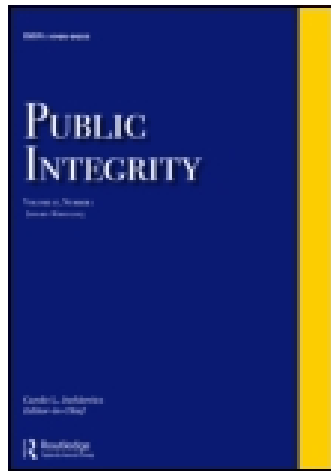


This article was downloaded by: [University of Baltimore]

On: 01 June 2015, At: 14:40

Publisher: Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Public Integrity

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/mpin20>

Liberty and Equality: In Defense of Same-Sex Marriage

Heather Wyatt-Nichol^a & Lorenda A. Naylor^a

^a University of Baltimore

Published online: 24 Mar 2015.



CrossMark

[Click for updates](#)

To cite this article: Heather Wyatt-Nichol & Lorenda A. Naylor (2015) Liberty and Equality: In Defense of Same-Sex Marriage, Public Integrity, 17:2, 117-130, DOI: [10.1080/10999922.2015.1000108](https://doi.org/10.1080/10999922.2015.1000108)

To link to this article: <http://dx.doi.org/10.1080/10999922.2015.1000108>

PLEASE SCROLL DOWN FOR ARTICLE

Taylor & Francis makes every effort to ensure the accuracy of all the information (the "Content") contained in the publications on our platform. However, Taylor & Francis, our agents, and our licensors make no representations or warranties whatsoever as to the accuracy, completeness, or suitability for any purpose of the Content. Any opinions and views expressed in this publication are the opinions and views of the authors, and are not the views of or endorsed by Taylor & Francis. The accuracy of the Content should not be relied upon and should be independently verified with primary sources of information. Taylor and Francis shall not be liable for any losses, actions, claims, proceedings, demands, costs, expenses, damages, and other liabilities whatsoever or howsoever caused arising directly or indirectly in connection with, in relation to or arising out of the use of the Content.

This article may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution in any form to anyone is expressly forbidden. Terms & Conditions of access and use can be found at <http://www.tandfonline.com/page/terms-and-conditions>

Liberty and Equality: In Defense of Same-Sex Marriage

Heather Wyatt-Nichol and Lorenda A. Naylor

University of Baltimore

Marriage equality has gained international attention in public discourse. Laws that prohibit same-sex marriage may be categorized as both paternalistic and moralistic. This article addresses ethical and legal considerations surrounding the right of same-sex couples to marry. Three subject areas are analyzed: equality, individual liberty, and morality. The implications of the analysis reveal that prohibition of same-sex marriage is not justified based upon the criteria necessary for paternalistic and moralistic policies.

Laws governing same-sex marriage vary widely around the world. Some countries support and affirm same-sex marriage, while other countries enforce severe punishments against gay couples. There are countries that prohibit same-sex activity and enforce harsh penalties. According to the International, Lesbian, Gay, Bi-Sexual, Trans and Intersex Association (2013), five countries have the death penalty for punishment of male-to-male relationships, and over 70 countries use imprisonment to deter same-sex activity. According to the Pew Research Center's (2014) report, "Gay Marriage Around the World," same-sex marriage is currently legal (or nationalized) in 15 countries: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay. Two countries offer same-sex marriage in subunits or specific jurisdictions: Mexico and the United States. In 2009, Mexico City approved gay marriage, which is recognized throughout the country (Human Rights Watch 2011). In June of 2013, the U.S. Supreme Court ruled in *United States v. Windsor* (570 U.S. 2013) that the federal government must recognize gay marriage in states that have provided legal sanction for gay marriage, or what is more commonly referred to as marriage equality. According to the Human Rights Campaign (n.d.), same-sex marriage is legal in the United States in 35 states plus the District of Columbia. Fifteen states prohibit same-sex marriage: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas. Given the legal variation across states and countries, as well as the political and cultural complexity of marriage, this article focuses on same-sex marriage in the United States.

In the United States there are an estimated 5.2 to 9.5 million adults who are gay, lesbian, or bisexual (Gates, 2014). Estimates of the number of same-sex partners who reside together range from 650,000 (Yen, 2011) to 3.1 million (Human Rights Campaign, n.d.). There are approximately 690,000 same-sex couples, of whom 124,000 are legally married (Gates, 2014; Yen, 2011). Despite the fact that a low percentage of the U.S. population is gay or lesbian, establishing legal rights for homosexuals has been controversial. Opposition to homosexuality is

grounded in religious doctrine and cultural norms. However, the rights of homosexuals are slowly forthcoming. A Pew Research Center poll released in February 2014 found that 49 percent of Americans favor same-sex marriage. Similarly, Gallup's annual Values and Beliefs poll conducted in May 2014 found that 55 percent of Americans support the legalization of same-sex marriage.

Regardless of public opinion, the U.S. Constitution is designed to protect individual liberties and provide equal protection under the law to all citizens. Historically, the LGBT community has been marginalized within our society. This article outlines an ethical argument against paternalistic and moralistic policy, and identifies legal considerations, including the Due Process, Equal Protection, and Full Faith and Credit Clauses of the Constitution.

