

*Speak Now or Forever Hold Your Peace: The Constitutionality of States Prohibiting and Not  
Recognizing Same-Sex Marriages*  
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## INTRODUCTION

The United States Supreme Court has granted certiorari to resolve the issues of whether states can limit marriage to between one man and one woman, and whether states must recognize same-sex marriages validly created in other states.<sup>1</sup> The Court has already struck as unconstitutional the Defense of Marriage Acts' federal definition of marriage as between one man and one woman in *United States v. Windsor*.<sup>2</sup> Dissenting in that opinion, Justice Scalia fatefully pronounced that he was waiting for the other shoe to drop—that is, that he believes the Court's language has already laid the groundwork for the downfall of the ability of states individually to define marriage as between one man and one woman.<sup>3</sup> However, *Windsor* and other Supreme Court precedents do not necessarily compel the conclusion that states must permit the solemnization of same-sex marriages. Nor do those precedents necessarily compel the conclusion that states must recognize such marriages that have been validly created in other states.

Part I of this Note focuses on the implications of the Court's recognition of marriage as a fundamental right in *Loving v. Virginia*.<sup>4</sup> That Part argues that, although marriage is a fundamental right, same-sex marriage does not fall within that definition. Therefore, state laws limiting marriage to between one man and one woman should not be subject to strict scrutiny as a matter of substantive due process. Rather, they must only be rationally related to a legitimate government interest in order to be constitutional.<sup>5</sup>

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<sup>1</sup> *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015).

<sup>2</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>3</sup> *Id.* at 2709-11 (Scalia, J., dissenting).

<sup>4</sup> *See infra* Part I.

<sup>5</sup> For purposes of this Note, I am assuming that the Supreme Court will not treat sexual orientation as a protected class under a Fourteenth Amendment Equal Protection Clause analysis. If the Supreme Court found sexual orientation to be a suspect class, then it would apply either strict scrutiny or intermediate scrutiny, which opponents of same-sex marriage would be highly unlikely to overcome.

Part II explores the arguments that proponents of same-sex marriage have made based on *Lawrence v. Texas*, which struck same-sex sodomy laws as unconstitutional.<sup>6</sup> That Part explains that the Court's decision was founded on its view of the impermissibility of the state invading the privacy of one's bedroom and criminalizing intimate conduct in which consenting adults engage in that particular context. It argues that, since the *Lawrence* Court was concerned exclusively about individual privacy, the precedent does not govern a state's public action of permitting or recognizing—or refusing to permit or recognize—same-sex marriage.

Part III analyzes the reasoning behind the Supreme Court's decision in *United States v. Windsor*.<sup>7</sup> It argues that the federalism implications of the federal government's attempt to define marriage in DOMA have little bearing on the ability of states individually to continue to define marriage. Further, although the federal government may have interfered with the equal dignity that a state had conferred on a same-sex marriage, it would work an equal affront to the dignity of other states if they were forced to permit and recognize marriage as defined by the state with the broadest definition of marriage. Therefore, *Windsor* does not compel states to permit or recognize same-sex marriages.

Part IV concludes with a proposal regarding how states can survive rational-basis review when their laws refuse to permit or recognize same-sex marriage.<sup>8</sup> After providing an overview of rational-basis review, it provides examples of legitimate government interests to which marriage laws are rationally related. Since laws refusing to permit or recognize same-sex marriage can survive rational-basis review, and existing precedent does not compel states to permit or recognize same-sex marriage, it is constitutional for states to limit marriage to between one man and one woman.

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<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* Part IV.

I. FUNDAMENTAL RIGHT OF MARRIAGE: WHAT STATE LIMITATIONS ARE PERMISSIBLE AFTER  
*LOVING?*

States have defined marriage in the past with a variety of limitations. For instance, they have limited marriage based on age,<sup>9</sup> degree of kinship,<sup>10</sup> number of spouses,<sup>11</sup> race,<sup>12</sup> and gender.<sup>13</sup> While few have qualms with the state limiting the ability of a twelve-year-old or of two siblings to marry, limitations based on race are undeniably unconstitutional.<sup>14</sup> The question, then, is whether a limitation based on gender—marriage as only between one man and one woman—is similarly unconstitutional or is a permissible limitation. In order to determine this, it is essential to examine the Supreme Court’s precedent of *Loving v. Virginia*,<sup>15</sup> where the Court clearly stated that marriage is a fundamental right,<sup>16</sup> and explore the implications of that decision.<sup>17</sup>

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<sup>9</sup> See, e.g., MICH. COMP. LAWS § 551.51 (2014) (“A marriage in this state shall not be contracted by a person who is under 16 years of age, and the marriage, if entered into, shall be void.”).

<sup>10</sup> See, e.g., § 551.3 (“A man shall not marry his mother, sister, grandmother, daughter, granddaughter, stepmother, grandfather’s wife, son’s wife, grandson’s wife, wife’s mother, wife’s grandmother, wife’s daughter, wife’s granddaughter, brother’s daughter, sister’s daughter, father’s sister, mother’s sister, or cousin of the first degree, or another man.”); § 551.4 (“A woman shall not marry her father, brother, grandfather, son, grandson, stepfather, grandmother’s husband, daughter’s husband, granddaughter’s husband, husband’s father, husband’s grandfather, husband’s son, husband’s grandson, brother’s son, sister’s son, father’s brother, mother’s brother, or cousin of the first degree, or another woman.”).

<sup>11</sup> See, e.g., § 551.5 (“No marriage shall be contracted whilst either of the parties has a former wife or husband living, unless the marriage of such former wife or husband, shall have been dissolved.”).

<sup>12</sup> See, e.g., Cyrus E. Phillips IV, *Miscegenation: The Courts and the Constitution*, 8 WM. & MARY L. REV. 133, 133-34 (1966) (noting which states had anti-miscegenation statutes still in effect in 1966 and which states had already repealed their anti-miscegenation statutes).

<sup>13</sup> See, e.g., § 551.1-2 (“Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.”).

<sup>14</sup> *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (explaining that the “statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classification violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment”).

<sup>15</sup> See *infra* Section I.A (providing an overview of *Loving*).

<sup>16</sup> *Loving*, 388 U.S. at 12. As the Supreme Court has elsewhere explained in the substantive due process clause context, a “fundamental right” is something that is “objectively, ‘deeply rooted in this Nation’s history and tradition.’” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

<sup>17</sup> See *infra* Section I.B (examining arguments on both sides of the issue of whether same-sex marriage is a fundamental right and exploring the implications of *Loving*’s language).

## A. Overview of *Loving*

In *Loving*, the Court determined that state laws limiting marriage based only on race violated the Fourteenth Amendment.<sup>18</sup> The Virginia laws at issue voided marriages between whites and persons of color.<sup>19</sup> Further, the laws made it a crime for a whites and persons of color to leave Virginia for the purpose of marrying in another state and before returning to Virginia to cohabit as husband and wife.<sup>20</sup> The United States Supreme Court struck these laws as unconstitutional, reversing Virginia's Supreme Court of Appeals, rejecting Virginia's equal protection argument, and declaring that marriage is a fundamental right.<sup>21</sup>

Virginia's Supreme Court of Appeals upheld the laws at issue because they served a supposedly legitimate purpose of preventing the creation of “a mongrel breed of citizens.”<sup>22</sup> Further, the court “reasoned that marriage has traditionally been subject to state regulation without federal intervention.”<sup>23</sup> However, the United States Supreme Court found that, despite this tradition, such invidious racial discrimination for the purpose of advancing White Supremacy was unconstitutional.<sup>24</sup>

Before the United States Supreme Court, Virginia argued that its laws do not violate the Equal Protection Clause because they punish whites and colored people in the same way.<sup>25</sup> Hence, although the laws classify persons based on race, they do not invidiously discriminate based on race and, therefore, heightened scrutiny did not apply.<sup>26</sup> Virginia further argued that,

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<sup>18</sup> *Loving*, 388 U.S. at 12.

