the discrimination. (*Goodridge* 9)

Another tactic that utilizes equal protection to defend same-sex marriages analyzes traditional marriage laws and comes to the conclusion that they serve no other purpose but to perpetuate hate and to impose inequality against a specific class of people. For example, the court in *DeLeon* stated:

> The only 'purpose served by treating same-sex married couples differently than opposite-sex married couples is the same improper purpose that failed in *Windsor* and in *Romer*: 'to impose inequality' and to make gay citizens unequal under the law. (*DeLeon* 29)

Both lines of reasoning determine no rational basis exists for limiting marriage to only one man and one woman. Moreover, both rationales conclude that such laws are a form of invidious discrimination meant to perpetuate hate and inequality.

While these arguments using the Equal Protection Clause appear to be logical and sound in their use of precedent, their conclusion that traditional marriage laws are a form of invidious discrimination intended to cause harm against a specific class of people are reached as a result of a misunderstanding of past case law. From the time of the *Goodridge* decision, it appears courts have become comfortable in comparing the

discrimination that occurred in *Loving* to states barring same-sex couples from participating in the institution of marriage. In addition, courts have construed *Romer* and *Windsor* to be cases that were decided solely on equal protection grounds, which is not the case. When these cases are more closely examined, it becomes clear that they are not championing the cause for same-sex marriage as many believe.

The court's suggestion that there exists no rational basis for limiting marriage to one man and one woman will be addressed, but only to the extent that proves that traditional marriage laws do in fact pass rational basis review. In addition, it will be proven that traditional marriage laws pass intermediate and strict scrutiny as well. The assertion that the state has no rational basis for limiting marriage to only one man and one woman will be discussed in more depth in Chapter 4, which discusses federalism and the state's power to define marriage.

Loving: *Race & Sex*

One of the common equal protection arguments in favor of same-sex marriage has been to analogize *Loving* with traditional marriage laws today. An example of a court utilizing this approach can be found in *Goodridge* where the Massachusetts court tied together race and sexual orientation.[5] The Supreme Court of Hawaii also accepted the *Loving* analogy when ruling that Hawaii violated the equal protection clause by not granting same-sex couples marriage licenses (Coolidge 202). Scholars have been explicit

[5] "In this case…a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance - - the institution of marriage - - because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving,* history must yield to more fully developed understanding of the invidious quality of the discrimination" (*Goodridge* 9)

in their support of the *Loving* analogy as well. Take for instance the statement made by Richard Delgado and David Yun:

> Same-sex attraction is as natural and inborn as one's race, and deploring or condemning it is as senseless as the prohibitions on interracial marriage the Warren court thankfully struck down in *Loving v. Virginia*. In 30 years, will we look back, as we do now, and wonder how we could have been so blind – or heartless? (Yun & Delgado 57)

In the public arena this analogy has been used more so for political expediency and its ability to rile the emotions of the American politic rather than for its actual contributions to the same-sex marriage debate.[6] As David Coolidge states, "In one fell swoop one can invoke race, civil rights, and the freedom to marry while simultaneously painting one's opponents as the Bull Connors" of today (201). Basically, the *Loving* analogy is a political weapon that paints opponents of same-sex marriage as vile bigots who only harbor ill feelings toward the LGBT community.

Although the *Loving* analogy is sometimes used for base political purposes the analogy is still a powerful argument because of its apparent simplicity. The majority of people today approve of interracial marriages; therefore, most would likely agree with the decision in *Loving* that it is unconstitutional to prohibit interracial marriages[7]. Accordingly, proponents of same-sex marriage use the foundation established by *Loving* and replace "same-sex couples" for "interracial couples." Take for instance the following examples, "As *Loving* is about broadening marriage to include interracial couples, so

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[6] "The use of Loving in our time is preeminently a political use. In the debate over the definition of marriage, Loving is the wedge, the theme piece, the call to arms. One might call Loving 'the race card' of the marriage debate. Advocates are 'playing the Loving card'" (Coolidge 201)

[7] A Gallup poll conducted in the summer of 2013 asked the question, "Do you approve or disapprove of marriage between blacks and whites?" The results of this poll showed that 87% of Americans approve of such marriages (Newport).

Baehr is about broadening marriage to include same-sex couples" and "As race was irrelevant to marriage then, so sex is irrelevant to marriage now" (Coolidge 204). Using a time tested argument and replacing it with a seemingly similarly situated group (i.e. same-sex couples) it appears at first glance to be an ingenious defense. Nevertheless, this argument is weakened when the substance of the anti-miscegenation and traditional marriage statutes are compared. In addition, a deeper look into the rationale used by *Loving* reveals that race and sex are not analogous and that the Court's decision in this instance does very little to support the idea of same-sex marriage.

The first distinction that should be noted between anti-miscegenation statutes and traditional marriage laws is the effect, or lack thereof, that each has on the institution of marriage. Despite the argument made in chapter two that history is a poor tool in creating boundaries for the state, it can still be used to create a useful foundation for an opinion. At the time *Loving* was decided, it is reasonable to assume that in light of the social mores at the time the Court would have held a traditional view on marriage (i.e. marriage is between one man and one woman). This is a logical assumption in that until recently "from Roman times…marriage has been understood to involve the union of a man and a woman" (Coolidge 219 – 220). Excluding a male and female from participating in marriage solely because of their race ran counter to the Court's gender complementary view of marriage, which they viewed as being the only requirement for a valid marriage to take place.

Traditional marriage laws, on the other hand, make no attempt to redefine society's historically understood definition of marriage. Traditional marriage laws only reassert what the citizens of individual states believe to be the correct definition of the

institution. This is not to say that this definition correctly delineates what constitutes a real marriage, but it is important to take note of because it marks a distinct difference between these two statutes. While anti-miscegenation statutes attempted to impose a foreign definition of marriage upon its citizens, traditional marriage laws are only reasserting a historically accepted definition of marriage that has been adhered to for centuries. Whether this definition is right or wrong is for the people to decide, but this certainly does not strengthen the argument for using *Loving* to support same-sex marriage.

The last and most important difference between these two statutes is that anti-miscegenation laws made certain conduct a *criminal act* while traditional marriage laws do not. Under the anti-miscegenation laws it was a "*felony* if a white and a black person married each other" (Coolidge 219, emphasis added). Section 20-59 of Virginia's law stated:

> If any white person intermarry with a colored person, or any colored person intermarry with a white person, *he shall be guilty of a felony* and shall be punished by confinement in the penitentiary for not less than one nor more than five years (*Loving* 4)

Furthermore, in the *Loving* case Richard Loving and Mildred Jeter were sentenced to one year in jail although they chose to have their sentence suspended by agreeing "not to reside together in Virginia as husband and wife for a period of twenty-five years" (Coolidge 220). Anti-miscegenation statutes *prohibited* certain action under the threat of criminal punishment. Traditional marriage laws, on the other hand, do no such thing.

Traditional marriage laws are positive laws instead of prohibitive. They impose no penalties or sanctions upon same-sex couples and the state in no way attempts to disturb or destroy their relationship. Take for example Hawaii's marriage law that was

reviewed in *Baehr*: "Section 572-1 [the marriage statute] *does not* compel any action from homosexual couples. It imposes *no penalties or other sanctions* upon them. Their relationships *are not* disturbed in any manner by the law" (Coolidge 219, emphasis added). Traditional marriage laws simply legitimatize the view of marriage of the majority of citizens of a state who choose to enforce such laws. They in no way make same-sex relations and/or activities a criminal offense against the state that could result in jail time or fines.[8]

In addition to the differences in the statutes themselves the rationale used by the *Loving* Court to strike down Virginia's anti-miscegenation statutes fails to support the analogy between race and sex. The argument made by advocates of same-sex marriage when utilizing *Loving* is straightforward. In the *Loving* case had Mildred Jeter not been black then she would have been allowed to marry her husband Richard Loving. Similarly, if Ricky were a girl, he would be allowed to marry his desired partner Fred. Professor Koppelman and his *I Love Lucy* hypothetical succinctly demonstrates this viewpoint: "If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex" (Koppelman 208).

Traditional marriage advocates may counter that no discrimination is occurring because the law is applied to both males and females equally (i.e. males can't marry males and females can't marry females). This has come to been known as the equal

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[8] Some may counter that despite the absence of criminal sanctions traditional marriage laws still disturb same-sex relationships because same-sex couples feel they are looked down upon by the state because of their lifestyle, because they are not able to freely express who they are as a person and a couple, and because of economical reasons. These arguments have already been addressed in chapter two on pages 20 to 23.

application argument. This line of reasoning, however, cannot be applied since the *Loving* Court rejected it when Virginia attempted to utilize it to defend its anti-miscegenation statutes. The counter-argument in defense of traditional marriage laws instead lies in the *motives* behind the passage of the laws since prohibiting interracial marriages is certainly different than recognizing an equal partnership between one man and one woman.

In *Loving* the Court rejected Virginia's equal-application justification because "Virginia's anti-miscegenation laws were based upon a clearly invidious purpose – an endorsement of the doctrine of 'White Supremacy'" (Duncan 242). The Court justified their claim in the following ways. First, the Court stated:

> In *Naim*, the state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent the 'corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy (*Loving* 7)

Secondly, the Court went on to argue that: "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy" (*Loving* 11). Lastly, Chief Justice Warren notes that the Virginia statute is not neutral in its concern about racial integrity pointing out that it "prohibits *only interracial* marriages involving white persons…" (*Loving* 11).

The rationale used in *Loving* is straightforward. Virginia's anti-miscegenation statutes used race as a classification for marriage by prohibiting whites from entering into any type of interracial marriage. The Court recognized that the statutes rested "solely upon distinctions drawn according to race"; thus, they applied strict scrutiny (*Loving* 11). In their search for the "accomplishment of some permissible state objective, independent

of racial discrimination" the Court could only find the goal of attaining/maintain White Supremacy and because of this struck it down as a violation of the Equal Protection Clause (*Loving* 11). *Loving,* then, "is a case about racial segregation and equal protection" (Duncan 242).