ETHICAL AND PHILOSOPHICAL CONSIDERATIONS

Central to the issue of same-sex marriage is the tension between protecting individual liberty and the right to make autonomous decisions protecting the interest of society over the individual by restricting such decisions. Laws that prohibit same-sex marriage and partnerships may be categorized as both paternalistic and moralistic. Paternalistic policies that interfere with individual liberty are justified when the decisions restricted are already "unfree," the intervention is minimally restrictive, and the person whose freedom is restricted accepts the goal of the intervention (Gutmann & Thompson, 1997). Prohibition of same-sex marriage does not satisfy the criteria necessary to justify paternalistic policy. Regarding the first criterion, unfree decisions, states have a legitimate interest in regulating marriage. One might contend that because states regulate marriage, the process is not truly free. For example, our society accepts the regulation of marriage when it is intended to guard against child marriage or prevent genetic disorders that can occur via incestuous relationships. Nevertheless, courts have consistently ruled that marriage is a fundamental right. The second criterion necessary to justify paternalistic policy is that the intervention is minimally restrictive. One can hardly argue that denying the legal protection and social recognition conferred through marriage is minimally restrictive. "Even through complex and expensive legal arrangements under contract and property law, same-sex couples may not be fully able to share health and retirement benefits, file joint tax returns, benefit under property and inheritance laws, or visit loved ones in medical facilities" (Steiner, 2009, p. 10).

Furthermore, prohibition of same-sex marriage restricts individual liberty and autonomy. Inherent in liberty is the autonomy and freedom to make decisions that affect one's life. Marriage falls within the purview of such decisions. According to John Stuart Mill (1859/1963), liberty comprises:

first, the inward domain of consciousness...liberty of thought and feeling...secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to the consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others; the person combining being supposed to be of full age, and not forced or deceived (pp. 312–313).

The third criterion to justify paternalistic policy requires the person whose freedom is restricted to accept the goal of the intervention. Equality advocacy and legal challenges to laws prohibiting same-sex marriage provide evidence that individuals who are marginalized do not accept the goal restricting marriage to heterosexual couples.

The prohibition of same-sex marriage also fails to satisfy the criterion of a moralistic policy. Moralistic policies are justified when the action is considered wrong and regulation of such action is relevant to some public purpose, and when the regulation does not cause harm greater than it seeks to prevent (Gutmann & Thompson, 1997). The perception of homosexuality as immoral is often grounded in religious doctrine and cultural norms. Although most Christian denominations reject homosexuality, there are disputes over biblical interpretations. For example, Mohr (1999) contends that homosexuality is never mentioned by Christ in the Bible and that recent interpretations of the Old Testament posit that “the story of Lot at Sodom is probably intended to condemn inhospitality rather than homosexuality” (p. 148). Furthermore, selective interpretation of the Bible begs the question: “If they cite the story of Lot at Sodom to condemn homosexuality, do they also cite the story of Lot in the cave to praise incestuous rape?” (Mohr, 1999, p. 148).

Although homosexuality may be considered immoral in religious doctrine, the separation of church and state by the First Amendment of the U.S. Constitution negates legislating morality based upon religion. A simple analogy is that eating pork violates some religious doctrines but that does not justify the restriction of one’s right to purchase pork at the supermarket. In addition, when considering cultural norms, it is useful to contemplate Mohr’s (1999) distinction between morality in the descriptive sense and in the prescriptive/normative sense. From a descriptive standpoint, homosexuality is considered immoral because it is not a socially accepted practice. However, from a prescriptive/normative sense, social acceptance of a practice does not make it morally right (e.g., slavery). Just because society does not accept the practice of homosexuality, the majority does not have the right to discriminate against individuals who identify as homosexual.

The second criterion requires that regulation of the prohibited action be relevant to some public purpose. While regulation of marriage is considered a legitimate government purpose, the restriction of marriage based upon sexual orientation is not (*Goodridge v. Department of Public Health*, 798 N.E.2d 941, 440 Mass. 309). “While government does have a legitimate interest in promoting familial stability, same-sex marriage prohibitions cannot survive rational basis review based on this interest because the exclusion of same-sex couples does not further—and in fact hinders—this interest” (Ewing, 2008, p. 1428).

Opponents of same-sex marriage contend that the purpose of marriage is procreation and provision of a stable family life in the best interest of children, therefore the state has a legitimate purpose in regulating marriage (Struening, 2009). Limiting marriage to a biological conception of procreation ignores the reality of blended families, assisted reproductive technologies, and the choice of many couples to remain childless. It is also a fallacy to assume that only heterosexual married couples are able to provide optimal child-rearing through a stable family life. There is no evidence that children raised in same-sex partner households suffer adverse developmental effects. In fact, studies consistently demonstrate no significant differences between children raised in heterosexual and homosexual households (Ewing, 2009; Racjzi, 2008; Steiner, 2009). Furthermore, if marriage promotes stability, then it is hypocritical to argue that heterosexual marriage contributes to the good of society while homosexual marriage results in social harm.

The third criterion for justification of moralistic policy, i.e., that the regulation does not cause harm greater than it seeks to prevent, is grounded in Mill's harm principle: "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (1859/1963, p. 310). Opponents contend that same-sex marriage would undermine traditional marriage, and they offer the slippery-slope argument that once marriage is extended to same-sex couples, it will open up debate to extend marriage (e.g., polygamy, incest, bestiality) until the definition is meaningless and civilization is irreparably harmed. Aside from speculation and appeal to tradition, opponents have failed to provide concrete examples of harm that outweigh the benefits of same-sex marriage (Racjzi, 2008).