<sup>19</sup> *Id.* at 4-5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2, 12.

<sup>22</sup> *Id.* at 7 (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (1955)).

<sup>23</sup> *Id.* (citing *Naim*, 87 S.E.2d at 756).

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *See id.*

because it was not clear what impact interracial marriages would have, the Court should defer to the legislature’s decision under rational-basis review.<sup>27</sup>

The Supreme Court first rejected Virginia’s equal-protection argument.<sup>28</sup> The Court stated that a law’s equal application does not alone “immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”<sup>29</sup> The Court pointed out that the Fourteenth Amendment’s “clear and central purpose . . . was to eliminate all official state sources of invidious racial discrimination in the States.”<sup>30</sup> As such, laws that classify based on race must be necessary to a permissible State goal other than racial discrimination in order to survive constitutional challenge.<sup>31</sup> The Court found that the law’s only goal was to advance White Supremacy, which is not a permissible state goal—let alone a compelling one.<sup>32</sup> Therefore, the Court found that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”<sup>33</sup>

The Supreme Court further found that these laws violate the Fourteenth Amendment’s Due Process Clause.<sup>34</sup> The Court explained that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>35</sup> Further, marriage is a basic civil right that is “fundamental to our very existence and survival.”<sup>36</sup> Therefore, the Court concluded that “[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Id.* at 11.

<sup>32</sup> *See id.*

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive . . . citizens of liberty without due process of law.”<sup>37</sup>

## B. Implications of *Loving* for Same-Sex Marriage

Many people hold *Loving* up as an example of the fundamental right to marry, claiming that same-sex marriage falls under this category.<sup>38</sup> However, others counter that the right to marry is limited to marriage between a man and a woman, as that is the most natural reading of the language and context of *Loving*.<sup>39</sup> Marriage is, indeed, a fundamental right that should be vigilantly protected.<sup>40</sup> However, the Court in *Loving* did not establish an absolute bar to states that impose limits on marriage.<sup>41</sup>

### 1. *Arguments that Same-Sex Marriage Is a Fundamental Right*

Many courts<sup>42</sup> and scholars<sup>43</sup> argue that same-sex marriage is included within marriage, which *Loving* established as a fundamental right. Therefore, they argue, state laws cannot infringe on the fundamental right of same-sex marriage unless they survive strict scrutiny.<sup>44</sup> Strict scrutiny requires that the law be necessary, or narrowly tailored, to achieve a compelling government interest.<sup>45</sup> Under this analysis, the law is presumed unconstitutional and the state has

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<sup>37</sup> *Id.*

<sup>38</sup> See *infra* Subsection I.B.1 (discussing arguments that same-sex marriage is a fundamental right).

<sup>39</sup> See *infra* Subsection I.B.2.

<sup>40</sup> See *Loving*, 388 U.S. at 12.

<sup>41</sup> See *id.*

<sup>42</sup> See, e.g., *Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1081 (10th Cir. 2014) (holding that “Oklahoma’s ban on same-sex marriage sweeps too broadly in that it denies a fundamental right to all same-sex couples who seek to marry or have their marriages recognized”); *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014) (“We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state’s marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.”).

<sup>43</sup> See, e.g., Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not “Argle Bargle”: The Inevitability of Marriage Equality After Windsor*, 23 TUL. J.L. & SEXUALITY 17, 22 (2014).

<sup>44</sup> *Bostic v. Schaefer*, 760 F.3d at 377.

<sup>45</sup> *Id.* at 378.

the burden of proof to establish the law's constitutionality.<sup>46</sup> If the Supreme Court ultimately agrees and finds that same-sex marriage is included within the concept of the fundamental right of marriage, then states have virtually no chance of proving that their laws limiting marriage to between one man and one woman are constitutional.<sup>47</sup>

For instance, last year, the Fourth Circuit held that same-sex marriage is included in the idea of marriage being a fundamental right.<sup>48</sup> In that case, Virginia's law refusing to recognize same-sex marriage was challenged.<sup>49</sup> The Fourth Circuit cited *Loving* when it explained its view that "the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms."<sup>50</sup> The court reasoned that the fundamental right of marriage was not narrowly construed in *Loving* to just a question of "the right to interracial marriage," but instead was seen as "a broad right to marry that is not circumscribed based on the characteristics of individuals seeking to exercise that right."<sup>51</sup> Hence, the court argued, people have a real choice of who they will marry, not an illusory one limited only "to certain couplings."<sup>52</sup> Having concluded that same-sex marriage is a fundamental right, the Fourth Circuit naturally found that Virginia's law significantly interfered with that right.<sup>53</sup> Therefore, the court applied strict scrutiny and struck Virginia's law as unconstitutional.<sup>54</sup>

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<sup>46</sup> *See id.*

<sup>47</sup> Because of this, I do not spend time in this Note discussing arguments for or against surviving strict scrutiny under the substantive Due Process Clause.

<sup>48</sup> *Id.* at 373.

<sup>49</sup> *Id.* at 367.

<sup>50</sup> *Id.* at 376.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 377.

<sup>53</sup> *Id.* ("Of course, '[b]y reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriages must be subjected to rigorous scrutiny.' Strict scrutiny only applies when laws 'significantly interfere' with a fundamental right." (citation omitted) (quoting *Zablocki v. Redhail*, 434 U.S. 347, 386 (1978)).

<sup>54</sup> *Id.* ("Under strict scrutiny, a law 'may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.'" (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977))).



Similarly, one scholar, Nancy Marcus, has argued that same-sex marriage is a fundamental right.<sup>55</sup> She maintained that “*Loving* will ultimately be a difficult case for same-sex marriage opponents to distinguish.”<sup>56</sup> Marcus maintained that the stage has been set “for a future marriage equality determination” because in *Windsor*, the Court cited *Loving* to “emphasiz[e] the primacy of fundamental individual marriage rights over discriminatory state and federal laws.”<sup>57</sup> However, based on this generalization of *Loving* and *Windsor*, she largely assumed that *Loving* is hard to distinguish from same-sex marriage without providing any analysis in support of that conclusion.

## 2. *Arguments that Same-Sex Marriage Is Not a Fundamental Right*

In contrast, some courts<sup>58</sup> and scholars argue that, although marriage is a fundamental right, history and tradition limit that right to marriages between one man and one woman. Further, others point out that *Loving*’s support of interracial marriages does not necessarily carry over into the context of same-sex marriages.<sup>59</sup> Together, these arguments demonstrate that same-sex marriage is not a fundamental right.

Although some argue that marriage as a fundamental right should not be narrowly defined to exclude same-sex marriage, the Court has previously defined recognized categories of fundamental rights narrowly. For example, in *Cruzan v. Director, Missouri Department of Health*, the Court found “that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.”<sup>60</sup> Leaning on *Cruzan*, in *Washington v. Glucksberg*, proponents of assisted suicide argued that this fundamental right should be broadly

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<sup>55</sup> See Marcus, *supra* note 43, at 22.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., *DeBoer v. Snyder*, 772 F.3d 388, 411 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015).

<sup>59</sup> See, e.g., Murray Dry, *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, The Separation of Powers, and Individual Rights*, 39 Vt. L. Rev. 275, 298 (2014).