Bearing in mind this understanding of *Loving* as addressing both racial segregation and equal protection, the *Loving* analogy fails because of the differences in purpose between the anti-miscegenation laws passed by Virginia and traditional marriage laws today. Virginia passed their laws based upon the idea that one race was superior to another. As was noted repeatedly throughout *Loving* the purpose of the anti-miscegenation statutes was to attain/maintain White Supremacy. This is in contrast to what traditional marriage laws recognize, which is the equality between the two genders. Unlike the inherent racial inequality found in anti-miscegenation statutes, the "heterosexual paradigm reflected in the dual-gender requirement is *not* based upon the notion that *one gender is superior and one inferior*" (Duncan 243, emphasis added). As Richard Duncan states:

> Anti-miscegenation laws *separated* the races; but conventional marriage laws *integrate* the genders. Anti-miscegenation laws *endorsed* the invidious doctrine of White Supremacy; but conventional marriage laws provide for the *full and equal protection* of one man and one woman in the institution of marriage (Duncan 243).

The *Loving* opinion rested on the fact that the purpose of Virginia's anti-miscegenation statute was to make one race inferior to another by supporting the doctrine of White Supremacy. Traditional marriage laws, on the other hand, in no way attempt to make one sex inferior or untouchable. Traditional marriage laws simply recognize the social importance of "marriage relationships, complementarity, and generativity that lie at the

heart of the social interest in marriage" (*A Critical Analysis of Constitutional Claims for Same-Sex Marriage* 87 – 88). Unless proponents of same-sex marriage can prove that the sexes are being treated unequally and/or that one gender is being promoted over the other then the *Loving* analogy cannot be utilized in support of same-sex marriage.

Romer *and* Windsor: *A Correct Interpretation?*

Romer and *Windsor* present a different type of equal protection challenge than *Loving*. The *Romer-Windsor* argument claims traditional marriage laws are a form of invidious discrimination and serve no other purpose but to impose inequality against a specific class of people. An example of applying this line of reasoning is found in *DeLeon*:

> The only "purpose served by treating same-sex married couples differently than opposite-sex married couples is the same improper purpose that failed in *Windsor* and in *Romer*: 'to impose inequality' and to make gay citizens unequal under the law." (*DeLeon* 29)

While it could be argued that rational, legitimate reasons for defining marriage as between only one man and one woman exist, this section will focus on whether the interpretation in *DeLeon* is the right one to apply to both *Romer* and *Windsor*. Specifically, whether or not both statutes in *Romer* and *Windsor* were overturned *solely* because their only purpose was "to impose inequality." When these cases are analyzed more closely it is revealed that while these are in fact equal protection cases, their foundation relies upon federalist principles. In other words, the reason *Romer* and *Windsor* were able to apply the Equal Protection Clause was because of the federalist principles that underlined both cases.

Before continuing it should be emphasized that this is not meant to imply that *Romer* or *Windsor* was not decided on equal protection grounds, but that this was not the *sole* reason that the Court overturned Amendment 2 and Section 3 of DOMA. The following simply suggests that there is another factor to the Court's decisions. To say otherwise would be a misunderstanding of the opinions. While some incorrectly only focus on the equal protection aspect, such as the *DeLeon* opinion above, it is important to recognize the other factors that contributed to the Court's logic. This is especially important in that the other factor found in *Romer* and *Windsor* may support the arguments brought by opponents of same-sex marriage.

Romer overturned a Colorado Amendment that was made in response to the cities of Aspen, Boulder, and Denver who each had "enacted ordinances which banned discrimination in many transactions and activities…" (*Romer* 623 – 624). Each of these statutes afforded protection to "persons discriminated against by reason of their sexual orientation" (*Romer* 624). Colorado's Amendment 2 repealed "these ordinances to the extent they prohibit discrimination on the basis of 'homosexual, lesbian, or bisexual orientation, conduct, practices or relationships'" (*Romer* 624). Justice Kennedy and the Court overturned Amendment 2 because of equal protection concerns. Justice Kennedy stated, Amendment 2 "imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint" (*Romer* 631).

There are two factors that contributed to *Romer's* result. First, Amendment 2 imposed a "broad disability on a single group" (Butland 1437). Second, Amendment 2 "impermissibly restructured the political process in order to disadvantage homosexuals,

including with respect to matters of local concern" (Butland 1437).[9] The question that must be answered is which of these two factors should be given more weight for why *Romer* was decided the way it was. More "commentators have signed on to the idea that *Romer* was decided in large part because of the *political restructuring* caused by Amendment 2 – more specifically, that Amendment 2 *subverted legislative choices traditionally left to local governments*" (Butland 1439, emphasis added). In other words, *Romer* was able to apply the Equal Protection Clause because Colorado had violated federalism *within* the state itself. Just as states have certain powers that the federal government cannot interfere with, municipalities have local powers that their respective state governments should leave alone. It has been suggested that this case involved a type of miniature federalism or, as Brodie Butland refers to it, a "localist" interpretation (1437).

There are several reasons for accepting the localist interpretation of *Romer* both within the opinion itself as well as a later case brought before the Court that dealt with a similar situation. First, Kennedy made several references to the idea of localism within his majority opinion. After noting that three municipalities had passed legislation in order to protect the LGBT community, Kennedy went on to point out that Amendment 2 overturned these protections and "forbade the enactment of others 'by every level of Colorado government.'" (Butland 1439). In addition, Kennedy asserted that Amendment 2 "prohibit[ed] all legislative, executive or judicial action *at any level of state or local government* designed to protect [homosexuals]" (*Romer* 624, emphasis added). Lastly,

[9] Butland refers to the political process being restructured as a result of Amendment 2 because "while other groups could petition their local government or the state government for protective laws, homosexuals first had to repeal Amendment 2" (Butland 1437)

Kennedy noted "[c]entral [to equal protection] is the principle that government and *each of its parts remain open* on impartial terms to *all* who seek its assistance" (*Romer* 633). Kennedy and the majority emphasized the inability of the localities at all levels of the Colorado government to protect the interests of the LGBT community if they desire to do so; thus, it is hard to believe that a localist aspect did not influence their decision.[10]

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati also helps to justify the localist interpretation of *Romer*. This case involved an amendment to the Cincinnati City Charter, Article XII, which sought to remove preferential treatment from minorities. Specifically, Article XII forbade all levels of the City from adopting "any ordinance, regulation, rule or policy which provides that [sexual orientation or conduct] provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment" (Butland 1441). Similar to Amendment 2, Article XII was passed in reaction to two city ordinances passed by the city council that "prohibited discrimination on the basis of sexual orientation in city hiring practices and private employment, housing, and public accommodations" (Butland 1441).

In the case's first hearing the Sixth Circuit held that Article XII *did not* violate equal protection, and the case was appealed to the Supreme Court (Butland 1441). Upon appeal the Court returned the case back to the Sixth Circuit to be heard in light of their

[10] "It is difficult to see why the Court would repeatedly emphasize that localities could no longer protect their own interests with respect to gays and lesbians if political restructuring was unimportant to its decision. Moreover, the majority opinion contains several passages that nearly mimic political restructuring language from *Seattle School District* and *Hunter*, indicating that the Court was drawing on ideas in those to decide *Romer*" (Butland 1439 – 1440).

recent decision in *Romer*.[11] In remanding the case back to the Sixth Circuit, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented from the decision to remand the case *because* of the localist dimension found in *Romer*. Justice Scalia stated when dissenting:

> *Romer* involved a state constitutional amendment prohibiting special protection for homosexuals. The consequence of its holding is that homosexuals in a city (or other electoral subunit) that *wishes* to accord them special protection cannot be compelled to achieve a state constitutional amendment in order to have the benefit of that democratic preference. The present case, by contrast, involves a determination by what appears to be the lowest electoral subunit that it does *not* wish to accord homosexuals special protection.[12]

On review of the case the Sixth Circuit reaffirmed its earlier decision "based on a localist reading of *Romer*" (Butland 1441). The Sixth Circuit distinguished Article XII from Amendment 2 emphasizing that the Cincinnati amendment reflected a "direct expression of the local community will on a subject of direct consequences to the voters" (Butland 1441). Amendment 2, on the other hand, constituted a political restructuring that "deprived a politically unpopular minority, but no others, of the political ability to obtain special legislation at every level of state government, including within local jurisdictions having pro-gay rights majorities" (Butland 1441). On appeal the Supreme Court would once again deny review.[13]

Without explicit guidance one is left to decide for why the Court decided not to overturn Article XII, which like Amendment 2 attacked a specific class of people (i.e. the LGBT community). Article XII was "worded nearly identically to and had the same

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[11] *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,* 518 U.S. 1001, 1001 (1996).
[12] *Id*. at 1001, emphasis added.
[13] *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati II*, 525 U.S. 943, 943 (1998).

practical effect as Amendment 2," yet the Sixth Circuit still upheld Article XII in light of *Romer* and the Supreme Court denied *certiorari* (Butland 1442). The only difference between the two was the "scope of the impact of the amendments on the political process for gays and lesbians and their supporters"; thus, it was because of the localist dimension and lack of political restructuring that Article XII was able to withstand judicial scrutiny (Butland 1442). Article XII was a direct result of the local communitie's will at the lowest political subunit and thus did not interfere with the decisions of any other level of government beneath it. Furthermore, unlike Amendment 2, Article XII did not "prohibit all legislative, executive or judicial action *at any level of state or local government* designed to protect [homosexuals]" (*Romer* 624, emphasis added). In other words, the LGBT community in Cincinnati still had the ability and opportunity to seek assistance from the government. Had Article XII been passed at the state level in response to a municipality attempting to add protections for the LGBT community it would be logical to assume that this case would have been decided differently. In sum, it was because Article XII did not intrude upon localism or mini-federalism that it withstood judicial scrutiny in spite of the fact that it targeted a specific class of people (i.e. the LGBT community).