The criteria used to analyze paternalistic and moralistic policies are linked to constitutional interpretations of liberty, due process, and equal protection. On the issue of marriage equality, Knauer (2008) acknowledges the historical role of the states in regulating marriage, and acknowledging the importance of constitutional protections, she asserts that "it is also worth noting that liberty interests involving marriage, child rearing, and basic issues of family autonomy form the core of our unenumerated fundamental rights protected and guaranteed by the U.S. Constitution" (p. 115). The following section addresses legal considerations of marriage equality at the federal and state levels.

LEGAL CONSIDERATIONS

The Right to Marry

The expansion of rights to same-sex couples is contingent upon the legal interpretation of the rights of the individual, particularly in matters of sexual and family/marriage autonomy and the extension of rights to minorities based upon the principle of equality (Fallinger, 2009). The right to marry is interpreted as a liberty protected under the Equal Protection Clause and the Fourteenth Amendment. In the 1923 case of *Meyer v. Nebraska* (262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042), the plaintiff was convicted for violating a state statute that prohibited teaching in a foreign language. Determining whether the statute infringed upon liberty guaranteed in the Fourteenth Amendment, the Court stated:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

The right to marry is further grounded in later U.S. Supreme Court decisions. In 1942, striking down the Oklahoma Habitual Sterilization Act (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535), the Court stated, "Marriage and procreation are fundamental to the very existence and survival of the race." In 1967, striking down a Virginia law that prohibited interracial marriage, the Court stated in *Loving v. Virginia* (388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010),

“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” (Sec. II, para. 1). In 1978, in *Zablocki v. Redhail* (434 U.S. 374), striking down a Wisconsin statute which required noncustodial parents to be in good standing on child-support payments and to obtain permission from the court in order to marry another person, the Court stated, “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests” (p. 682).

In summary, prohibition of same-sex marriage and partnerships in the United States is unjustified based upon legal considerations and the ethical criteria required for paternalistic and moralistic policies. First, prohibition of same-sex marriage fails the paternalistic criteria. Marriage is a fundamental right, the policy is overly restrictive, and gays and lesbians reject the claim that marriage should be reserved for heterosexuals only. Similarly, the policy fails the three criteria for moralistic policy. The core moral argument is that homosexuality is “wrong.” However, the separation of church and state by the First Amendment negates legislating morality based upon religion. Simply stated, an act cannot be determined as right or wrong based upon biblical verse. Second, the right to marry is protected under the Due Process and Equal Protection Clauses, and third, same-sex marriage does not create harm. There are no concrete examples of harm that outweigh the benefits of same-sex marriage (Raczi, 2008).

Equal Protection and the Three-Tiered Analysis Doctrine

The federal judiciary employs a three-tiered analysis (suspect, quasi-suspect, rational basis) to interpret the law. Suspect classifications are subject to strict scrutiny when a law burdens a fundamental right or targets a suspect class. Statutes challenged under this approach require evidence of a compelling government interest to be sustained. Quasi-suspect classifications are subject to intermediate heightened scrutiny. Statutes challenged under this approach require evidence of being substantially related to an important government interest. Everything else falls under the rational-basis test—statutes need only demonstrate evidence of being rationally related to a legitimate government interest to be upheld. In determining suspect or quasi-suspect classifications, the court will consider the history of discrimination, political power (or lack thereof), whether the trait that serves as the basis of discrimination is immutable, and whether the characteristic is unrelated to performance and social contribution (Ewing, 2008).

One could argue that cases of discrimination based upon homosexuality should be subject to strict scrutiny. There is evidence of hatred and discrimination against homosexuals throughout American history. Moreover, the marginalization of homosexuals weakens their political power, because there are social repercussions that can affect one’s livelihood if one openly identifies as gay or lesbian. While there have been conflicting decisions on the status of homosexuality as an immutable trait, evidence is leaning toward the position that sexual orientation is not something that can be willfully changed. Furthermore, being homosexual should have no bearing on the contributions that one is able to make to society.

In 1988, in *Watkins v. U.S. Army* (837 F.2d 1428), the Ninth Circuit U.S. Court of Appeals ruled that Army regulations intended to discharge service members on the basis of homosexuality violated the Equal Protection Clause. The case also provides a legal interpretation that

homosexuals constitute a suspect class. Watkins served in the U.S Army from 1967 until 1982, when he was discharged for being homosexual. Watkins never denied his homosexuality and checked a box indicating that he had homosexual tendencies in 1967. In 1968, he signed an affidavit stating that he had engaged in homosexual conduct with two other service members, but the case was dropped due to lack of evidence. He continuously reenlisted, but his security clearance was revoked in 1979. The Army issued new regulations (AR 635-200, chap. 15) in 1981 that mandated disqualification of homosexuals regardless of service tenure. In determining whether homosexuality is a suspect class, Judge William Albert Norris asserted in his concurring opinion that sexual orientation is immutable:

At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity . . . immutability may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. (Sec. IV, para.11).