<sup>60</sup> *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 281 (1990).

construed as either a right to decide how and when to die or a right to dignity in death.<sup>61</sup> However, the Court rejected this broad definition and instead narrowly considered if the right to suicide, and the accompanying right to assisted suicide, is rooted in our nations' history and tradition.<sup>62</sup> Using this more narrow definition of the proposed right, the Court found that the right to suicide is not rooted in our nation's history; therefore, there is no fundamental right to assisted suicide.<sup>63</sup> Moreover, the Court noted that the fact "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."<sup>64</sup>

In a similar analysis, the Sixth Circuit recently found that same-sex marriage is not within the fundamental right to marry.<sup>65</sup> Much like the Court in *Glucksberg*, the Sixth Circuit explained "that something can be fundamentally important without being a fundamental right under the Constitution."<sup>66</sup> In order to rank as a constitutionally fundamental right, "the question is whether our nation has treated the right as fundamental and therefore worthy of protection under substantive due process."<sup>67</sup> In other words, the court must analyze "whether the right is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"<sup>68</sup> Although the Court in *Loving* recognized that marriage is a fundamental right, the Sixth Circuit reasoned that, by definition, same-sex marriage was not included in that concept.<sup>69</sup> Rather, the Court in *Loving*

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<sup>61</sup> *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 728.

<sup>64</sup> *Id.* at 727 (citation omitted).

<sup>65</sup> *DeBoer v. Snyder*, 772 F.3d 388, 411 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

<sup>69</sup> *Id.*

was focused on the unconstitutional prohibition of interracial marriages between *opposite sex* couples.<sup>70</sup> Therefore, *Loving* does not support a fundamental right to same-sex marriage.<sup>71</sup>

Additionally, one scholar, Murray Dry, has pointed out that proponents of same-sex marriage hold out *Loving*'s rejection of racial limitations in marriage as a shining example of why same-sex marriages must be recognized.<sup>72</sup> However, that scholar noted that this "analogy between race and sexual orientation . . . presupposes that a republican, or representative, government has no more reason to take the natural difference between male and female into account when enacting laws regarding marriage than it does to take race or color into account."<sup>73</sup> He argued that, because "procreation depends on the division of labor between male and female and has nothing to do with racial difference or similarity, it should not be assumed that a right to racially mixed marriages implies a right to same-sex marriages."<sup>74</sup> As this scholar concluded, when the Court was discussing marriage as a fundamental right in *Loving*, "the Court viewed marriage as the union of a man and a woman."<sup>75</sup>

### 3. *Conclusions from Loving's Language*

Having surveyed arguments on each side of this debate, the ultimate focus ought to be on the language of *Loving* itself. The *Loving* Court stated that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious *racial* discriminations. Under our Constitution, the freedom to marry or not marry, a person of another *race* resides with the individual and cannot be infringed by the State."<sup>76</sup> Therefore, even in its substantive due process analysis, the *Loving* Court focused on not limiting marriage based on invidious racial

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<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

<sup>72</sup> Dry, *supra* note 59, at 298.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 336.

<sup>76</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (emphasis added).

classifications.<sup>77</sup> This is much different than saying that *Loving* supports a fundamental right of marriage that a state cannot curtail for any reason. Hence, the language of *Loving* itself is much more limited than many proponents of same-sex marriage have claimed.<sup>78</sup>

Again, the Court did not say that a person has the unlimited freedom to marry any other person he or she chooses.<sup>79</sup> Rather, the Court said that people have the unlimited freedom to marry “a person of another race.”<sup>80</sup> While by analogy this could support the freedom to marry someone of the same gender, *Loving* is not necessarily that expansive.<sup>81</sup> Indeed, one can soundly argue that the *Loving* Court presupposed that one of the essential attributes of marriage is its being between a man and a woman, much like the essential marriage requirements of consent or marrying only one person at a time.<sup>82</sup> In contrast, a non-essential marriage requirement is that the man and woman be of the same race. Therefore, while the state may not impose racial restrictions on marriage, it may impose limits based on gender, consent, and number of spouses. Indeed, at the time the Court decided *Loving*, it likely did not even conceive of the “one man and one woman” requirement as a limitation, but was instead just a natural aspect of marriage itself.<sup>83</sup>

Therefore, although the choice of whom to marry is a deeply personal decision, it is not a fundamental right. As the Court explained in *Glucksburg*, “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”<sup>84</sup> Since same-sex marriage is not deeply rooted in America’s history and tradition, it does not fall within

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<sup>77</sup> *See id.*

<sup>78</sup> *See Dry, supra* note 59, at 298.

<sup>79</sup> *See Loving*, 388 U.S. at 12.

<sup>80</sup> *Id.*

<sup>81</sup> *See Dry, supra* note 59, at 298.

<sup>82</sup> *Id.* at 336 (arguing that when the Court was discussing marriage as a fundamental right in *Loving*, “the Court viewed marriage as the union of a man and a woman); *see also* *DeBoer v. Snyder*, 772 F.3d 388, 411-12 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015).

<sup>83</sup> *See DeBoer*, 772 F.3d at 411.

<sup>84</sup> *Washington v. Glucksburg*, 521 U.S. 702, 727 (1997) (citation omitted).

the fundamental right of marriage. Hence, the heightened scrutiny that accompanies fundamental rights does not apply to prohibitions against same-sex marriages. Instead, laws limiting marriage to between one man and one woman are constitutional if they “rationally advance a legitimate government policy.”<sup>85</sup> Whether such state laws can survive rational basis is further addressed in Part IV.<sup>86</sup>

## II. PRIVATE ACTION V. PUBLIC ACKNOWLEDGEMENT: IS THE STATE BOUND BY PERSONAL AUTONOMY IN MARRIAGE DECISIONS AFTER *LAWRENCE*?

Another common argument for same-sex marriage is based on *Lawrence v. Texas*, in which the Court struck same-sex sodomy laws as unconstitutional.<sup>87</sup> Some have argued that the state should not be allowed to invade people’s decisions on whom to marry.<sup>88</sup> However, others point out that *Lawrence* alone does not compel the conclusion that states must permit same-sex marriage.<sup>89</sup> Before examining these arguments, it is important to first examine the Court’s reasoning and holding in *Lawrence*.<sup>90</sup> Only with this background in mind can one fully appreciate the implications of *Lawrence* for the same-sex marriage debate, and understand why *Lawrence* does not require states to permit same-sex marriage.<sup>91</sup>

### A. Overview of *Lawrence*

In *Lawrence*, the Court overruled *Bowers v. Hardwick* in holding that Texas’ statute criminalizing homosexual sodomy was unconstitutional.<sup>92</sup> The Court started its opinion by explaining,

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<sup>85</sup> *DeBoer*, 772 F.3d at 404.

<sup>86</sup> *See infra* Part IV.

<sup>87</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>88</sup> *See infra* Subsection II.B.1.

<sup>89</sup> *See infra* Subsection II.B.2.

<sup>90</sup> *See infra* Section II.A.

<sup>91</sup> *See infra* Subsection II.B.3.

<sup>92</sup> *Lawrence*, 539 U.S. at 562, 578.

Liberty protects the person from unwanted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>93</sup>

The Texas law at issue criminalized having “deviate sexual intercourse . . . with a member of the same sex.”<sup>94</sup> The Court considered the question of whether consenting adults could “engage in [this] private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment.”<sup>95</sup> As a backdrop to its reconsideration of *Bowers v. Hardwick*, the Court provided an overview of cases that addressed various liberties under substantive due process.<sup>96</sup>

First, the Court discussed its past cases considering the right to privacy in utilizing contraceptives.<sup>97</sup> In *Griswold v. Connecticut*, the Court held that states cannot constitutionally prohibit married couples from buying and using contraceptives.<sup>98</sup> Emphasizing “the marital relation and the protected space of the marital bedroom,” the Court found that there was a “protected interest” in “a right to privacy.”<sup>99</sup> Several years later, in *Eisenstadt v. Baird*, the Court extended “the right to make certain decisions regarding sexual conduct” to unmarried couples.<sup>100</sup> In *Eisenstadt*, the Court ruled a state law unconstitutional under the Equal Protection Clause because it prevented the distribution of contraceptives to unmarried couples.<sup>101</sup> However, the Court also mentioned that the law interfered with fundamental rights, stating, “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from

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<sup>93</sup> *Id.* at 562.

<sup>94</sup> *Id.* at 563 (quoting TEX. PENAL CODE ANN. § 21.06(a) (2003)).