Having uncovered the localist dimension of *Romer* the opinion can now be interpreted in a different light. Once again, there is no debate that this case was decided upon the Equal Protection Clause and that the harm and special disability imposed upon homosexuals factored into the Court's decision. However, these two ideas were not the *sole* reason for why the decision in *Romer* was made. Amendment 2 restructured the political process by removing decision-making authority from the local government on an

issue that directly affected them. In other words, Colorado broke the principles of mini-federalism by intruding upon the sovereignty of Aspen, Boulder, and Denver. Consequently, Amendment 2 violated the Equal Protection Clause *because* it "prohibit[ed] all legislative, executive or judicial action *at any level of state or local government* designed to protect [homosexuals]" (*Romer* 624, emphasis added). This harm directly affected the LGBT community alone by "forbid[ing] [them] the safeguards that others enjoy or may seek without constraint" (*Romer* 631). It was the localist dimension that allowed Justice Kennedy to construct a decision based upon equal protection principles; thus, *Romer* rested upon the specific harm to the LGBT community *and* the restructuring of the political process, which violated the principles of localism or mini-federalism.

Similar to *Romer* Justice Kennedy in *United States v. Windsor* is able to construct an equal protection argument *because* of violations of federalist principles. Before proving this point it is important to note the question that was before the Court in *Windsor*. Some people wrongly assume that *Windsor* dealt with whether or not same-sex marriage should be legal. The real question, however, was whether the federal government, through DOMA, could constitutionally refuse to recognize same-sex marriages despite the fact that some states had chosen to recognize these unions as legal marriages. In other words, this was a case of whose power should trump whose relating to the definition of marriage, the states' or the federal government? This was not about the rights of the LGBT community per se but about federalist principles.

Throughout the entire opinion Justice Kennedy and the majority focused on New York's determination to recognize same-sex marriages and the federal government's

decision to go over the states to demean these couples. This idea is found in numerous places throughout the decision. For instance, Justice Kennedy stated:

> The class to which DOMA directs its restrictions and restrains are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons *deemed by a State* entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the *State finds* to be dignified and proper" (*Windsor* 25, emphasis added).

Kennedy again notes the federal government's intrusion into a historically recognized state power when he stated:

> By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability…the State has found…proper to acknowledge and protect (*Windsor* 22).

The Court's claim that the federal government is interfering and demeaning the state's decision to grant import to same-sex marriages is described perfectly by Justice Ginsburg during oral arguments when she stated that the federal government was transforming "full marriage" into a "skim-milk marriage" (Young and Blondel 137). These are just a few examples that prove that the Court placed immense importance on New York's definition of marriage and rejected the claim that the federal government could create a separate definition for their own laws.

These federalist principles along with the Court's recognition that the state has a historically held power to define and regulate marriage provided Kennedy and the majority the foundation they needed to create a case based upon the Equal Protection

Clause.[14] The synthesis of these two ideas to create an equal protection case is found when Kennedy stated:

> DOMA's unusual deviation from the *usual tradition of recognizing and accepting state definitions of marriage* here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to *impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States*. (*Windsor* 20 – 21, emphasis added).

This statement shows that it was *because of* the import the state chose to grant same-sex marriages that equal protection of the laws was violated. This was the "strong evidence" that Kennedy was referring to. Heterosexual couples recognized by New York were granted federal benefits, but homosexual couples that were also recognized by the state were not; thus, two similarly situated classes of people were being treated differently under the law despite the fact that the state had chosen to treat them equally.

This is what created the "separate status" and "contradictory marriage regimes" that Kennedy refers to throughout his opinion. Without recognition of the state's marriage power and principles of federalism the argument made by Kennedy would not have been possible. If no respect had been given to New York's decision to recognize same-sex marriages, there would have been no reason to deny the federal government to create separate marital rules that superseded the states. This idea is found in the last paragraph of the majority opinion:

> The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State…sought to protect in personhood and dignity. By seeking to displace this protection and treating those

[14] For an analysis of the importance of the state's power over marriage granted by Windsor and how this created the foundation for an Equal Protection Clause case see Chapter 2 pages 5 – 6 and 14 – 16.

> person as living in marriages *less respected than others*, the federal statute is in violation of the Fifth Amendment. *This opinion and its holding are confined to those lawful marriages*. (*Windsor* 25 – 26, emphasis added).

Kennedy declared the federal statute invalid because it made same-sex marriages respected by the state of New York "less respected" than heterosexual marriages. Furthermore, it's important to note that Kenney confined the holding to only "those lawful marriages"; thus, the decision only applied to those states who had or will in the future legally recognize same-sex marriages. This implies the importance to which Kennedy placed on the fact that the state had granted legal recognition to same-sex marriages. In sum, much like *Romer* Kennedy constructed an equal protection argument based on principles of federalism. There is no disputing that the harm caused to this specific class of people factored into the decision, but this would not have happened had Kennedy not recognized that New York's power of marital concerns had been violated by DOMA.

The importance of these revised interpretations is that they show the respective statutes in both cases were not overturned simply because they made homosexuals unequal under the law and/or portrayed animus. These were factors in both decisions but were not the sole basis for them. In both cases the principles of localism and federalism helped the Court to construct Equal Protection Clause arguments. Both statutes interfered with decisions that sought to give the LGBT community added import and protection; thus, in their attempt to make unequal what legitimate government processes sought to make equal both were deemed a violation of the Equal Protection Clause. The recognition of localism and federalism makes it difficult to reference both cases to support constitutionally recognizing same-sex marriage. On the one hand traditional

marriage laws target a specific class of people (i.e. those who do not engage in heterosexual relationships), but on the other hand these laws are also an accepted utilization of a state's power to define and regulate marriage. In sum, neither case helps one side more than the other but instead makes an already complicated issue that much more difficult to resolve.

Strict Scrutiny, Intermediate Scrutiny, and Rational Basis Test

When adjudicating on the constitutionality of traditional marriage laws, the Court may choose from three different levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review. For the sake of thoroughness, all three tests will be applied to traditional marriage laws to determine whether they would be deemed constitutional against an equal protection challenge. The analysis will begin with rational basis review and end with strict scrutiny. Since these laws vary from state to state in how they distribute marital benefits, this discussion cannot be considered an argument for or against all traditional marriage laws. The focus of this section will be on whether or not defining marriage as between only one man and one woman violates the Equal Protection Clause.

The lowest level of scrutiny is rational basis review. This requires the state to show a "rational relationship between the disparity of treatment and some legitimate governmental purpose" (*Heller v. Doe* 320). In other words, the state is not required to show a close relationship exists between the classification and the supposed goal. Instead, the state is only required to prove a "rational relationship" exists. This type of test is applied to all classifications that do not fall under intermediate or strict scrutiny.

Traditional marriage laws meet the requirements to pass rational basis review and would be deemed constitutional if reviewed under this standard.

Before applying rational basis review the low threshold that the state must meet should be further explained. When the Court applies rational basis review it "is not a license…to judge the wisdom, fairness, or logic of legislative choices" (*FCC v. Beach Communications Inc.* 313). Furthermore, a "legislative choice is not subject to courtroom factfinding and may be based on rational speculation *unsupported* by evidence or empirical data" (*Heller* 320, emphasis added). Lastly, this test does not authorize the Court to "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines" (*New Orleans v. Dukes* 303). With this in mind, a "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" (*Heller* 319). Basically, the state must only provide a rational reason for why the classification they made will achieve and/or further a state goal.[15]

The state has multiple rational reasons for defining marriage as between only one man and one woman. The state's legitimate goal is to promote and keep biological parents together. The state believes this arrangement helps to increase the likelihood of strong families and creates the best possible child-rearing environment. The state believes that mothers and fathers have different strengths and that their respective absences would bring harm to both families and children. The state supports this belief

[15] The Court is not allowed to strike down a state policy because it is unscientific or illogical. A classification "must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification" (Heller 320). *Heller* further stated, "The problems of government are practical ones and may justify…rough accommodations – illogical, it may be, and unscientific" (321).

by pointing to studies that have shown that the "family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage" (Anderson, Jekielek, and Emig 1). The state also asserts that alternatives to their preferred marital arrangement are less effective in rearing children and creating strong families.

As sociologists Sara McLanahan and Gary Sandefur state:

> Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents…regardless of whether the resident parent remarries (Girgis et. al 61 – 62)

The state believes that if they were to officially recognize other marital arrangements the ideal of two-parent biological families and all their benefits could be put at risk. Redefining marriage as an emotional relationship risks the permanence and exclusivity that defines marriage. As Sherif Girgis states:

> As more people absorb the new law's lesson that marriage is fundamentally about emotions, marriages will increasingly take on emotion's tyrannically inconstancy. Because there is no *reason* that emotional unions – any more than the emotions that define them, or friendships generally – should be permanent or limited to two, these norms of marriage would make less sense. People would thus feel less bound to live by them whenever they simply preferred to live otherwise (56 – 57)

In other words, the state is worried that redefining marriage in the way proposed by revisionists risks the permanency and exclusivity of marriage because an emotional union does not require these limits.[16] If these limits are lost then their ideal of two-parent biological families is put at risk, and as a result so are the stable, strong families that create an ideal child-rearing environment.

[16] Revisionist definition of marriage: Marriage is viewed as "the union of two people who commit to romantic partnership in domestic life: essentially an emotional union, merely enhanced by whatever sexual activities the partners find agreeable" (Girgis et. al 4).

The traditional definition of heterosexual marriage meets the rational relationship threshold in that it increases the likelihood of stronger families and creates the best possible child-rearing environment. There is no need to critique the science behind this reasoning or whether the policy is wise or illogical. If there is any "reasonable conceivable state of facts that could provide a rational basis for the classification" then the classification must be upheld against an equal protection challenge (*Heller* 320). With this in mind, traditional marriage laws meet the threshold for rational basis review.

Intermediate scrutiny is the second highest standard and is typically applied to restrictions and/or classifications "that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex" (*United States v. Virginia* 568, Scalia dissenting). It could be argued that traditional marriage laws classify or discriminate on the basis of sex.[17] Justice O'Connor stated in *Clark v. Jeter* that a classification based on sex is evaluated under a standard that lies "[b]etween th[e] extremes of rational basis review and strict scrutiny," that being intermediate scrutiny (461). As a result, the state must demonstrate "that the classification serves *important governmental objectives* and that the discriminatory means employed are *substantially related* to the achievement of those objectives." (*Mississippi University for Women et al. v. Hogan* 724, emphasis added).