Judge Norris further declared that homosexuals lack political power:

... the social, economic, and political pressures to conceal one's homosexuality commonly deter many gays from openly advocating pro-homosexual legislation, thus intensifying their inability to make effective use of the political process. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are partially powerless to pursue their rights openly in the political arena. (Sec. IV, para. 14)

The facts of the case also reveal that Watkins's performance was stellar throughout his military career; therefore, his homosexuality had no bearing on his ability to contribute as an active service member.

Regardless of the ruling in *Watkins*, courts are reluctant to categorize homosexuality as a suspect classification. One of the main arguments against the three-tiered analysis doctrine is that as long as courts refuse to recognize homosexuality as a suspect classification, nearly any statute that discriminates on the basis of sexual orientation need only meet the basis for rational review; i.e., that government has a legitimate interest in regulating an activity (Ewing, 2008). The determination of homosexuality as a suspect classification often stops once a court refuses to acknowledge it as an immutable trait—a history of discrimination and lack of political power are ignored (Ewing, 2008). Balkin (1997) contends that immutability is insufficient to analyze discrimination. Instead, discrimination analysis requires a deeper reflection on group status hierarchies within society.

Racial discrimination is wrong because of the historical creation of a status hierarchy organized around the meaning of skin color. The question is not whether a trait is immutable, but whether there has been a history of using the trait to create a system of social meanings, or define a social hierarchy, that helps dominate and oppress people (Balkin 1997, p. 2366).

By framing homosexual rights as a cultural struggle, Balkin provides evidence of the marginalization of the social status of homosexuals and argues for extending social equity by eliminating unjust hierarchies.

Despite the limitations of the three-tiered doctrine, the rational-basis test has been used, on occasion, to reject discrimination based upon sexual orientation. In 1996, in *Romer v. Evans*

(517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855), the U.S. Supreme Court held unconstitutional the Colorado State Constitution Amendment 2, adopted just four years earlier in 1992, to repeal and prohibit any government action to protect individuals against discrimination based on sexual orientation. The Court reasoned that the intent of the amendment was not for a particular legislative purpose other than to discriminate against homosexuals: “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”

More recently, an alternative to the three-tiered doctrine is found in *Lawrence v. Texas* (539 U.S. 558, 123 S.Ct. 2472, 156 L.ed. 2d 508), a 2003 case in which the U.S. Supreme Court struck down Texas sodomy laws and rejected the earlier Supreme Court decision in *Bowers v. Hardwick* (1986). In her concurring opinion, Justice Sandra Day O’Connor asserts:

A law branding one class of persons as criminal solely based on the State’s moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and Equal Protection Clause, *under any standard of review* [emphasis added].

Proponents of *Lawrence* praise its alternative approach to the traditional three-tiered doctrine, which minimizes the distinction between strict scrutiny and rational basis (Ewing, 2008; Struening, 2009), and simultaneously blends equal protection and substantive due process without ever using the term “fundamental right.” “The liberty of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact” (Tribe, 2004, p. 1898).

In contrast, critics of the *Lawrence* decision condemn the legal reasoning in the majority opinion because the justices did not specify a fundamental right and standard of review used to arrive at the decision (Lund & McGinnis, 2004)—more precisely, critics were perturbed that the traditional tiered doctrine was not followed. It is also important to recognize that although sodomy laws were rejected on the basis that moral disapproval of such practices does not qualify as a legitimate government interest, the same logic was not extended to same-sex marriage. In the final analysis of her concurring opinion, Justice O’Connor declares, “Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group” (para. 17). Despite this specific declaration, Justice Antonin Scalia warns in the conclusion of his dissenting opinion that the decision opens the door for homosexual unions.

The Defense of Marriage Act

When the Supreme Court of Hawaii, in 1996, ruled in *Baehr v. Miike* (910 P2d 112, 80 Haw. 341) that denial of same-sex marriage violated the state constitution, opponents feared that Hawaii would legalize gay marriage and other states would be forced to recognize those marriages under the Full Faith and Credit Clause. In response, the Defense of Marriage Act (Pub. L. No. 104–199, 110 Stat. 2419. 1 U.S.C. § 7 and 28, U.S.C. § 1738C) was enacted by the 104th Congress in 1996. The purpose of the law, known as DOMA, was to ensure that other states would not have to recognize same-sex marriages. As a result, same-sex marriages were not recognized by the federal government. Specifically, DOMA defined marriage, at the federal

level, as a “legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife” (PL 104–199, Sec. 3). This meant that under DOMA the U.S. government would not legally recognize same-sex marriages, nor would states be required to recognize same-sex marriages. Today, 29 states have state constitutional amendments that define marriage as between a man and a woman (Lambda Legal, n.d.).

Proponents of marriage equality argued that DOMA was discriminatory because homosexuals were systematically treated differently than heterosexual couples. According to Section 2 of DOMA, states had the right to refuse recognition of same-sex marriage:

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.

DOMA was significant because, in refusing to recognize same-sex marriage, it also denied over 1,100 federal benefits, rights, and privileges, such as Social Security survivor benefits, family health insurance, veterans’ benefits, and joint tax returns, to same-sex partners (U.S. GAO, 2004). For example, a gay or lesbian married couple who filed a state joint tax return could not file a federal joint tax return, nor could a homosexual federal employee receive health benefits for his or her spouse. Equally important, benefits to spouses in states that legally recognize same-sex marriage benefits are taxable by the federal government and must be reported as income (Fish, 2005).