<sup>95</sup> *Id.* at 564.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 564-65 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

<sup>99</sup> *Id.* (citing *Griswold*, 381 U.S. at 485).

<sup>100</sup> *Id.* at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972)).

<sup>101</sup> *Id.* (citing *Eisenstadt*, 405 U.S. at 453-54).

unwanted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>102</sup> Therefore, laws interfering with the private decisions of individuals to use contraceptives were held unconstitutional.<sup>103</sup>

Second, the Court turned to its decision in *Roe v. Wade*, which limited the ability of states to enact laws prohibiting or regulating abortions.<sup>104</sup> The Court found that a woman’s right to choose abortion was “protect[ed] as an exercise of her liberty under the Due Process Clause.” The Court “recognized the right of a woman to make certain fundamental decisions affecting her destiny” and further affirmed “that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”<sup>105</sup>

Finally, the Court reconsidered its decision in *Bowers v. Hardwick*, where the Court had previously upheld a Georgia law that prohibited both homosexual and heterosexual sodomy.<sup>106</sup> In *Bowers*, the Court defined the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”<sup>107</sup> In reconsidering *Bowers*, the *Lawrence* Court explained that this narrow definition of the issue “failed to appreciate the extent of the liberty at stake” because the statutes “touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home” and also sought “to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”<sup>108</sup> Having thus

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<sup>102</sup> *Id.* (quoting *Eisenstadt*, 405 U.S. at 453).

<sup>103</sup> *See id.* (citing *Eisenstadt*, 405 U.S. at 453-54).

<sup>104</sup> *See id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>105</sup> *Id.* (citing *Roe*, 410 U.S. 113).

<sup>106</sup> *Id.* at 566 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

<sup>107</sup> *Id.* at 566 (citing *Bowers*, 478 U.S. at 190).

<sup>108</sup> *Id.* at 567.

broadened the issue, the *Lawrence* Court concluded that consenting adults can, in the privacy of their homes, choose to engage in homosexual, intimate conduct.<sup>109</sup>

Since the Court more broadly defined the liberty at stake, the Court also found that history and tradition did not support the ability of the states to limit consensual homosexual conduct.<sup>110</sup> The Court focused on the history of prohibitions against all sodomy, whether homosexual or heterosexual.<sup>111</sup> Further, the Court noted that these laws typically were not enforced against adults who consented to the acts and performed them in private.<sup>112</sup> Rather, the Court claimed that the purpose of anti-sodomy laws was to prevent “predatory acts” in situations where a minor or an assault victim did not give consent.<sup>113</sup> Finally, the Court explained that an “emerging awareness” in America’s “laws and traditions” illustrated “that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>114</sup>

Next, the Court turned to its holdings after *Bowers*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>115</sup> the Court held that, as a matter of substantive due process, “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>116</sup> Further, in *Romer v. Evans*, the Court struck as unconstitutional a law that deprived homosexuals of the protection of antidiscrimination laws in the state.<sup>117</sup> The Court found that this law was the

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 568-69.

<sup>112</sup> *Id.* at 569.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 571-72.

<sup>115</sup> *Id.* at 573 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)).

<sup>116</sup> *Id.* at 573-74 (citing *Casey*, 505 U.S. at 851).

<sup>117</sup> *Id.* at 574 (citing *Romer v. Evans*, 517 U.S. 620, 624 (1996)).



product of animus against homosexuals, and thus was not rationally related to a legitimate government interest.<sup>118</sup>

After surveying all of this precedent, the Court returned to the Texas law at issue in *Lawrence*.<sup>119</sup> The Court focused on the stigma imposed by a statute that criminalizes homosexual conduct.<sup>120</sup> Those who engage in homosexual conduct could incur criminal records and be placed on sex-offender registration lists.<sup>121</sup> As a result, they could have a more difficult time obtaining employment.<sup>122</sup> Finally, the Court noted that this was not a case involving minors, coercion, public conduct, or prostitution.<sup>123</sup> Rather, it was a case involving adults engaged in consensual homosexual conduct.<sup>124</sup> Since those adults were “entitled to respect for their private lives,” the state could not “demean their existence or control their destiny by making their private sexual conduct a crime.”<sup>125</sup> Therefore, the Court overruled *Bowers* because, under the Due Process Clause, people are free to participate in this conduct without government intervention.<sup>126</sup>

## B. Implications of *Lawrence* for Same-Sex Marriage

Many people argue that *Lawrence*’s protection of the right to engage in consensual homosexual conduct clearly supports a corresponding right to same-sex marriage.<sup>127</sup> However, others counter that *Lawrence* was limited to sexual intimacy and does not extend to the marriage context.<sup>128</sup> Overall, the language of *Lawrence* illustrates that the Court was concerned about

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<sup>118</sup> *Id.* (citing *Romer*, 517 U.S. at 634).

<sup>119</sup> *Id.* at 575.

<sup>120</sup> *Id.* at 575-76.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 578.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See infra* Subsection II.B.1.

<sup>128</sup> *See infra* Subsection II.B.2.

protecting *private* sexual conduct, which does not necessarily demand a corresponding protection for the public act of marriage.<sup>129</sup>

### 1. *Arguments for Allowing and Recognizing Same-Sex Marriage*

Some scholars<sup>130</sup> and courts<sup>131</sup> have argued that *Lawrence* supports a constitutional right to same-sex marriage. They often consider the language of *Lawrence* addressing autonomy in personal decisions.<sup>132</sup> In doing so, they conclude that same-sex marriage is included within the fundamental right to marry.<sup>133</sup>

For example, one scholar, Nancy Marcus, argued that the right to same-sex marriage involves “a substantive due process claim under the Fourteenth Amendment.”<sup>134</sup> Marcus focused on *Lawrence*’s language that, like heterosexual persons, “persons in a homosexual relationship may seek autonomy for [the] purposes” of “freedom of thought, belief, expression, and certain intimate conduct.”<sup>135</sup> From this, Marcus concluded that *Lawrence* and other Supreme Court precedent affirm that “the right to marry the person of one’s choice [is] a fundamental right.”<sup>136</sup>

Similarly, the Fourth Circuit also focused on *Lawrence*’s language in finding that same-sex marriage is a constitutionally protected right.<sup>137</sup> The Fourth Circuit looked to *Lawrence*’s language that the Due Process Clause “afford[s] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just

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<sup>129</sup> See *infra* Subsection II.B.3.

<sup>130</sup> See, e.g., *infra* text accompanying notes 134-136.

<sup>131</sup> See, e.g., *infra* text accompanying notes 137-140.

<sup>132</sup> See *infra* text accompanying notes 135, 138.

<sup>133</sup> See *infra* text accompanying notes 136, 140.

<sup>134</sup> Marcus, *supra* note 43, at 39.

<sup>135</sup> *Id.* at 41 (quoting *Lawrence v. Texas*, 539 U.S. 558, 562, 574 (2003)).

<sup>136</sup> *Id.*

<sup>137</sup> *Bostic v. Schaefer*, 760 F.3d 352, 374, 376 (4th Cir. 2014) (citing *Lawrence*, 539 U.S. at 574).

as heterosexual persons do.”<sup>138</sup> Since the *Lawrence* Court would not narrowly define the issue to the right to engage in homosexual sodomy, the Fourth Circuit similarly would not narrowly define its issue to the right to same-sex marriage.<sup>139</sup> Rather, in defining the issue more broadly, the Fourth Circuit found “that the fundamental right to marry encompasses the right to same-sex marriage.”<sup>140</sup> The Fourth Circuit described this broad issue as, at the heart, involving “a matter of choice” in “personal relationships.”<sup>141</sup>

## 2. *Arguments Against Allowing and Recognizing Same-Sex Marriage*

In contrast, other scholars and courts have argued that *Lawrence* does not necessarily support a constitutional right to same-sex marriage. While *Lawrence* assists same-sex marriage proponents in some ways, its language clearly does not require states to permit same-sex marriages.