Before analyzing whether the classification passes intermediate scrutiny the "substantial relation" standard should be discussed in more depth. Unlike strict scrutiny, "intermediate scrutiny has never required a least-restrictive means analysis, but only a 'substantial relation' between the classification and the state interests that it serves"

[17] See chapter three, page 7.

(*United States v. Virginia* 573, Scalia dissenting). In other words, the classification made *does not* have to hold true in every case and may interfere with some who help to achieve the state's objective but are excluded nonetheless.[18]

As Justice Scalia states in his dissenting opinion in *United States v. Virginia*:

> In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 579, 582 – 583 (1990)…*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), we held that a classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying objective. (573 – 574)

In sum, the state must prove the sex-based classification serves an important governmental objective and that in the aggregate it is substantially related to the achievement of this objective.

The question that needs to be answered then is this: Is the exclusion of same-sex couples from the institution of marriage substantially related to an important governmental objective? It was noted earlier the state has a legitimate goal to promote and keep biological parents together. They wish to achieve this goal in order to increase the likelihood of strong families and create the best possible child-rearing environment. This rational, legitimate state goal could also be considered an important governmental objective; thus, it needs to be considered whether only recognizing two-person heterosexual marriages is substantially related to achieving this goal.

Recognizing only two-person heterosexual marriages is substantially related to the important governmental objective because adopting the revisionist's definition of

[18] For example, in Rostker v. Goldberg, 453 U.S. 57 (1981), the Court held that Congress could exempt women from selective-service registration, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans" (81).

marriage would place the permanence and exclusivity of marriage at risk. This argument is centered on three principles: 1) The law shapes and influences our beliefs 2) Our beliefs shape our social behavior, and 3) Our beliefs and social behavior affect "human interests and human well-being" (Girgis et. al 54).[19] Some who support adopting the revisionist definition of marriage also recognize the affect of law on society and its beliefs. For instance, Joseph Raz a supporter of the revisionist view and prominent Oxford philosopher states:

> [O]ne thing can be said with certainty [about recent changes in marriage law]. They will not be confined to adding new options to the familiar heterosexual monogamous family. They *will change the character of the family*. *If these changes take root in our culture then the familiar marriage relations will disappear*. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and that bonding itself is much more easily and commonly dissoluble. All these factors are already working their way into the constitutive conventions which *determine what is appropriate and expected* within a conventional marriage and *transforming its significance* (Raz 393).

If the "character of the family" is changed and "familiar marriage relations…disappear" then the state has a substantial reason to fear that the ideals of strong, stable families and the best possible child-rearing environments could be put at risk. The state would rather keep and continue promoting a marital arrangement that has been proven to work as opposed to arrangements that some claim are lacking. Child Trends, a research institution that attempts to improve the lives and prospects of children through research, supports the state's fear. They state:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological

[19] "No one acts in a void. We all take cues from cultural norms, shaped by the law. For the law affects our ideas of what is reasonable and appropriate. It does so by what it prohibits – you might think less of drinking if it were banned, or more of marijuana use if it were allowed – but also by what it approves" (Girgis et. al 54).

> parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes…There is thus value for children in *promoting strong, stable marriages between biological parents*…[I]t is not simply the *presence* of two parents,…but the presence of *two biological parents* that seems to support children's development. (Girgis et. al 43).

With this in mind, it is understandable why the state fears a change in marital and/or family arrangements. Such a drastic change in the "character of the family" could potentially affect the state's interest objective of increasing the likelihood of strong, stable families and creating the best possible child-rearing environment.

As a result of the relationship between the law, beliefs, and social behavior it can be said that the sex-based classification implemented by the state is "substantially related" to its "important governmental objectives." Were the state to adopt the revisionist view of marriage their objective of promoting and keeping biological parents would be in danger, since the permanence and exclusivity of the institution could potentially fade away. The new marital arrangements and changes in the character of the family would also put at risk the state's important objectives of increasing the likelihood of strong, stable families and creating the best possible child-rearing environment. With this information in mind, the sex-based classification is "substantially related" to its "important governmental objectives"; thus, traditional marriage laws pass intermediate scrutiny.

Before moving on to strict scrutiny the science that supports the purpose behind traditional marriage laws should be discussed further. Some may assert this research, such as the study conducted by Child Trends, is negated by numerous studies that support same-sex parenting. For example, Dr. Benjamin Siegel, a professor of pediatrics at Boston University, disagrees with Justice Scalia's belief that there's "considerable

disagreement among sociologists as to what the consequences are of raising a child in a…single-sex family" (Barlow par.2). In an interview with *BU Today* Siegel claims that children of single-sex families are doing just fine, and that this belief is supported by current sociological evidence (Barlow par. 3 – 4). Despite these assertions Siegel admits there are limits to this research. For instance, "none of the studies [have] been a randomized, controlled trial – the Holy Grail of scientific investigation – and all studies of gay parenting are necessarily small, since there aren't many gay parents" (Barlow par. 6). Sherif Girgis points out shortcomings of this type of research as well. Girgis states:

> Several that are most frequently cited in the media actually compare same-sex parenting outcomes with single-, step-, or other parenting arrangements already shown to be suboptimal. Few test for more than one or two indicators of well-being. Most resort to 'snowball sampling,' in which subjects recruit their friends and acquaintances for the study (Girgis et. al 60).

Lastly, Baylor sociologist Dr. Martha Sherman holds similar beliefs as those explicated by Dr. Siegel and Sherif Girgis about the reliability and/or conclusiveness about studies over same-sex parenting. Dr. Sherman states:

> It could be argued that children from same-sex families do so well because their parents are worried about their abilities as parents and thus make the extra effort to try harder, be more involved, take parenting classes, etc. It is also likely that many of these same-sex families – particularly those that are able to afford fertility specialists or the legal aid that might be needed for same-sex adoptions – are not working class or at least not in poverty thus making the outcomes for their children better on average anyway, unless they are being carefully compared to families of similar backgrounds (Sherman).

What is clear from these statements is that caution should be exercised, as there is indeed a need for high quality scientific studies before declaring that the debate over same-sex parenting is over. These studies have yet to meet the criteria to be recommended as top-quality social science; thus, it is important not to conclude beyond the data or rule out

other potential explanations until these criteria are met. Until proven otherwise, studies supporting the rationale behind traditional marriage laws should not be set aside.

Strict scrutiny is the highest standard that a law has to meet and is reserved for "classifications based on race or national origin and classifications affecting fundamental rights" (*Clark v. Jeter* 461). Traditional marriage laws do not make "classifications based on race or national origin" and it was proved in chapter two that there does not exist a fundamental right to marry a person of the same-sex. However, for the sake of discussion, what if the Court did find that such a right existed and that strict scrutiny should be applied? In order to pass constitutional muster, the state is required to show that defining marriage as between only one man and one woman is "narrowly tailored to further compelling governmental interests" (*Grutter v. Bollinger* 326). "Narrowly tailored" means the state must prove that the interest is being accomplished in the least restrictive means possible (i.e. there is no other way to achieve this compelling state interest). The state meets both of these standards.

The state's interest in promoting and keeping biological parents together has been established throughout this chapter. By keeping biological parents together the state hopes to increase the likelihood of strong, stable families and create the best child-rearing environment possible. This goal should be considered a compelling governmental interest[20]; therefore, it need only be decided whether traditional marriage laws are "narrowly tailored" to achieve this interest.

For legislation to be considered "narrowly tailored" to achieve a governmental interest there cannot exist another least restrictive means to do so. The interest the state

[20] See pages 21 – 22 and 24 – 26 for further discussion and evidence about why this interest should be considered compelling

claims to achieve is promoting and keeping biological parents together, which in turn will increase the likelihood of strong, stable families and create the best child-rearing environment possible. The only way to promote and keep biological parents together is to only recognize marriages performed between one man and one woman. Recognizing other marital arrangements would place the permanence and exclusivity of marriage at risk by shaping and changing the beliefs of society regarding marriage.[21] As a result of the law's effect on beliefs and social behavior, the only way to achieve the state's compelling governmental interests is to define marriage as between only one man and one woman. Recognizing any other type of marital arrangement could potentially put these compelling governmental interests at risk.

Conclusion

In reviewing the Equal Protection Clause argument in favor of same-sex marriage three cases most often referenced to were scrutinized: *Loving*, *Romer*, and *Windsor*. The parallel made between anti-miscegenation statutes in *Loving* and traditional marriage laws were proven to be lacking. Anti-miscegenation statute's purpose was to make one race inferior to another in order to support the doctrine of White Supremacy. Traditional marriage laws, on the other hand, in no way attempt to make a particular sex inferior or untouchable. The purpose of traditional marriage laws is to recognize the social importance of "marriage relationships, complementarity, and generativity that lie at the heart of the social interest of marriage" (*A Critical Analysis of Constitutional Claims for Same-Sex Marriage* 87 – 88). In analyzing *Romer* and *Windsor* it was shown that these decisions were not made *solely* because homosexuals were made unequal under the law

[21] See pages 24 – 26 for further elaboration on this assertion.

and/or portrayed animus. These were admittedly important factors, but both cases also utilized the principles of federalism and/or localism to construct equal protection arguments. The recognition of multiple influential factors in both decisions makes it more difficult to reference either case to support recognizing same-sex marriage because of the Equal Protection Clause.

In addition to discussing these commonly referred to cases, traditional marriage laws were analyzed under all three levels of scrutiny that could be used by the Court. In applying these tests it was decided that all traditional marriage laws meet the criteria of all three. Ultimately, it was concluded that if the state were to alter their traditional marital policy this could potentially affect the state's goal of promoting and keeping biological parents together. This in turn would negatively impact the state's interest in increasing the likelihood of strong families and thereby creating the best possible child-rearing environment. No matter what level of scrutiny the Court chooses to apply traditional marriage laws should be deemed constitutional.

Although the Equal Protection Clause may not be the answer same-sex marriage proponents are looking for there still are several other options that may be utilized. In the section analyzing the levels of scrutiny much was said about the state's interest in regulating marriage and why the federal government and the Court should respect their decision. However, this federalist argument may backfire on the states and could potentially be used in favor of same-sex marriage proponents through the use of the Full Faith and Credit Clause. In the following chapter this and other principles of federalism will be discussed and how they relate to the current constitutional debate on same-sex marriage.