In contrast, heterosexual married couples do not pay taxes on federal benefits, creating unequal benefits between married heterosexual and homosexual couples. This results in discrimination based on sexual orientation. As a result, *Golinski v. Office of Personnel Management* and six other legal cases were filed against the federal government by civilians alleging that Section 3 of DOMA was unconstitutional (Perrin, n.d.).

Moreover, under DOMA same-sex military spouses were not eligible for the same military benefits offered to opposite-sex married spouses. For example, spouses of uniformed service members with same-sex partners were not eligible for military healthcare or basic housing allowances, creating a financial hardship for gay or lesbian military couples. This means that U.S. service members who serve our country, and possibly die protecting our country, were not provided the same benefits as their opposite-sex counterparts. As a result, in 2011 the Servicemembers Legal Defense Network filed a lawsuit against the Department of Defense on behalf of eight military couples in the U.S. District Court for the District of Massachusetts (*McLaughlin v. Panetta*, 1:11-cv-11905), arguing that DOMA was unconstitutional (as well as Titles 10, 32, and 38 of the U.S. Code) on the basis of unequal treatment.

In February 2011, President Obama declared DOMA unconstitutional, and U.S. Attorney General Eric Holder advised that the administration would no longer defend DOMA in legal cases. According to Attorney General Holder, “classifications based on ‘sexual orientation’ should be subjected to a strict legal test intended to block unfair discrimination. As a result ... a crucial provision of the Defense of Marriage Act is unconstitutional” (Savage & Solberg, 2011, para. 2).

Specifically, the attorney general stated in a letter to House Speaker John Boehner that DOMA, “as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment” (Holder, 2011). In May of 2011, a federal appeals court found DOMA’s benefits section unconstitutional, arguing that gay couples were denied the same benefit rights as heterosexual couples (*Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 698 F.Supp.2d 234). The ruling was significant because it was the first federal appeals court to find DOMA unconstitutional.

In 2013, the U.S. Supreme Court delivered a landmark decision for gay rights in *United States v. Windsor* (570 U.S., 2013, docket number 12-307). The *Windsor* case struck down Section 3 of the federal Defense of Marriage Act of 1996 (Pub.L. 104–199), which provided a federal definition of marriage as between a man and a woman. In sum, it made the marriage definition unconstitutional and required the federal government to recognize legal gay marriages. In the majority opinion Justice Anthony Kennedy wrote:

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. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.

The *Windsor* ruling is unique because the individual liberty interest of gays and lesbians, protected by New York’s same-sex marriage law, was used as a “new trigger for heightened scrutiny” (Barnett, 2013). Restricting the interpretation of the liberty interest to the state statute avoids the recognition of homosexuality as a protected class subject to suspect classification. Same-sex marriage would have extended to all states had the Court recognized homosexuality as a protected class in the *Windsor* decision.

Furthermore, the *Windsor* ruling was simultaneously a victory and a loss for marriage equality. Now that the federal Defense of Marriage Act is unconstitutional, other states may view this as a window of opportunity to enact same-sex marriage. On the other hand, the ruling leaves the question of marriage equality at the state level—the mini-DOMAs remain intact. Time will reveal whether states will be “laboratories of democracy” or communities of oppression. The next section addresses legal interpretations of same-sex marriage at the state level.

State Court Decisions and Appeals

According to Lambda Legal (n.d.), 35 states and the District of Columbia have marriage equality laws that recognize relationships among same-sex couples,¹ eight states have civil union or broad domestic partnership laws,² four states provide limited domestic partnership laws,³ and seven states recognize out-of-state marriages of same-sex couples.⁴ Partial explanation for the variation across states is based on legal interpretation—some states employ the traditional three-tiered analysis (e.g., New York), while other states (e.g., Vermont) employ a unitary analysis (Ewing, 2008).

The first state to consider same-sex marriage was Hawaii, in *Baehr v. Lewin* (852 P2d 44, 74 Haw. 645). Because the Equal Protection Clause of the state constitution of Hawaii

(Art. I, sec. 5) specifically states that equal protection cannot be denied on the basis of “race, religion, sex, or ancestry,” the appellants claimed that denial of marriage based on sexual orientation was a form of sexual discrimination. Hawaii includes sex as a suspect classification; therefore, the case was subject to strict scrutiny. The Hawaii Supreme Court remanded the case to be considered under the strict-scrutiny standard. On remand, the trial court ruled that Hawaii’s ban on same-sex marriage violated the state constitution (*Baehr v. Miike* 1996). Nevertheless, through a ballot initiative in 1998, citizens elected to limit marriage to heterosexual couples. During this same time, however, the first statewide domestic partnership law was enacted.