Although some scholars have reasoned that *Lawrence* may provide support for same-sex marriage, they also concede that *Lawrence* alone does not compel the conclusion that states must permit same-sex marriages.<sup>142</sup> For instance, Murray Dry categorized *Lawrence* as a case that could lend support to same-sex marriage.<sup>143</sup> However, he ultimately pointed to *Lawrence*’s language explaining that the case did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>144</sup> Similarly, Carlos Ball noted that the *Lawrence* Court “distinguished between the ability of the state, consistent with the Constitution, to criminalize same-gender sexual conduct, and the obligation of the state to

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<sup>138</sup> *Id.* at 374 (quoting *Lawrence*, 539 U.S. at 574).

<sup>139</sup> *Id.* at 377 (citing *Lawrence*, 539 U.S. at 566-67).

<sup>140</sup> *Id.* at 376.

<sup>141</sup> *Id.*

<sup>142</sup> See *infra* text accompanying notes 143-148.

<sup>143</sup> Dry, *supra* note 59, at 296.

<sup>144</sup> *Id.* (quoting *Lawrence*, 539 U.S. at 578).

recognize same-sex relationships.”<sup>145</sup> Ball argued that, while *Lawrence* is relevant to the same-sex marriage debate, it is not dispositive.<sup>146</sup> For example, *Lawrence* is relevant to this debate because, if states could criminalize homosexual conduct, it would make little sense to say that states must permit homosexual marriage.<sup>147</sup> Although *Lawrence* removed this barrier, Ball acknowledged that *Lawrence* alone does not necessarily compel the conclusion that states must permit same-sex marriages.<sup>148</sup>

Likewise, in *DeBoer v. Snyder*, the Sixth Circuit noted that *Lawrence* itself only “invalidates a State’s criminal antisodomy law and . . . ‘does not involve . . . formal recognition’ of same-sex relationships.”<sup>149</sup> However, the Sixth Circuit went further in contrasting the situation in *Lawrence* with the same-sex marriage debate.<sup>150</sup> Specifically, the Sixth Circuit contrasted the state of America’s social values and the European Court of Human Rights at the time of *Lawrence* and *DeBoer*.

First, the Sixth Circuit addressed society’s values as measured by the number of states criminalizing sodomy or prohibiting same-sex marriage.<sup>151</sup> The *Lawrence* Court’s analysis was informed by the fact that only thirteen states at that time still prohibited sodomy, and those states rarely enforced their anti-sodomy laws.<sup>152</sup> In contrast, at the time of the Sixth Circuit’s decision in *DeBoer*, “[f]reed from federal-court intervention, thirty-one states would continue to define

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<sup>145</sup> Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1185 (2004).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1206 (“[A]s long as the state was constitutionally allowed to criminalize same-gender sexual conduct, it could be argued that it would be contradictory to require, as a matter of constitutional law, that the state recognize the personal relationships that can accompany that conduct.”).

<sup>148</sup> *Id.* at 1185-86, 1206 (“It is not possible . . . to rely only on *Lawrence* to make the case for a due process right to same-sex marriage because the case did not directly address the issue of whether the state has an affirmative obligation to recognize the intimate relationships that can accompany the kind of sexual conduct that the Court held is constitutionally protected.”).

<sup>149</sup> *DeBoer v. Snyder*, 772 F.3d 388, 402 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015) (quoting *Lawrence*, 539 U.S. at 578).

<sup>150</sup> *Id.* at 416.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

marriage the old-fashioned way.”<sup>153</sup> Therefore, the Sixth Circuit reasoned that society’s values have not changed in relation to same-sex marriage in the same way that they had changed in relation to sodomy.<sup>154</sup> Hence, society’s values have not yet changed enough or become sufficiently settled to justify interfering with states’ definitions of marriage.<sup>155</sup>

Second, the Sixth Circuit acknowledged that the Supreme Court has occasionally considered foreign practice “when deciding to expand the meaning of constitutional guarantees.”<sup>156</sup> For instance, the *Lawrence* Court looked to a European Court of Human Rights (ECHR) decision, along with actions of other nations, which affirmed that “the protected right of homosexual adults to engage in intimate, consensual conduct” was “an integral part of human freedom in many other countries.”<sup>157</sup> Hence, the *Lawrence* Court’s decision accorded with the “values we share[d] with a wider civilization.”<sup>158</sup> Regarding same-sex marriage, however, “the [ECHR] ruled only a few years ago that European human rights laws do not guarantee a right to same-sex marriage.”<sup>159</sup> Further, the ECHR determined that, since the law is still evolving on whether same-sex marriage is a human right, the individual states retain wide discretion about when to introduce changes legislatively.<sup>160</sup> Since the *Lawrence* Court utilized precedent from the ECHR in striking anti-sodomy laws, the Court should similarly be informed by the ECHR in the context of same-sex marriage. Just as the ECHR declined to declare a European human right to same-sex marriage, thereby permitting individual nations to adopt or refuse the institution, the

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (“On this record, what right do we have to say that society values, as opposed to judicial values, have evolved toward agreement in favor of same-sex marriage?”).

<sup>155</sup> *Id.* at 416-17 (“The theory of the living constitution rests on the premise that every generation has the right to govern itself. If that premise prevents judges from insisting on principles that society has moved passed, so too should it prevent judges from anticipating principles that society has yet to embrace.”).

<sup>156</sup> *Id.* at 417 (citing *Lawrence v. Texas*, 539 U.S. 558, 576 (2003)).

<sup>157</sup> *Lawrence*, 539 U.S. at 576-77.

<sup>158</sup> *Id.*

<sup>159</sup> *DeBoer*, 772 F.3d at 417 (citing *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409).

<sup>160</sup> *Id.* (citing *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. at 438).

Supreme Court ought not declare a constitutional right to same-sex marriage, thereby permitting individual states to adopt or refuse the institution.<sup>161</sup>

### 3. *Conclusions from Lawrence's Language*

As proponents and opponents of same-sex marriage have shown in the arguments expressed above, the *Lawrence* Court offered language that lends support to each side of the debate. However, rather than utilizing a scalpel to extract only the most favorable language for a particular side, it is important to return to the overview of how *Lawrence* was decided and the totality of the language used. It then becomes clear that *Lawrence* does not compel a right to same-sex marriage.

At the beginning of *Lawrence*, the Court found that consenting adults enjoy the liberty to engage in sexual conduct because liberty under the Due Process Clause protects individuals from the government intrusion into homes and other private contexts.<sup>162</sup> The recurring references to “private conduct” and “private places” imply that the Court was focused solely on preventing state interference in private places.<sup>163</sup> However, the Court went further, explaining that liberty transcends private places because it “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>164</sup> Proponents of same-sex marriage seize upon this language about autonomy and extend it to the marriage context.<sup>165</sup> However, as the rest of the case shows, they act too hastily in so concluding.

The Court next moved to its precedent addressing the right to privacy. First, this right operated as an umbrella over the right of both married and unmarried couples to buy and use

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<sup>161</sup> See *id.*

<sup>162</sup> *Lawrence*, 539 U.S. at 562, 564.

<sup>163</sup> See *id.*

<sup>164</sup> *Id.* at 562.

<sup>165</sup> See *supra* Subsection II.B.1.

contraceptives.<sup>166</sup> The Court found a “right to make decisions regarding sexual conduct” because the right to privacy encompasses the right “to be free from unwanted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>167</sup> Second, this concept naturally flowed into the Court’s decision in *Roe v. Wade* that a woman has a right to choose abortion because it is a “fundamental decision[] affecting her destiny.”<sup>168</sup> However, each of these cases dealt specifically with reproductive rights, involving inherently private decisions.