CHAPTER 4

Federalism & Full Faith & Credit Clause

Introduction

The federalist position makes a structural argument in favor of same-sex marriage. Instead of directly attacking traditional marriage laws, it challenges the constitutionality of Section 2 by invoking principles of federalism and full faith and credit jurisprudence. Those who make this argument believe all states are required to recognize out-of-state same-sex marriages based on the federalist principles inherent in the Full Faith and Credit clause. Proponents of this argument use federalism to avoid the more difficult Due Process and Equal Protection Clause questions in an attempt to secure nationwide recognition of same-sex marriage.

Mark Strasser, a well-known proponent of same-sex marriage, gives an illustration of this argument. Strasser asserts the Full Faith and Credit Clause "is a 'national unifying force' that is designed to make the several states 'integral parts of a single nation'" (107). He continues by noting that states cannot become "integral parts of a single nation" without "surrendering some of their autonomy"; therefore, the Clause "requires that states sometimes sacrifice local policies as a price of being a member of a federal system" (Strasser 107).

Strasser links the Clause's purpose together with the state's power over marriage and principles of federalism. He agrees that the state has significant power over marriage as well as an interest in promoting the institution. Nonetheless, he argues that refusing to

recognize out-of-state same-sex marriages compromises the institution of marriage rather than promotes it. Allowing non-recognition of out-of-state same-sex marriages would in essence allow a state to nullify a marriage that had already been legally sanctioned in another. In Strasser's view, it is odd to say that a state is promoting marriage when it has the power to nullify marriages that are disagreeable with its social policies. Strasser also contends that allowing non-recognition of same-sex marriages will harm the well being of same-sex couples, in that as they move across state lines they "will not be secure in their knowledge concerning their marital status" (Strasser 142). Central to Strasser's view is that under the current federal system states must surrender some power over marriage and recognize out-of-state same-sex marriages for the sake of national unity and the promotion of marriage.

Ostensibly, Strasser's argument seems convincing. Few would argue against his assertion that one of the purposes of the Full Faith and Credit Clause was to act as a "national unifying force" (Strasser 107). Furthermore, his argument that allowing states to refuse recognition of out-state same-sex marriages will harm state's power over marriage and national unity is logical as well. Despite this, Strasser's reasoning does not conform to the correct understanding of full faith and credit and federalism as they relate to Section 2 of DOMA. Strasser underemphasizes the state's power over marriage and does not balance the principles of the Full Faith and Credit Clause with the 10th Amendment. A proper understanding of the interrelationship between the principles of federalism and the Full Faith and Credit Clause make it clear that Section 2 is constitutional.

The Full Faith & Credit Clause: Tension with the States Power Over Marriage

An issue that must be resolved regarding Section 2 in DOMA is balancing the purposes of the Full Faith and Credit Clause with the 10th Amendment that grants the states their police powers, including the power over marriage. At first glance the 10th Amendment and the Full Faith and Credit Clause seemingly conflict with one another. The 10th Amendment on the one hand gives states particular police powers detailing areas over which they are sovereign. One of these domains is domestic relations. Domestic relations have a long been recognized as one of the realms of a state's police powers. As was stated in *In re Burrus,* "[t]he whole subject of…domestic relations…belongs to the laws of the States and not the laws of the United States" (593-594)[22]. Domestic relations include the power over marriage, divorce, and child custody (Cruz 817).

In apparent conflict with the state's power over domestic relations granted by the 10th Amendment, the Full Faith and Credit Clause demands that full faith and credit be given to the "public acts, records, and judicial proceedings" of sister states. A rigid, literal interpretation of the Clause would seem to require a state to recognize an out-of-state same-sex marriage. This interpretation however would allow states to impose their own marital policy on other states, thereby infringing upon a state's historical police power over marriage. This would clearly violate recognized principles of the 10th Amendment. Resolving this conflict does not have to involve picking one constitutional principle over the other. Instead, the solution is to balance the interests that each is meant

[22] *In re Burrus* was decided on May 19, 1980. In re Burrus held that a District Court of the United States does not have jurisdiction to "issue a writ of *habeas corpus* to restore an infant to the custody of its father, when unlawfully detained by its grandparents" (586).

to serve within the broader concept of federalism throughout the Constitution. In order to achieve this, a basic understanding of the Full Faith and Credit Clause is needed; thus, three fundamental aspects of the Clause will be reviewed.[23] First, the purpose of the Clause will be discussed. Secondly, the appropriate faith and credit due to state judgments will be determined. Lastly, the proper faith and credit due to state acts will be established.

As noted earlier, the purpose of the Clause was to bring the states together into a single, unified nation. This is evidenced by the Founding Fathers who intended the Clause to "better…secure and perpetuate mutual friendship and intercourse among the people of the different states in this union…" (*Journals of the Continental Congress* 214). Joseph Story, a former U.S. Supreme Court Justice, expresses a similar view. Story argues that it is reasonable to assume that the Articles were meant to "promote uniformity" (Story 177). With the goal of the Articles being unity and uniformity, "It is probable…that the [full faith and credit] amendment in the constitution was…designed to cure the defects in the existing provision" (Story 177). Story's point is that the Clause in the Articles, "which was substantially similar to the first portion of the Clause in the Constitution," was meant to foster unity. However, since the Articles failed to accomplish this goal, it is logical to presume that the Clause in the Constitution was meant to achieve what the Articles could not. With this in mind, the motive of the Clause "must have been, 'to form a more perfect Union,' and to give to each state a higher

[23] A discussion has already been had on the state's constitutional power over marriage (see chapter two, 6-16); thus, for the sake of brevity, it will not be explored here. The state's power over marriage will be referenced to with the assumption that the reader is familiar with the ideas discussed in chapter two.

security and confidence in the others, by attributing a superior sanctity and conclusiveness to public acts and judicial proceedings of all" (Story 179).

Under the Full Faith and Credit Clause the judgments of other states are to be given conclusive effect. Meaning judgments in one state are to be given the same effect in sister-states as they would receive in states where the judgment was made. The decision is to be accepted as final and is not to be re-litigated. This view is supported by several court cases decided in the decades after ratification. In *Hitchcock v. Aiden*, Judge Livingston stated:

> It is difficult to make choice of language more apt to render a domestic judgment as binding here, as if it had been obtained in one of our own courts. What other signification, so natural or obvious, can be affixed to the terms, '*full faith and credit,*' as that, when the existence of these judgments is once established…they *shall* be received as containing the whole truth and right between the parties, and that the matters, or points settled by them shall not be drawn into dispute elsewhere (Schmitt, 503)

Justice Washington in *Banks v. Greenleaf* and *Green v. Sarmiento* adheres to a similar view. In *Banks* he states that a court "cannot question the validity of the judgment of another state" (759). He argues in *Greenleaf* that this rule "is declared and established by the constitution itself, and was to receive no aid, nor was it susceptible of any qualification, by the legislature of the United States" (1118).

In 1813 *Mills v. Duryee* became the first case to directly rule on Congress's full faith and credit power and reaffirmed the view of the faith and credit due to state judgments enunciated by Livingston and Washington earlier. Justice Story, who authored the *Mills* opinion, asserted that state judgments deserved "faith and credit of evidence of the highest nature" (483 – 484). Story insisted that were judgments to be "considered *prima facie* evidence only" the Clause "would be utterly unimportant and

illusory" (*Mills* 485). Story's opinion is important in that up to that point, only lower courts had affirmed the principle in question. As a result of *Mills*, the principle that state judgments are to be given conclusive effect gained a newfound legitimacy.

As was stated previously, the Full Faith and Credit Clause must be balanced with the powers the 10th Amendment grants to the states. Although the Full Faith and Credit Clause require state judgments to be given conclusive effect, this constitutional principle in no way implies that the same effect needs to be given to state acts. Granting conclusive effect to state acts would make the 10th Amendment essentially nonexistent. In order to maintain the appropriate balance between the powers the 10th Amendment grants to the states and the Full Faith and Credit Clause, a different principle is needed regarding the relationship between the Clause and state acts.

Allowing a state act to have conclusive effect created the potential problem of infringing on sister-state's police powers. Court's never directly addressed this question "because of the great uniformity with which state courts applied the traditional choice-of-law rules derived from Story's treatise" (Borchers 159). As a result of working from the same legal foundation, courts "largely agreed as to the applicable law" to be applied; hence, "interjurisdictional conflict was fairly rare" (Borchers 159).

To address the fact there was no case that dealt directly with the full faith and credit to be given to state acts, state judgments and legal treatises conceptualized the jurisdictional rule.[24] Early writings and decisions were used to form the jurisdictional rule, which was created to protect the federalist principles inherent in the Constitution. The jurisdictional rule is to be considered when applying full faith and credit to state acts.

[24] The term "jurisdictional rule" is borrowed from Jeffery Schmitt, which he used in "A Historical Reassessment of Full Faith and Credit."

Although *Mills* established that state judgments were to be regarded as conclusive in sister-states, courts were "seemingly unanimous in finding that a state judgment rendered without valid jurisdiction was *not entitled* to such respect" (Schmitt 516, emphasis added).[25] For instance, the New York Supreme Court case *Borden v. Fitch* held, "The want of jurisdiction makes [a judgment] utterly void, and unavailable for any purpose" (Schmitt, 516). Another example is found in the Massachusetts case *Bissell v. Briggs*. There the court stated:

> Whenever, therefore, a record of a judgment of any court of any state is produced as conclusive evidence, the *jurisdiction of the court rendering it is open to inquiry*; and if it should appear that the court had no jurisdiction of the cause, *no faith or credit* whatever will be given to the judgment (Schmitt 516, emphasis added).

In sum, a judgment was not to be afforded full faith and credit if it was rendered outside of a state's valid jurisdiction. As a result, a state's influence was constrained by its territorial boundaries.