A few years later, in *Baker v. Vermont* (744 A.2d 864), the Supreme Court of Vermont held that excluding same-sex couples from entering into marriage violated the Common Benefits Clause of the Vermont constitution. The court acknowledged the traditional arguments, particularly procreation and optimal childrearing, as legitimate government interests in regulating marriage. However, it rejected these arguments as valid public interests by noting that marriage is not limited to procreation and “the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against.”⁵ Similarly, in 2003 the Supreme Judicial Court of Massachusetts ruled in *Goodridge v. Department of Public Health* (798 N.E.2d 941, 440 Mass. 309) that denying marriage to same-sex couples violated the state constitution. The court relied heavily on the *Lawrence v. Texas* decision in ruling that the marriage law in Massachusetts could not be upheld even under a rational-basis review because it did not serve a legitimate state purpose. As an alternative approach to traditional three-tiered analysis, the New Jersey Supreme Court considers the nature of the right in question, the extent to which the statute limits the right, and the public interest for restriction of the right—“the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right” (Ewing, 2008, p. 1432). Thus in *Lewis v. Harris* (188 NJ 415) the New Jersey Supreme Court, in 2006, recognized the legitimate government interest of strengthening families through marriage regardless of sexual orientation, although it provided the option of establishing civil unions as an alternative. A few years later, in 2008, the Connecticut Supreme Court ruled in *Kerrigan v. The State Commissioner of Public Health* (SC17716) that classification based on sexual orientation requires heightened scrutiny and that same-sex marriage violates the Equal Protection Clause of the Connecticut state constitution. The following year, the Iowa Supreme Court mirrored the *Kerrigan* decision in *Varnum v. Brien* (763 NW 2d 862). It is important to note, however, that Connecticut and Iowa used traditional three-tiered analysis to arrive at their decisions.

In stark contrast, in 2003 the Superior Court of the State of Arizona upheld the prohibition of same-sex marriage in *Standhardt v. Superior Court* (77 P.3d 451, 206 Ariz. 276). The court ruled that a fundamental right to marry does not include the right to marry someone of the same sex, reasoning that simply “because other language in *Lawrence* indicates that the Court did not consider sexual conduct between same-sex partners a fundamental right, it would be illogical to interpret the quoted language as recognizing a fundamental right to enter a same-sex marriage.” Prohibition of same-sex marriage was also upheld by the Court of Appeals of New York in *Hernandez v. Robles* (855 N.E. 2d 1, 7 N.Y. 3rd 338, 921 N.Y.S.2d 770) in 2006.⁶ Using the traditional three-tiered approach, the court rejected the argument that same-sex marriage should be subject to strict scrutiny and that the regulation of marriage through the Domestic Relations

Law of New York met the requirement of a legitimate state purpose. Likewise, in 2007 the Maryland Court of Appeals (*Conaway v. Deane*, 932 A. 2d 571) upheld the Maryland Code, Family Law, section 2-201, which only recognizes marriage between heterosexual couples as valid. The court held that same-sex marriage is not a fundamental right and that homosexuals were not politically powerless in the state, since they had been successful in professional fields and elective offices. A same-sex marriage initiative failed in the Maryland General Assembly in 2011, but passed both the Assembly and a voter referendum in 2012 (Witte, 2013).

Washington State's Defense of Marriage Act (WDOMA) was upheld in 2006 by the Washington Supreme Court in *Andersen v. King County* (138 P.3d 963, Nos. 75934-1, 75956-2006). The court held that sexual orientation is not an immutable characteristic, nor are homosexuals politically powerless in the state (given the representation of homosexuals in elective offices). As a result, homosexuality is not a suspect classification subject to strict scrutiny. The court also rejected the argument that marriage, regardless of sexual orientation, is a fundamental right, and held that the regulation of marriage through WDOMA serves a legitimate state purpose. Although WDOMA was upheld in the *King County* decision, Washington citizens in 2012 voted to legalize same-sex marriage.

Similarly, in 2006 the U.S. Court of Appeals for the Eighth Circuit upheld Nebraska's constitutional amendment defining marriage as between a man and a woman, and prohibiting same-sex civil unions (*Citizens for Equal Protection v. Bruning*, 455/455.F3d.859.05-2604). Using the rational-basis standard of review, the court held that regulations pertaining to marriage satisfy a legitimate government interest. Citing *Zablocki v. Redhail* (434 U.S. 374, 1978), the Eighth Circuit opined, "Surely, for example, a state may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old" (Sec. II, 36).

The greatest controversy over same-sex marriage in recent years has occurred in California. Proposition 8 ("prop. 8"), passed by the citizens of California in 2008, was a ballot initiative that amended the state constitution to prohibit same-sex marriage. In 2009, the California Supreme Court upheld prop. 8. When it was challenged in federal court, Judge John Walker of the U.S. District Court for the Northern District of California ruled in *Perry v. Schwarzenegger* (591 F.3d 1147, 2010) that prop. 8 violated the Equal Protection and Due Process Clauses of the U.S. Constitution. Proponents of prop. 8 then sought to vacate Judge Walker's decision on the grounds of his sexual orientation (an interesting move, since advocates of same-sex marriage do not seek to vacate decisions against same-sex marriage on the basis that a judge is heterosexual). The district court rejected the challenge. Upon appeal, the U. S. Court of Appeals for the Ninth Circuit asked the California State Supreme Court to determine whether proponents of prop. 8 had legal standing for the right to appeal. On November 17, 2011, the California Supreme Court answered in the affirmative via *Perry v. Brown* (No. S189476), asserting that "when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so ... the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity" (Sec. IV, para. 1). On December 7, 2012, the U.S. Supreme Court granted certiorari to *Hollingsworth v. Perry* to rule on the status of Proposition 8. In June 2013, the U.S. Supreme Court ruled in the *Perry* case and restored marriage equality in California (570 U.S., 2013, docket number 12-144).