Similarly, when the *Lawrence* Court overruled *Bowers*, it found that the statute at issue “touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home” and also sought “to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”<sup>169</sup> Further expounding on this point, the Court indicated “that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>170</sup> Hence, as the Court mentioned at the beginning of its opinion, people have a right to autonomy in their decisions about private, intimate conduct.<sup>171</sup>

While choices about whether to marry and whom to marry are among the most private, intimate decisions that an individual can make, marriage necessarily involves a public component that the decisions to utilize contraceptives or to engage in sexual intimacy lack. As one scholar has explained, “[C]ivil marriage (at least the way we have traditionally understood it in this country) cannot exist in the absence of state recognition. It is State action that creates the

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<sup>166</sup> *Lawrence*, 539 U.S. at 562, 564-65.

<sup>167</sup> *Id.* at 565 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

<sup>168</sup> *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>169</sup> *Id.* at 567.

<sup>170</sup> *Id.* at 571-72.

<sup>171</sup> *Id.* at 562.

very institution that makes the exercise of the fundamental right to liberty in the context of marriage possible.”<sup>172</sup> This fundamental difference brings the same-sex marriage debate out of the strictly private arena of autonomous choices, which were the focus of these prior precedents dealing with the right to privacy.<sup>173</sup> Instead of merely asking if individuals have a right to make personal decisions in private without state interference, one must ask if the state should publically be required to permit or recognize same-sex marriages.

With that difference in mind, the most problematic language in *Lawrence* for opponents of same-sex marriage appears in the Court’s discussion of *Casey*, wherein the Court found that “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” are “afford[ed] constitutional protection.”<sup>174</sup> While proponents of same-sex marriage take this reference to marriage as a sign that same-sex marriage is also protected under the right of privacy, Part I’s discussion of *Loving* dispelled the notion that same-sex marriage is included within the fundamental right of marriage.<sup>175</sup> Hence, this language in *Lawrence* is not as helpful to same-sex marriage proponents as it would first seem.

Further, the *Lawrence* Court concluded by expressly clarifying what the case did not concern.<sup>176</sup> It was not a case involving minors, coercion, public conduct, prostitution, or the recognition of a relationship by the state.<sup>177</sup> Instead, the Court noted that it was simply a case involving adults who desired to engage in private, consensual conduct without fear of government intrusion or punishment.<sup>178</sup> The Court held that people are “entitled to respect for

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<sup>172</sup> *Ball*, *supra* note 145, at 1206 (footnote omitted).

<sup>173</sup> *See supra* text accompanying notes 166-171.

<sup>174</sup> *Lawrence*, 539 U.S. at 573-74 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>175</sup> *See supra* Part I.

<sup>176</sup> *Lawrence*, 539 U.S. at 578.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*



their private lives” and that the state may not “demean their existence or control their destiny by making their private sexual conduct a crime.”<sup>179</sup>

Hence, *Lawrence* was ultimately founded on the Court’s view of the impermissibility of the state invading the privacy of one’s bedroom and criminalizing intimate conduct involving consenting adults.<sup>180</sup> In contrast, marriage involves the state’s public recognition of a relationship.<sup>181</sup> Therefore, since the *Lawrence* Court was concerned about privacy, while the permission or recognition of same-sex marriage involves a public action by the state, *Lawrence*’s language and the implications drawn from that language do not require states to permit or recognize same-sex marriages.

### III. FEDERALISM, DIGNITY, AND ANIMUS: WHAT DID *WINDSOR* ACTUALLY IMPLY?

Likewise, *United States v. Windsor* does not compel the conclusion that states must permit or recognize same-sex marriage. The federalism implications of the federal government’s attempt to define marriage in the Defense of Marriage Act (DOMA) have no bearing on the authority of states individually to continue to define marriage.<sup>182</sup> Further, although the federal government through DOMA may have interfered with the equal dignity that a particular state had conferred on a same-sex marriage,<sup>183</sup> it would work an identical affront to force a state to permit and recognize a relationship in conformity with the broadest definition of marriage.<sup>184</sup> Additionally, states with such laws are not acting out of animus in holding to a traditional definition of marriage.<sup>185</sup> Therefore, *Windsor* does not compel states to permit or recognize same-sex marriage.

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<sup>179</sup> *Id.*

<sup>180</sup> *See id.*

<sup>181</sup> *See Ball, supra* note 145, at 1206.

<sup>182</sup> *See infra* Subsection III.A.1.

<sup>183</sup> *See infra* Subsection III.A.2.

<sup>184</sup> *See infra* Section III.B.

<sup>185</sup> *See infra* Section III.B.

## A. Overview of *Windsor*

Before delving into the federalism issues in *Windsor*, it is first important to understand the statute at issue. Section 3 of DOMA supplied federal definitions for marriage and spouse.<sup>186</sup> It defined marriage as ““only a legal union between one man and one woman as husband and wife.””<sup>187</sup> Correspondingly, it defined spouse as ““only . . . a person of the opposite sex who is a husband or a wife.””<sup>188</sup> The reach of this statute was extremely broad, “control[ing] over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.”<sup>189</sup>

### 1. *Federalism*

In determining that this federal statute was unconstitutional, the Court examined DOMA’s “design, purpose, and effect,” as well as the history and tradition of states regulating marriage.<sup>190</sup> The Court observed that DOMA was an example of Congress “mak[ing] determinations that bear on marital rights and privileges.” While this has generally been an acceptable exercise of congressional power, the Court affirmed that, based on history and tradition, the individual states have retained the authority to define and regulate marriage as long as they respect the constitutional rights of individuals.<sup>191</sup> The Court recognized that “[t]he definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations.”<sup>192</sup> Because this power was reserved to the states, marriage laws often differ

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<sup>186</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

<sup>187</sup> *Id.* (quoting 1 U.S.C. § 7 (2012) (invalidated 2013)).

<sup>188</sup> *Id.* (quoting § 7).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 2689-91.

<sup>191</sup> *Id.* at 2689-90 (“By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”). Although states “must respect the constitutional rights of persons,” state ““regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’” *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

<sup>192</sup> *Id.* (“The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’” (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930)).

between the states.<sup>193</sup> For instance, states have different requirements for the minimum age to marry and the degree of consanguinity.<sup>194</sup> In exercising this authority, several states, like New York, have chosen to recognize and permit same-sex marriages.<sup>195</sup>

The Court was highly concerned about DOMA's impact on these same-sex marriages, especially considering that the Constitution affords the federal government no authority over marriage.<sup>196</sup> Because of this lack of authority, the federal government has historically deferred to states on the subject of domestic relations.<sup>197</sup> The obvious problem with DOMA, then, was that it ran counter to the strong history and tradition of states defining marriage.<sup>198</sup> In contrast, due to the strong tradition of states defining marriage,<sup>199</sup> *Windsor* actually seems to support the authority of states to have different definitions of marriage—some allowing same-sex marriage and some prohibiting it. However, the Court did not stop here in its discussion of DOMA's unconstitutionality.<sup>200</sup>

## 2. *Dignity and Animus*

The Court next turned to what it perceived as an even more apparent problem with DOMA—the fact that states had conferred a *dignity* on same-sex marriages that the federal government refused to recognize.<sup>201</sup> The Court explained that when states exercise their historical authority to define marriage, they confer dignity on those marriages.<sup>202</sup> However,

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 2689-90.

<sup>196</sup> *Id.* at 2690-91.

<sup>197</sup> *Id.* at 2691.

<sup>198</sup> *Id.* at 2692.

<sup>199</sup> *Id.* (“Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each States, though they may vary, subject to constitutional guarantees, from one States to the next.”).