Several prominent early American jurists supported conceptualizing the jurisdictional rule. Each of these men recognized that allowing a state act to have conclusive effect outside of its own territorial boundaries threatened principles of federalism and the sovereignty of the states. Chancellor James Kent, former Chief Justice of the New York Supreme Court and author of *Commentaries on American Law*, believed that "if a statute…was to have the same effect in one state as in another, then one state would be *dictating laws for another*, and a fearful collision of jurisdiction would instantly follow" (Schmitt 522). Additionally, he believed that allowing state acts

[25] See *Rogers v. Coleman* 3 Ky. (Hard.) 413, (1808); *Bissell v. Briggs* 9 Mass. (9 Tyng) 462, (1813); *Hitchcock v. Aiden* 1 Cai. 460 (N.Y. Supreme Court 1803); *Aldrich v. Kinney* 4 Conn. 380, (1822); and *Chew v. Randolph*, 1 Miss. (1 Walker) 1, (1818).

to "operate beyond the limits of the territory," would surely affect "the necessary independence of nations" (Schmitt 522). Kent believed that giving a state act full faith and credit meant giving it full effect within its *own* territorial boundaries. Allowing its effect to extend to sister-states infringed upon their sovereignty.

Justice Story held similar views towards the faith and credit due to state acts. Story believed that while judgments were conclusive, a court could still conduct "an inquiry into the jurisdiction of the court, in which the original judgment was given" to either pronounce it or the state as having valid jurisdiction (183). Story argued that limiting a state's power to within its own territorial and/or jurisdictional boundaries was necessary. Since, according to Story, the "constitution *did not mean to confer a new power or jurisdiction*; but simply to *regulate* the effect of the acknowledged jurisdiction over persons and things within the territory" (183, emphasis added). Story's point is exactly what Kent argued for above. Specifically, that a state's power is limited by its territorial boundaries. A state's power cannot be allowed to extend into states over which it has no jurisdiction. Allowing this to occur would allow a state to impose their own policies on sister-states and infringe on their sovereignty.

Application to Section 2 of DOMA: Balancing the Principles of the Police Power Over Marriage and the Full Faith and Credit Clause

With the purpose and principles of the Full Faith and Credit Clause and the states police power established, a critical analysis of Section 2 can now be conducted. This analysis will demonstrate that Section 2 is constructed in such a way as to balance the principles of full faith and credit and federalism regarding same-sex marriage. Four

important constructs of this statute will be highlighted, which will demonstrate its constitutionality.

The first important construct of Section 2 involves how it deals with the Full Faith and Credit Clause and the fact that the Clause establishes the conclusiveness of state judgments. In what seems to go against this, Section 2 allows states to not recognize judgments from sister-states regarding same-sex marriage. While this may create questions about the constitutionality of Section 2, these questions are resolved when it is realized that marriages are not considered judgments for full faith and credit purposes. In order to be considered a judgment there must be an element of controversy that requires remediation. The Second Restatement of Conflict of Laws states, "judicial action" is an "action taken in the name of the state by a duly authorized representative or representatives in the *adjudication of a controversy*" (Borchers 165). In other words, in the absence of a controversy there cannot exist a judgment that requires judicial action.

Unlike marriage, a divorce must be recognized by sister-states. A divorce, distinct from marriage, has an element of controversy and involves "an adversarial proceeding, with fact-finding as to whether one party has engaged in serious wrongdoing such as adultery or extreme cruelty" (Borchers 166). As a result, divorces may be considered judgments for full faith and credit purposes; thus, a state must recognize a divorce that was conducted outside of its jurisdictional boundaries. Marriage undoubtedly lacks this characteristic of "an adversarial proceeding". A man does not compel his fiancée into marriage by taking her to court to seek a ruling that forces her to enter into marriage. There is no disagreement to resolve or harm to remedy. Marriages are built upon a foundation of cooperation and understanding, two elements rarely found

in a controversy that requires adjudication. This is why an analogy between divorce and marriage, in an effort to suggest marriages should be recognized by sister-states, is baseless. Having established marriages are not judgments under the Full Faith and Credit Clause, the apparent unconstitutionality of Section 2 based on this particular contention disappears.

Having debunked that notion that Section 2 is unconstitutional based on the Full Faith and Credit Clause, attention can now be turned to the positive attributes of this legislation, namely the fact it is constructed in such a way as to protect federalism and affirm the states power over marriage.

Section 2 fosters the natural debate federalism was intended to encourage. The Constitution created a federal system that was meant "to allow States…[the] freedom to experiment and to debate contentious policy issues" (Young, Englert, Cuellar, Blondel 6). Encouraging state experimentation fosters federal diversity on contentious policy issues such as same-sex marriage, which "enables the democratic process to accommodate a higher proportion of…citizens' views" as opposed to a "uniform national answer" (Young, et. al 9). This is a process that the Framers envisioned as important in enhancing the individual liberty of citizens. As was stated in *Bond v. United States*, "State sovereignty is not just an end in itself: Rather, federalism *secures to citizens the liberties* that derive from the diffusion of sovereign power" (Young et. al 8, emphasis added). *Bond's* point is that by allowing states to experiment with contentious policy issues under their purview, citizens' individual liberties are enhanced as a result in that it grants them power to increase protections conceded to them by the state.

In addition to enhancing the individual liberties of citizens, state experimentation also allows for better policy to be developed by informing sister-state legislatures of their successes or failures. Debate is best informed by actual results from experimentation as opposed to abstract debate. As the Federalism Scholars state, "To the extent that same-sex marriage proponents and opponents disagree about its likely effect on traditional marriage, *actual experience* in States recognizing same-sex marriage could inform that debate" (Young, et. al 10). The states experimental power can be analogized to the idea of the survival of the fittest. In this case, the best social policy and/or idea will win out in the end as a result of its superiority. The only way, however, that an idea can prove its superiority is by competing in the open market place of ideas. In short, states are able to perceive which policies are most appropriate when competition exists. By allowing some states to maintain their traditional laws and others to adapt theirs to recognize same-sex marriages the country is able to find out which policy works best.

A ruling against Section 2 would stifle crucial debate and experimentation regarding issues that fall within a state's police powers. As a result, this all-important tool of federalism will be hindered greatly and states will be forced to accept policies of sister-states on marriage that have not withstood the scrutiny of informed debate.

Section 2 protects and maintains states sovereignty over marriage by preserving their power over the institution. It allows states the ability to define marriage the way they see best fit for their citizens as well as whether or not to recognize out-of-state same-sex marriages. The state's power over marriage was discussed in depth in chapter two; however, the recent case of *United States v. Windsor* highlights the importance of this power. As was previously mentioned, it appears the whole foundation for *Windsor* rested

on the fact that the federal government was interfering with a historically recognized state power. Kennedy stated that the federal government "throughout our history, has deferred to state law policy decisions with respect to domestic relations" (*Windsor* 17). Kennedy also contended that the "regulation of domestic relations" is "an area that has long been regarded as a virtually *exclusive* province of the States" (*Windsor* 16, emphasis added). Kennedy's opinion clearly maintains that the state has a broad power over marriage and overturning Section 2 would directly impede on it by forcing states with traditional marital laws to accept policies that are repugnant to their own.

Forcing states with traditional marital laws to accept policies that are in conflict with their own would not only be contrary to recognized federalist principles, but would also would be in conflict with Full Faith and Credit Clause principles. Granting extraterritorial power to state marital policies is in direct conflict with the jurisdictional rule that dictates a state's power cannot extend beyond its jurisdictional and/or territorial boundaries. Overturning Section 2 would make the state's power over marriage essentially non-existent by placing them at the mercy of sister-states. In order to ensure states are able to dictate policy within their jurisdictional/territorial boundaries Section 2 must be upheld.

The last point in the analysis of the balance that Section 2 achieves between full faith and credit principles and the states power over marriage is it prevents an inescapable definition of marriage, which would seemingly contradict the reasoning utilized by the Court in *Windsor*. The Court in *Windsor* places an emphasis on the fact that New York chose to place import on same-sex marriages while the federal government created legislation that demeaned their decision to do so. In the opinion, Kennedy recognizes

"the significance of state responsibilities for the definition and regulation of marriage" and contends that this power "dates to the *Nation's beginning*"" (*Windsor* 18, emphasis added). He then notes that Section 3 of DOMA, which created a federal definition of marriage, departs from the "*history and tradition* of reliance on state law to define marriage" (*Windsor* 19, emphasis added). By creating a separate definition of marriage that New York was required to acknowledge, the federal government essentially created "two contradictory marriage regimes within the same State" (*Windsor* 22). A decision overturning Section 2, as it specifically relates to preventing an inescapable definition of marriage, would allow for the harm to occur that the Court accused the federal government of committing against New York. It would create "two contradictory marriage regimes within the same State" by forcing states with traditional marriage laws to recognize same-sex marriages as valid. This would effectively implement a law contradictory to standing laws by forcing states to recognize marriages that are repugnant to their marital policies. As a result, a state with traditional marital laws would also have a de facto law that recognizes same-sex marriages. Moreover, the state and its citizens would be powerless to do anything about the contradictory laws since they cannot control the marital policies of sister-states nor are they able to invalidate a decision handed down by the highest court in the land (i.e. the Supreme Court).

Some may object that this does not necessarily create two contradictory marriage regimes since states are not forced to recognize same-sex marriages performed within their respective states. They may contend that states are only required to recognize marriages performed outside their territorial boundaries, and that this in no way affects their own marital policies. If this line of reasoning were valid then the decision in

Windsor should have come out in favor of the federal government, since in that case the federal government was not necessarily legislating New York's marital policies. The Court, however, did not utilize this line of reasoning because it misses the main harm imposed by creating contradictory marital regimes within the same state. Namely, it harms the original purpose behind the law's passage.

Kennedy states that New York created their marital policies to permit same same-sex marriage because it "sought to eliminate inequality" (*Windsor* 22). New York passed this law in order to impart import and protect the "personhood and dignity" of same-sex couples, which they believed was not achieved by only recognizing heterosexual marriages. By passing Section 3 of DOMA, Kennedy believes the federal government "diminish[ed] the stability and predictability…the State had found…proper to acknowledge and protect" (*Windsor* 22). In other words, the federal government had interfered with and disrupted the goals and purpose behind New York's marriage statute recognizing same-sex marriages.