SUMMARY AND CONCLUSION

The recent decisions of *U.S. v. Windsor* and *Hollingsworth v. Perry* reinforce federalism by reserving the regulation of marriage at the state level. This leaves open the opportunity for states to permit or prohibit same-sex marriage. Although federalism has been praised as a means for states to experiment with solutions to problems, it has also been used to oppress marginalized groups. Federalism and states' rights were used to justify segregation for decades. Mini-DOMAs allowing states to prohibit same-sex marriage and deny recognition of same-sex marriages performed in other states are equivalent to state statutes prohibiting interracial marriage.

In addition, the variation of state laws pertaining to same-sex marriage creates a real dilemma, because Article IV, Sections 1 and 2 of the U.S. Constitution, the Full Faith and Credit Clause, requires that states recognize "public Acts, Records, and judicial Proceedings of every other State" and declares that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Ultimately, the prohibition of same-sex marriage restricts liberty and autonomy, fails to meet the criteria for moralistic and paternalistic policies, and violates the U.S. Constitution. Marriage is one of the most important decisions that an individual will make in a lifetime. The right to marry is a fundamental right and liberty protected under the Equal Protection Clauses of the Fifth and Fourteenth Amendments. Equal protection trumps federalism. The Supremacy Clause, Article VI of the U.S. Constitution, places the Constitution above state laws that are contrary to the Constitution. Any federal or state legislation that prohibits marriage based solely on sexual orientation deprives an entire class of people of "life, liberty, and property" and denies "equal protection of the laws" (Fourteenth Amendment). If our society truly believes that marriage promotes stability, then it is time to extend the opportunity to all individuals.

NOTES

1. Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, and Washington. Marriage, Unions, Partnerships. There are notable differences between same-sex marriage, civil union, and domestic partnership. Same-sex marriage implies that the married couple receives all state-created benefits and responsibilities. These benefits travel with them from state to state (as long as the state traveled to recognizes same-sex marriage). As of this writing, nine states and the District of Columbia recognize same-sex marriage: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, and Vermont, Washington (Lambda Legal, n.d.). Civil unions also confer rights, protections, and marriage benefits granted by a state. However, a civil union may not be recognized by other states. Equally important is the argument that unions or partnerships create a "separate but equal" status denying homosexual couples the same rights and social status of heterosexual married couples; it is a separate and inferior status (Lambda Legal, n.d.). The following eight states and the District of Columbia recognize and provide civil unions: California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Washington. Domestic partnerships are comparable to civil unions. State rights and benefits are granted to the couple. There are four states that provide for partnerships: Colorado, Maine, Maryland, and Wisconsin. Seven states recognize out-of-state marriages: California, Illinois, Maryland, New Jersey, New Mexico, New York, and Rhode Island.

2. California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Washington.

3. Colorado, Maine, Maryland, and Wisconsin.

4. California, Illinois, Maryland, New Jersey, New Mexico, New York, Rhode Island.

5. In 2009 Vermont passed legislation permitting same-sex marriage.

6. New York passed legislation permitting same-sex marriage in 2009.

REFERENCES

- Andersen v. King County, 138 P.3d 963, Nos. 75934–1, 75956–1 (2006).
- Baehr v. Lewin, 852 P.2d 44, 74 Haw. 645 (1993).
- Baehr v. Miike, 910 P.2d 112, 80 Haw. 341 (1996).
- Baker v. Vermont, 744 A.2d 864 (1999).
- Balkin, J. M. (1997). The constitution of status. *Yale Law Journal*, 106(8), 2313–2374.
- Barnett, R. (2013). *Federalism marries liberty in the DOMA decision*. Retrieved from <http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/>
- Citizens for Equal Protection v. Bruning, 455 F. 3d 859 (2006).
- Commonwealth of Massachusetts v. The United States Department of Health and Human Services, 698 F.Supp.2d 234 (2010).
- Conaway v. Deane, 932 A. 2d 571 (2007).
- Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419. 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996).
- Ewing, R. P., Jr. (2008). Same-sex marriage: A threat to tiered Equal Protection Doctrine? *St. John's Law Review*, 82, 1409–1446.
- Fallinger, M. A. (2009). Sex and the statehouse: The law and the American same-sex marriage debate. *Dialogue: A Journal of Theology*, 48(1), 19–29.
- Fish, E. (2005). The road to recognition: A global perspective on gay marriage. *Harvard International Review*, 27(2), 32.
- Gallup. (2014). *Same-sex marriage support reaches new high at 55%*. Retrieved from <http://www.gallup.com/poll/169640/same-sex-marriage-support-reaches-new-high.aspx>
- Gates, G. J. (2014). *LGBT demographics: Comparisons among population-based surveys*. Retrieved from <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf>
- Golinski v. Office of Personnel Management (2011).
- Goodman, B. L. (2007). Individual rights: Rational basis review reveals that Washington statute forbidding same-sex marriage is unconstitutional and implicates the fundamental right to marriage. *Rutgers Law Journal*, 38(4), 1299–1327.
- Goodridge v. Department of Public Health, 798 N.E.2d 941, 440 Mass. 309 (2003).
- Gutmann, A., & Thompson, D. (1997). *Ethics & politics: Cases and comments* (3rd ed.). Chicago, IL: Nelson Hall.
- Herek, G. M. (n.d.). *Facts about homosexuality and mental health*. Retrieved from http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html
- Hernandez v. Robles, 855 N.E. 2d 1, 7 N.Y.3d 338, 921 N.Y.S.2d 770 (2006).
- Holder, E. (2011). *Re: Defense of Marriage Act*. Retrieved from http://metroweekly.com/poliglot/LETTER_BOEHNER.pdf
- Hollingsworth v. Perry, 570 U.S. docket number 12–144 (2013).
- Human Rights Campaign. (n.d.). *Marriage center*. Retrieved from <http://www.hrc.org/marriage-center>
- Human Rights Watch. (2011). *A decade on, progress on same-sex marriage*. Retrieved from <http://www.hrw.org/news/2011/03/14/decade-progress-same-sex-Marriages>
- International, Lesbian, Gay, Bi-Sexual, Trans, & Intersex Association. (2013). *Lesbian and gay rights in the world*. Retrieved from http://old.ilga.org/Statehomophobia/ILGA_map_2013_A4.pdf
- Kerrigan v. The State Commissioner of Public Health, SC17716 (2008).
- Knauer, N. J. (2008). Same-sex marriage and federalism. Research Paper No. 2008–72. Philadelphia, PA: Temple University.
- Lamda Legal. (n.d.). *Status of same-sex relationships*. Retrieved from <http://www.lambdalegal.org/publications/nation-wide-status-same-sex-relationships>
- Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed. 2d 508 (2003).
- Lewis v. Harris, 188 NJ 415 (2006).
- Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).
- Lund, N., & McGinnis, J. O. (2004). Lawrence v. Texas and judicial hubris. *Michigan Law Review*, 102(7), 1555–1614.
- McLaughlin v. Panetta, 1:11-cv-11905 (2011).
- Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).
- Mill, J. S. (1859/1963). On liberty. In J. Somerville & R. E. Santoni (Eds.), *Social and political philosophy* (pp. 302–341). New York, NY: Anchor Books.