<sup>200</sup> *Id.* (“Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.”).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

“DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.”<sup>203</sup> Since this is an unusual form of discrimination, the Court noted that it is important to carefully consider whether Section 3 of DOMA violates the Constitution.<sup>204</sup> Within this consideration, the Court examined whether this injury deprives people of liberty that the Fifth Amendment protects.<sup>205</sup>

First, the Court observed that New York acted within its authority when it recognized same-sex marriages in response to “the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.”<sup>206</sup> The Court recognized that states have an “interest in defining and regulating the marital relation, subject to constitutional guarantees, [which] stems from the understanding the marriage is more than a routine classification for purposes of certain statutory benefits.”<sup>207</sup> As such, when New York recognized and permitted same-sex marriages, it provided “legal acknowledgement of the intimate relationship between two people,” showing the community’s new understanding of equality.<sup>208</sup>

With this in mind, the Court determined that DOMA violated the Fifth Amendment’s due-process and equal-protection requirements.<sup>209</sup> The Court explained that the government cannot treat a group disparately based only on a “bare congressional desire to harm a politically unpopular group.”<sup>210</sup> Further, the Court saw DOMA’s unusual departure from the tradition of allowing states to define marriage as “strong evidence” that DOMA was “motivated by an

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (“[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitution.”) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928))).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 2692-93.

<sup>209</sup> *Id.* at 2693.

<sup>210</sup> *Id.* (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)).

improper animus or purpose.”<sup>211</sup> Hence, the Court determined that a more careful review of DOMA was required in order to ensure that the law was not motivated by animus.<sup>212</sup>

Applying this close review, the Court examined DOMA’s history and text.<sup>213</sup> The Court concluded that DOMA’s “essence,” not merely its “incidental effect,” was to “interfere[] with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power.”<sup>214</sup> The Court condemned DOMA as treating same-sex marriages, which states have chosen to recognize, as “second-class marriages for purposes of federal law.”<sup>215</sup>

Further, the Court concluded that DOMA’s effect was to “write inequality into the entire United States Code.”<sup>216</sup> In the Court’s view, DOMA made a “subset of state-sanctioned marriages” unequal, which “diminished the stability and predictability of basic personal relations the State ha[d] found it proper to acknowledge and protect.”<sup>217</sup> Additionally, the Court argued that DOMA “tells [same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.”<sup>218</sup> This inequality “demeans the couple . . . and humiliates [their] children.”<sup>219</sup> Hence, for this and a variety of other reasons on which the Court elaborated in *Windsor*, DOMA burdened the lives of same-sex couples.<sup>220</sup>

From all of this, the *Windsor* Court found that DOMA’s “principle purpose and necessary effect . . . are to demean those persons who are in lawful same-sex marriage.”<sup>221</sup> Hence, DOMA violated the Fifth Amendment by unconstitutionally depriving people of their liberty and denying

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 2693-94.

<sup>216</sup> *Id.* at 2694.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 2694-95 (explaining various ways in which same-sex couples are burdened by DOMA).

<sup>221</sup> *Id.* at 2695.

them equal protection.<sup>222</sup> Since the Court could not find a legitimate purpose to overcome this apparent unconstitutional purpose, the Court declared DOMA’s federal definitions of marriage and spouse unconstitutional.<sup>223</sup>

#### B. Implications of *Windsor* for Recognition/Permission of Same-Sex Marriage by States

Although the *Windsor* Court specifically stated that its holding was confined to same-sex marriages explicitly recognized under state law,<sup>224</sup> many have argued that *Windsor* itself compels the conclusion that states must permit, or at least must recognize, same-sex marriages.<sup>225</sup> While the language about “animus” and “dignity” may lend some support to such a conclusion,<sup>226</sup> the focus on the traditional role of states in defining marriage militates toward the contrary result.<sup>227</sup>

Some courts have utilized *Windsor* to determine that states must recognize same-sex marriages established by other states.<sup>228</sup> In particular, “[b]y the summer of 2014, thirteen federal district courts . . . had struck down state laws or constitutional amendments that prohibited same-sex marriages.”<sup>229</sup> Also, in 2014, the Fourth, Seventh, Ninth, and Tenth Circuits reached similar conclusions.<sup>230</sup> In reaching this result, the Seventh Circuit was influenced by the *Windsor* Court’s discussion of how a state’s refusal to recognize same-sex marriage would harm the

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See *infra* text accompanying notes 236-237.

<sup>226</sup> See *Dry*, *supra* note 59, at 329.

<sup>227</sup> See *infra* text accompanying notes 239-244.

<sup>228</sup> See *Dry*, *supra* note 59, at 329 (“Suppose another state refuses to recognize a same-sex marriage performed in New York? Section 2 of DOMA expressly protects each state’s right to decide such questions. While Justice Kennedy made no reference to § 2 of DOMA, his discussion of the harm of taking away the ‘dignity’ that marriage confers led several lower federal courts to conclude that such non-recognition was unconstitutional.” (footnotes omitted)).

<sup>229</sup> *Id.* at 330.

<sup>230</sup> *Id.* at 330-31.

children of the couple who could not marry.<sup>231</sup> Moreover, the Ninth Circuit cited *Windsor* in concluding that heightened scrutiny applies to “classifications based on sexual orientation.”<sup>232</sup>

Admitting the tension between opposing positions about *Windsor*'s implications, one scholar, Murray Dry, posited that if *Windsor* is mainly about federalism, states should retain their authority to refuse same-sex marriage.<sup>233</sup> However, if *Windsor* is about a substantive due-process right of dignity, then it is much more difficult for states to justify a refusal to permit or recognize same-sex marriages.<sup>234</sup> He points out that, on the one hand, the *Windsor* Court did not mention Section 2 of DOMA, “which guarantees each state the right to determine its own marriage laws regardless of what other states do.”<sup>235</sup> However, on the other hand, *Windsor* contains strong language about the dignity that a state confers upon a same-sex marriage and the harm that the federal government inflicts by refusing to recognize that marriage.<sup>236</sup> Dry noted that this concept could be extended to prevent states from “deny[ing] this ‘fundamental right’ to same-sex couples, including those who were married in another jurisdiction . . . as well as those who wish to marry in their own state.”<sup>237</sup> Therefore, he concludes that it is difficult to determine how the Court will rule on whether states must permit and recognize same-sex marriage.<sup>238</sup>

However, some courts have concluded that *Windsor* does not compel states to permit or recognize same-sex marriage. For instance, the Sixth Circuit noted that, although the *Windsor* Court avoided one federal question, it acknowledged federalism issues when discussing

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<sup>231</sup> *Id.* at 331 (citing *Baskin v. Bogan*, 766 F.3d 648, 660-64, 672 (7th Cir. 2014)).

<sup>232</sup> *Id.* (citing *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014)).

<sup>233</sup> See Dry, *supra* note 59, at 332-33.

<sup>234</sup> *Id.* at 333.

<sup>235</sup> *Id.* at 332.

<sup>236</sup> *Id.* (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 334.

“individual dignity.”<sup>239</sup> Rather, the Court started by noting that, since the federal government was acting contrary to the tradition of state authority to define and regulate marriage, this “raise[d] suspicion that bigotry rather than legitimate policy [was] afoot.”<sup>240</sup> It explained that Congress lacked the “power to enact ‘unusual’ legislation that interfered with the States’ long-held authority to define marriage.”<sup>241</sup> In stark contrast, when states define marriage in the traditional way and choose not to recognize same-sex marriages, they are “doing exactly what every State has been doing for hundreds of years: defining marriage as they see it.”<sup>242</sup> For example, as the *Windsor* Court explicitly noted, “New York ‘without doubt’ had the power under its traditional authority over marriage to extend the definition of marriage to include gay couples.”<sup>243</sup> Likewise, as the Sixth Circuit concluded, the states’ “undoubted power” to define marriage illustrates that states should be afforded great deference when they choose to maintain traditional marriage definitions.<sup>244</sup>

As discussed in *Windsor*, states have a clear and deeply rooted tradition of defining marriage without interference from the federal government.<sup>245</sup> Because of the concerns about dignity, some argue that, by refusing to recognize same-sex marriages, states similarly violate the Constitution by interfering with the dignity of those marriages.<sup>246</sup> However, if that were the case, each state would be forced as a constitutional matter to adopt or recognize the definition of marriage from the state with the broadest definition. Otherwise, states would be in danger of creating

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<sup>239</sup> DeBoer v. Snyder, 772 F.3d 388, 413-14 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015) (“[P]laintiffs mistake *Windsor*’s avoidance of one federalism question for avoidance of federalism altogether.”).