The same could be said for states that have traditional marital policies. By forcing these states to recognize out-of-state same-sex marriages, which would create two contradictory marital regimes within the same state, the states goals of increasing the likelihood of strong families and creating the best possible child-rearing environment is impeded. By recognizing out-of-state same-sex marriages states would not be promoting the traditional family setting that they believe is best for children and families. By overturning Section 2, sister-states who recognize same-sex marriage would be "diminishing the stability and predictability [of the family]" that states with traditional marital laws "had found…proper to acknowledge and protect" (*Windsor* 22).

Furthermore, allowing this to occur would depart from the "*history and tradition* of reliance on [the forum's] state law to define marriage" (*Windsor* 19, emphasis added).

In sum, the federal government's intervention into a historically recognized area of the states was the focal point of *Windsor*. The federal government's infringement on state marital power created a regime contradictory to the marital policies of New York who, according to historically recognized constitutional principles, should be sovereign in this area within their own territorial boundaries.[26] This in turn hindered the purpose of New York's marital policy, which was to grant increased status and protection to same-sex couples. Overturning Section 2 and forcing states with traditional marital laws to recognize same-sex marriages would create the same harm. Specifically, two contradictory marital policies would exist within these states. In light of this, Section 2 must be upheld.

Why Section 2 Helps to Further Same-Sex Marriage Interests

Not only does Section 2 balance the principles between the Full Faith and Credit Clause and the states power over marriage, it also will prove to be beneficial for same-sex couples in the future. Were Section 2 to be overturned and states forced to recognize out-of-state same-sex marriages, advocates of traditional marriage would most likely be inspired to be even more opposed to the idea of same-sex marriage. However, were Section 2 to stand, advocates of same-sex marriage would have the opportunity to persuade their opponents that same-sex marriage marital policies are superior to

[26] See Chapter 2 pages 11-16 for discussion of state's power over marriage and pages 5-8 of this chapter for discussion on the jurisdictional rule.

traditional ones. They could do so by utilizing an important process involved in the healthy out workings of federalism, namely state experimentation.

By allowing Section 2 to stand the practice of state experimentation will be kept intact regarding marriage. This means that some states will continue to implement traditional marital policies and others will go on creating unique policies that recognize same-sex marriage. Consequently, the country will have two distinct marital policies competing for the hearts and minds of the states. The states will be able to make an informed decision on which policy is superior with the aid of hard evidence on the efficacy of both policies. As a result, the superior policy has the opportunity to be validated and accepted by the country, not because of a ruling by nine justices, but rather because the minds of the citizens of every state will have been persuaded.

Convincing citizens through hard data obtained by experimentation and vigorous debate results in a policy with the highest form of legitimacy. That is, having an idea vindicated by all fifty state governments who were elected by the free volition of their citizens. There is no higher stamp of approval than this; thus, if same-sex marriage were to win the day, its advocates could truly claim their policies superior to traditional marital polices. Advocates could not, however, claim this ultimate victory were they to win through the courts, which go over the heads of state governments and their citizens in making their decisions. In sum, if advocates of same-sex marriage truly want to legitimize same-sex marital policies then they should advocate for the continued implementation of Section 2.

There are some who agree that Section 2 nicely balances full faith and credit principles with the states power over marriage. Moreover, that federalism offers same-

sex marriage the opportunity to attain the highest form of legitimacy that a policy can attain. Nonetheless, they would counter that Section 2 must be overturned because federalism isn't moving fast enough and same-sex couples are being harmed as a result. Nancy Knauer provides such an example. Knauer states:

> With respect to same-sex relationships…state level reform efforts have not been uniformly progressive. To the contrary, the vast majority of these efforts prohibit the legal recognition of same-sex relationships and, in many instances, have been downright hostile to same-sex couples and their families (422).

Additionally, Knauer states that federalism "can facilitate both a progressive and a conservative impulse," and in her case she prefers the former (423).

The problem with Knauer's contention is that she has an incorrect view of the purpose of federalism. Knauer seems to believe that federalism should be accepted if it has a progressive impulse, or that federalism is only good if it is advancing progressive ideas. However, the Founders envisioned federalism as a way to create an environment where debate is fostered and ideas compete in the open marketplace. This allows for superior policies to prevail by demonstrating their value, and inferior ones to be done away with. By granting states sovereignty in certain areas of social policy, such as marriage, federalism ensures that this political process occurs no matter how long it may take.

The vitality of federalism lies in its strength in fostering a process in which all ideas will be given a fair and equal opportunity in the marketplace of ideas. Whether an idea is conservative or progressive, it will have its day to prove its superiority. Federalism does not, however, ensure that an idea will be vindicated quickly or that all ideas championed are to be progressive, as Knauer wrongly assumes. True federalism in action is seen when a state is allowed to implement policies that its government and

respective citizens view as necessary for the public good in areas that it is has been deemed sovereign. With this in mind, those who claim to champion the principles of federalism must realize that choosing *not to partake* in progressive social change, such as legalizing and/or recognizing same-sex marriage, is just as much federalism as choosing to do so.

Conclusion

Section 2 is consistent with previously established laws and principles and therefore should be held constitutional. It balances the principles of the Full Faith and Credit Clause and the states power over marriage; thus, ensuring the continuance of federalist principles. It has been demonstrated that Section 2 is not in conflict with the constitutional understanding of judgments under the Full Faith and Credit Clause in that marriages are not considered judgments for full faith and credit purposes. Furthermore, Section 2 encourages state experimentation, an essential element of federalism that enhances individual liberty. It has also been demonstrated that Section 2 maintains state sovereignty over marriage and codifies the jurisdictional rule, which is apart of full faith and credit principles. Lastly, Section 2 prohibits the creation of an inescapable definition of marriage, which is consistent with the decision in *Windsor*, thereby preventing two contradictory marital regimes within the same state.

Not only is Section 2 consistent with the intentions of the Founders and Court precedent, it also serves to create an environment in which same-sex marriage can be validated through the open market place of ideas. This eventually could provide same-sex marital policies with the highest legitimacy that an idea can receive. Lastly, although some may protest that state experimentation takes too long to legalize same-sex marriage,

federalism does not promise a quick resolution. Federalism only guarantees that an idea will be given its opportunity among the states and does not show bias towards progressive or conservative ideas.

CHAPTER 5

Conclusion

So What?: The Future of Section 2 & Same-Sex Marriage

Section 2 of DOMA has endured numerous attacks concerning its constitutionality. These attacks have some scholars foreshadowing its inevitable demise. Despite these challenges, Section 2, as has been shown in this thesis, is entirely consistent with constitutional precedent regarding the Due Process Clause, Equal Protection Clause, Full Faith and Credit Clause, and principles of federalism. Notwithstanding this evidence, I believe the Court will overturn Section 2 by incorrectly ruling traditional marriage laws violate the Equal Protection Clause. The Court will likely give weight to the nation's changing views on same-sex marriage when crafting their opinion. Take for instance Justice Ginsburg's recent comments on same-sex marriage:

> The change in people's attitudes on [same-sex marriage] has been enormous…In recent years, people have said, "This is the way I am." And others looked around, and we discovered it's our next-door neighbor – we're very fond of them. Or, it's our child's best friend, or even our child. I think that as more and more people came out and said that "this is who I am," the rest of us recognized that they are one of us (Stohr and Winkler par.4).

On its merit, this assertion will be difficult to counter. According to the latest Gallup poll on the issue of same-sex marriage, which was taken in May of 2014, 55% of Americans support granting homosexuals the same legal marital rights as heterosexuals[27].

[27] This was a poll published in May 2014 and asked "Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?"

Moreover, in June 2013 only 12 states allowed same-sex marriage. Today, 37 states legally recognize same-sex marriage (Chumley par.3).

The Court will also point out the absurdity and inequality of granting benefits to heterosexual couples with children but not to similarly situated homosexual couples. The Court will question the motives of the states in promoting strong, stable families when they refuse to support growing homosexual families, who only differ in composition. Lastly, as Justice Scalia predicted in *Windsor*, the Court will cite *Lawrence* to argue that these laws "deprive couples…*enjoying constitutionally protected sexual relationships*, but no other couples, of both rights and responsibilities" (*Windsor* 23). In short, the majority will conclude the only purpose behind these laws is inequality and animus.

The majority striking down Section 2 will likely close their opinion by emphasizing the human costs in constraining marriage to heterosexual couples. They will assert that homosexuals are just as capable at loving and nurturing children as heterosexuals, and to suggest otherwise would be as a result of hostility directed towards the LGBT community. Consequently, the Court will end the social debate on marriage and proclaim same-sex marriages as equal to heterosexual ones in the eyes of the law. In doing so, they will imply to those who believe in traditional marriage that their beliefs are bigoted and outdated. Moreover, they will indicate the only reason to oppose same-sex marriage could be from feelings of resentment towards the LGBT community.

There are three issues with this hypothetical ruling that could negatively affect future jurisprudence as well as the future of the country. First, legalizing same-sex marriage nationwide and trumping the police power of the states because of the changing views of the country is a dangerous precedent. The Court is not supposed to take into

account what the nation thinks on social policy when making legal decisions. As Alexander Hamilton states, "The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body" (Bodi 698). Using this rationale to support legalizing same-sex marriage threatens to turn the Court into a *de facto* Legislature that sanctions laws based on public opinion rather than sound constitutional judgment. The court should be insulated from factions outside its walls that exist amongst the body politic and within Congress. They should be guided only by the principles of the Constitution and not the latest social trend. Their charge is to evaluate and subsequently make rulings on the constitutionality of law based on previously established precedent and their understanding of constitutional principles. The Court, unlike elected legislative officials, should not be swayed by public opinion.

In addition to not being swayed by public opinion, the Court should not infringe upon the states historically recognized police powers. Ironically, the Court makes this case in *Windsor* when it asserted that the federal government was infringing upon New York's historical power over marriage. When an issue such as this arises that concerns a historically recognized police power, and involves no clear fundamental rights being infringed upon, the Court should exercise restraint and defer to the states. A recent change in attitude that has resulted in a slight social consensus on same-sex marriage does not justify infringing on previously established state police powers.

The reliance on the fickle nature of public opinion to make constitutional decisions sets a dangerous precedent for the future. Public opinion may ebb and flow, and Court decisions driven by public opinion would necessarily have to change as well.