- Mohr, R. D. (1999). Gay basics: Some questions, facts, and values. In J. Rachels (Ed.), *The right thing to do* (2nd ed., pp. 141–156). Boston, MA: McGraw-Hill.
- Perrin, K. (n.d.). *List of pending DOMA cases*. Retrieved from <http://www.scribd.com/doc/49755370/List-of-Pending-DOMA-Cases>
- Perry v. Brown, No. S189476 (2011).
- Perry v. Schwarzenegger (Perry I), 591 F.3d 1147 (2010).
- Pew Research Center. (2013). *Gay marriage around the world*. Retrieved from <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/>
- Pew Research Center. (2014). *Political survey*. Retrieved from http://www.pewsocialtrends.org/files/2014/03/2014-03-07_generations-appendix-b-Topline-Questionnaire.pdf
- Raczi, A. (2008). A populist argument for legalizing same-sex marriage. *Monist*, 91(3), 475–505.
- Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).
- Savage, C., & Solberg, S. G. (2011). *In shift, U.S. says marriage act blocks gay rights*. Retrieved <http://www.nytimes.com/2011/02/24/us/24marriage.html>
- Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).
- Standhardt v. Superior Court, 77 P.3d 451, 206 Ariz. 276 (2003).
- Steiner, R. L. (2009). A commentary on the old saw that same-sex marriage threatens civilization. In G. A. Babst, E. R. Gill, & J. Pierceson (Eds.), *Moral argument, religion, and same-sex marriage: Advancing the public good* (pp. 1–17). Lanham, MD: Lexington Books.
- Struening, K. (2009). Looking for liberty and defining marriage in three same-sex marriage cases. In G. A. Babst, E. R. Gill, & J. Pierceson (Eds.), *Moral argument, religion, and same-sex marriage: Advancing the public good* (pp. 19–49). Lanham, MD: Lexington Books.
- Tribe, L. H. (2004). Lawrence v. Texas: The ‘fundamental right’ that dare not speak its name. *Harvard Law Review*, 117, 6, 1893–1955.
- U.S. Constitution. (1776). *Constitution of the United States*. Retrieved from <http://www.archives.gov/exhibits/charters/constitution.html>
- U.S. Department of Justice. (2011). *Re: Defense of Marriage Act*. Retrieved from http://metroweekly.com/poliglot/LETTER_-_BOEHNER.pdf
- U.S. Government Accountability Office. (2004). *Defense of Marriage Act: Update to prior report (AO-04-353 R)*. Retrieved from <http://www.thetaskforce.org/downloads/reports/reports/GAObenefits.pdf>
- United States v. Windsor, 570 U.S., docket number 12–307 (2013).
- Varnum v. Brien, 763 NW 2d 862 (2009)
- Witte, B. (2013). Same-sex marriage ceremonies begin. Retrieved from http://www.huffingtonpost.com/2013/01/01/maryland-same-sex-marriage_n_2391194.html
- Watkins v. United States Army, 837 F.2d 1428 (1988).
- Yen, H. (2011). Census: Many gay couples say they’re married—even if they technically aren’t. Retrieved from http://www.msnbc.msn.com/id/44690992/ns/us_news-life/t/census-many-gay-couples-say-theyre-married-even-if-they-technically-arent/#
- Zablocki v. Redhail, 434 U.S. 374 (1978).