This type of precedent poses danger not just to homosexuals but also to all Americans. Constitutional precedent should be consistent. This is achieved by interpreting the Constitution based off the principles inherent within it. Reliance upon popular opinion is the antithesis to this ideal and poses danger to the liberty and freedom of all Americans.

The second issue with overturning Section 2 is that it ignores the nation's most vulnerable class: the children. The states have established their interest in promoting and maintaining the traditional family, which provides the best environment to raise children. The majority opinion will likely highlight the rights of same-sex parents, establish that same-sex couples are participating in a constitutionally protected relationship and will defend their abilities as parents. While these may be true, the Court must disprove that recognizing same-sex relationships will harm the states interest in promoting and keeping biological parents together. Moreover, they must show how recognizing same-sex relationships will not decrease the likelihood of strong families and negatively affect the ideal child-rearing environment. Repeatedly referencing the abilities of homosexuals as parents does not answer these questions. The Court must provide more than their "good word" that same-sex couples will not harm the states interest in only recognizing traditional marriages.

Unfortunately for those in favor of same-sex marriage, the debate whether same-sex couples would pose such harm is not settled in that social science supports neither side. Multiple studies have found conflicting conclusions on whether children do better, or the same, with same-sex or heterosexual couples. Furthermore, "none of the studies" conducted on same-sex couples have been a "randomized, controlled trial – the Holy Grail of scientific investigation" (Barlow par.6). Moreover, all the studies that have

analyzed same-sex parenting "are necessarily small, since there aren't many gay parents" (Barlow par.6). In addition to the incomplete methodologies many of these studies may have an inherent, unintended bias. As Dr. Sherman states, "It could be argued that children from same-sex families do so well because their parents are worried about their abilities as parents and thus make the extra effort to try hard, be more involved, take parenting classes, etc." (Sherman). Many of the same-sex couples studied "are [also] not working class or at least not in poverty thus making the outcomes for their children better on average anyway, unless they are being carefully compared to families of similar backgrounds" (Sherman).

In sum, there is adequate evidence to foster skepticism about studies claiming to have ended the social debate over same-sex marriage and parenting. Until the flaws of these studies are resolved it is important for the Court not to conclude beyond the data or rule out other potential explanations. Until then, the Court should not make its own scientific decisions and should leave this decision to the states. Stepping over the judicial boundaries into the field of social science could hold disastrous effects, especially for the children. If the Court is wrong about this issue it places the welfare of the children at risk, as well as the structure of the family that the state has tried desperately to protect.

Critics may counter that there is no hard evidence to validate these claims of placing children and families at risk. However, the same could be said in regards to the claims of those advocating for same-sex marriage. They have no hard proof that the concerns raised by their opponents would not come to fruition. This places these opposing sides at a crossroads. Until it is known for certain the effect of same-sex parenting and whether it is in fact as effective as heterosexual parenting, the children's

interests should outweigh those of their parents. As it stands now with the known facts of current social science, the Court cannot make a conclusive decision that same-sex couples will not harm the states interests in children and the family.

Lastly, a ruling in favor of same-sex marriage could have a negative effect on religious liberty, particularly in regards to businesses refusing service to same-sex couples and religious institutions maintaining their institutional integrity. Take for instance the recently decided florist case in Washington. The florist refused to provide service for a gay wedding "because of [her] relationship with Jesus" (Kaplan par.1). The Washington court ruled against her because her actions violated the state's anti-discrimination and consumer protection laws. As Benton County Superior Court Judge Alexander Ekstrom states:

> In trade and commerce, and more particularly when seeking to prevent discrimination in public accommodations, the courts have confirmed the power of the legislative branch to prohibit conduct it deems discriminatory, *even where the motivation for that conduct is grounded in religious belief*. (Kaplan par. 2, emphasis added).

In a similar case, a New Mexico photography company refused to photograph a same-sex wedding because such unions went against their religious beliefs. As their representation states, "They believe that if they were to communicate a *contrary* message about marriage – by, for example, telling the story of a polygamous wedding ceremony – they would be *disobeying* God" (Wolf par.10, emphasis added). The New Mexico Supreme Court ruled against the photographer. They contended that refusing service to customers on the basis of sexual orientation violated anti-discrimination laws "in the same way as if it had refused to photograph a wedding between people of different races" (Wolf par.8).

In both cases private business owners are forced to provide services for same-sex couples despite their belief that doing so would violate their religious beliefs. By ruling in favor of same-sex marriage the Court will put a multitude of similarly positioned private business owners, who view their work as an extension of their faith, in the situation of choosing between making a profit and holding true to their religious convictions.

Private business owners who object to same-sex marriage on religious liberty grounds could find protection in State RFRA laws. State RFRA laws codify the compelling interest test and protect citizens' religious freedom from government interference. If a state law substantially infringes upon a citizen's exercise of religion, the government must show the law furthers a compelling interest in the least restrictive means possible. Private business owners who are forced to serve same-sex couples could claim that doing so infringes upon their exercise of religion, and thereby force the government to pass the compelling interest test. This is an exacting standard to meet and any state government would struggle to meet such a high threshold of proof; thus, State RFRA laws could provide protection to business owners who object to serving same-sex couples on religious grounds.

Related interests are raised concerning religious organizations institutional integrity. A ruling in favor of same-sex marriage may force religious establishments to accept ideas and members that contradict its institutional message. For example, San Francisco Archbishop Salvatore Cordileone has received backlash after proposing morality clauses for Catholic high school handbooks and teacher contracts. The handbooks "single out church teaching against homosexual relations, [and] same-sex

marriage" as well as other issues such as pornography and abortion (Gibson par.3). Archbishop Cordileone argues that school faculty and staff should follow these guidelines and live out their lives "so as not to visibly contradict, undermine or deny" Catholic doctrine on these issues (Gibson par.4). In other words, he believes that faculty and staff employed by the Catholic Church should reflect, or at the very least not undermine, Catholic beliefs.

Five members of the state Assembly and three state senators have already contacted Archbishop Cordileone requesting he remove the clauses because of their "discriminatory and divisive" nature (Gibson par.5). The officials' request essentially asks the Archbishop to ignore Catholic doctrine on important, controversial social issues; thus, they risk making San Francisco Catholic schools less Catholic. If same-sex marriage is legalized similar problems could arise concerning religious organizations. According to the Pew Research Center, eight major religions prohibit same-sex marriage (Masci, par.4).[28] If same-sex marriage is legalized these religions may experience increased pressure from governmental officials to abandon their long-standing religious tenets on marriage.

Religious establishments could find protection in Court precedent were same-sex marriage to become legalized. In *Boy Scouts of America v. Dale* (2000) the Court declared that the Boy Scouts had the right to remove a homosexual scoutmaster from its organization since including him affected the propagation of their views on homosexuality. According to the Court, forcing a group to accept a member is an

[28] American Baptist Churches, Church of Jesus Christ of Latter-day saints, Islam, Lutheran Church-Missouri Synod, Orthodox Jewish Movement, Roman Catholic Church, Southern Baptist Convention, United Methodist Church.

"intrusion into a group's internal affairs" (640). Furthermore, an undesired member "affects in a significant way the group's ability to advocate public or private viewpoints" (*Boy Scouts of America* 640). The Scouts assert, "homosexual conduct is inconsistent with the values" embodied in their organization (*Boy Scouts of America* 650). As a result of the Scouts' beliefs on homosexuality, the Court reasons that the presence of a gay scoutmaster "would, at the very least, force the organization to send a message…that the Boy Scouts accept homosexual conduct as a legitimate form of behavior" (*Boy Scouts of America* 653). The Court ruled in favor of the Scouts in that allowing a member who portrayed values contrary to the beliefs of the organization would affect the group's ability to advocate their preferred viewpoints on homosexuality.

The rationale used in this case could be applied to religious institutions in order to protect their institutional integrity on the issue of marriage. By forcing religious organizations to accept, whether explicitly or implicitly, same-sex marriage and/or homosexual lifestyles risks affecting the organization's ability to advocate its beliefs on homosexuality and marriage. This would force religious establishments who believe in traditional marriage "to send a message…that…[they] accept homosexual conduct as a legitimate form of behavior" (*Boy Scouts of America* 650). Consequently, a contradictory message would be sent to the world and its followers about the establishment's views on marriage and homosexuality; thus, harming the establishment's institutional integrity.

In the end, this question should not turn on the national consensus of what is marriage or whether same-sex parents are as adequate as their heterosexual counterparts. Instead, this decision should turn on constitutional principles, namely federalism. From the nation's beginnings to today the Court has recognized that marriage is a police power

of the states. Furthermore, that the state has a deeply seated interest in regulating marriage because of its importance to society and connection to the family. Under this recognized power, some states have chosen to only recognize heterosexual marriages for the sake of promoting biological parents to stay together in order to increase the likelihood of strong families and create the best possible child-rearing environment. Since these laws do not violate the Due Process or Equal Protection Clauses and the state has enacted a law under their marital police power the Court must uphold both traditional marriage laws and Section 2 of DOMA.

Critics may contend that a federalist decision like the one outlined above fails to take account of the human element present in this case. There is no doubt that a decision upholding traditional marital laws and Section 2 will affect same-sex couples and their families. These families will continue to live without the benefits afforded to their heterosexual counterparts, which could admittedly add familial pressures. This is unfortunate and one could sympathize with those who hold these concerns. Nonetheless, this case is about what is constitutional and not what is wise public policy. The responsibility of the Court is not to overturn laws because they disagree with the affect they have on certain people. Their responsibility is to say elucidate the law is and to adjudicate the constitutionality of legislation in light of the principles of the Constitution. As Justice Kennedy states in *Texas v. Johnson* in his concurring opinion that the desecration of the American flag is protected under the First Amendment, "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the *law and the Constitution*, as we see them, *compel* the result" (397, emphasis added).

The issues involved with Section 2 and traditional marital laws creates one of those cases where members of the Court may not like the affect their decision will have on same-sex families nationwide. Despite these sincere sympathetic feelings, the "law and the Constitution…compel" them to uphold traditional marital laws and Section 2; thus, they must do their duty and decide accordingly.

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