<sup>240</sup> *Id.* at 414.

<sup>241</sup> *Id.* (quoting *Windsor*, 133 S. Ct. at 2692-93).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* (quoting *Windsor*, 133 S. Ct. at 2692-93).

<sup>244</sup> *See id.* at 416.

<sup>245</sup> *Windsor*, 133 S. Ct. at 2689-90, 2695 (“By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”).

<sup>246</sup> *See Dry*, *supra* note 59, at 332.



“second-tier” marriages or violating the “dignity” that other states had conferred on those marriages.<sup>247</sup> In the end, there would be a nationally applied standard of marriage implemented by those states with the broadest definitions of marriage. That result seems deeply antithetical to the acknowledged tradition of states individually defining marriage that the *Windsor* Court found so important to protect.<sup>248</sup> Therefore, the reasons that compelled the federal government to recognize a same-sex marriage conferred by a state do not compel a state to recognize a same-sex marriage from a sister state.

Furthermore, would not forcing states to recognize same-sex marriages be an equal affront to the dignity of marriage as those states choose to define it? As the Court in *Windsor* noted,

[U]ntil recent years . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged.<sup>249</sup>

The Court further pointed out that New York had “a statewide deliberative process” in which its citizens could evaluate same-sex marriage before “enlarg[ing] the definition of marriage.”<sup>250</sup> If New York could utilize its democratic process in making a vast change to the way the venerable institution of marriage is defined,<sup>251</sup> then why should other states be deprived of this opportunity by having this new definition foisted on them through a constitutional mandate to recognize those marriages from other states? That itself seems like an affront to the important tradition of

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<sup>247</sup> See *Windsor*, 133 S. Ct. at 2693-94 (concluding that DOMA “interfere[d] with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power,” and treated same-sex marriages like “second-class marriages for purposes of federal law”).

<sup>248</sup> See *id.* at 2693 (explaining that DOMA’s “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage” was “strong evidence” that DOMA was “motivated by an improper animus or motive”).

<sup>249</sup> *Id.* at 2689.

<sup>250</sup> *Id.*

<sup>251</sup> See *id.*

states defining marriage and the dignity that those states choose to confer on marriage within their own borders.<sup>252</sup>

Therefore, *Windsor* does not require states to permit or recognize same-sex marriage. *Windsor* was largely focused on the tradition of states defining and regulating marriage and the federal government's contravention of its bounds in an unusual way, evidencing the possible animus behind the law.<sup>253</sup> In contrast, when states adhere to their own definitions of marriage, they are simply acting under their traditional authority.<sup>254</sup> Since there is nothing unusual about states having different requirements for marriage, the evidence of animus meriting closer review is lacking. Instead, as will be discussed in Part IV, states should be granted a high degree of deference in their regulation of marriage when under rational-basis review.<sup>255</sup>

#### IV. SURVIVING RATIONAL BASIS REVIEW: UPHOLDING TRADITIONAL MARRIAGE

Just as the precedent from opinions like *Loving*, *Lawrence*, and *Windsor* does not require states to permit or recognize same-sex marriage, states can also survive rational-basis review by holding to a traditional definition of marriage. This Part first explains what rational-basis review entails.<sup>256</sup> It then applies rational-basis review to laws that refuse to permit and recognize same-sex marriage.<sup>257</sup> Additionally, this Part provides examples of legitimate government interests to which marriage laws are rationally related.<sup>258</sup> Finally, it concludes that, since these marriage laws can survive rational-basis review, states can constitutionally limit marriage to between one man and one woman.<sup>259</sup>

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<sup>252</sup> See *id.* at 2692-93 (recognizing that states have an “interest in defining and regulating the marital relation”).

<sup>253</sup> See *supra* Section III.A.

<sup>254</sup> See *supra* text accompanying notes 240-244.

<sup>255</sup> See *infra* Section IV.A.

<sup>256</sup> See *infra* Section IV.A.

<sup>257</sup> See *infra* Section IV.B.

<sup>258</sup> See *infra* Section IV.B.

<sup>259</sup> See *infra* Section IV.B.

## A. Rational Basis Review Explained

Before examining whether state laws that refuse to permit or recognize same-sex marriage are unconstitutional, it is vital to determine the appropriate standard of review. Unless a form of heightened scrutiny applies—because the right at issue is fundamental right or the restriction discriminates against a suspect or quasi-suspect class—laws challenged as violative of equal protection or due process must only survive rational-basis review.<sup>260</sup> As argued in Part I’s discussion of *Loving*, the right to same-sex marriage is not fundamental.<sup>261</sup> Further, the Supreme Court has never recognized sexual orientation as a suspect or quasi-suspect class.<sup>262</sup> Therefore, based on current Supreme Court precedent, neither strict scrutiny<sup>263</sup> nor intermediate scrutiny<sup>264</sup> would apply in this context.

Hence, these laws should be reviewed under the rational-basis standard. That is, the law need only be rationally related to a legitimate government interest.<sup>265</sup> If there is “any plausible reason” for the law, “even one that did not motivate the legislators who enacted it,” then “the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens.”<sup>266</sup> Under this standard, the law need not even be the best way to accomplish an objective.<sup>267</sup> As one

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<sup>260</sup> See *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)).

<sup>261</sup> See *supra* Part I.

<sup>262</sup> However, some courts, like the Seventh Circuit, have concluded that sexual orientation is a suspect class and have therefore applied heightened scrutiny. See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014).

<sup>263</sup> Sarah C. Loehr, Note, *Strictly Speaking, DOMA Is Unconstitutional: United States v. Windsor*, 5 CHARLOTTE L. REV. 165, 181 (2014) (“Under the strict scrutiny standard, the government has the burden of proving that the [law] is necessary to accomplish a compelling government objective.”).

<sup>264</sup> *Id.* at 170 (explaining that under intermediate scrutiny, a law must be “substantially related to an important government interest”).

<sup>265</sup> *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015).

<sup>266</sup> *Id.* (citing *Heller v. Doe*, 509 U.S. 312, 330 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 17-18 (1992)); see also *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) (explaining that under rational basis review with an equal protection challenge, a law is upheld “if there is any conceivable state of facts that could provide a rational basis for the classification” (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993))).

<sup>267</sup> See *Dry*, *supra* note 59, at 338.

scholar has put it, “a law can be constitutional even if it could be improved.”<sup>268</sup> Further, the law can be over-inclusive or under-inclusive.<sup>269</sup> Moreover, the law is presumed constitutional, and those challenging the law have the burden of proving its unconstitutionality.<sup>270</sup>

## B. Rational Basis Review Applied

Applying rational-basis review, some courts have concluded that state laws adhering to the traditional definition of marriage are unconstitutional.<sup>271</sup> However, the Sixth Circuit recently reached the contrary conclusion.<sup>272</sup> While there are valid arguments on both sides of the issue, overall, states do have legitimate interests to which their traditional-marriage laws are rationally related. Therefore, state laws prohibiting<sup>273</sup> and not recognizing<sup>274</sup> same-sex marriage are constitutional.

### 1. *Prohibiting Solemnization of Same-Sex Marriages Within the State*

Before considering legitimate government interests that are rationally related to a state law prohibiting same-sex marriages, this subsection begins by clearing up the three important issues. First, as discussed in regard to *Loving* in Part I, it is vital to remember that race-based and same-sex-based limitations on marriage are not identical.<sup>275</sup> Second, laws are typically given broad deference under rational-basis review, and there is no reason to deviate from that formula in this context.<sup>276</sup> Third, states did not enact these laws out of animus, as the *Windsor* Court accused the federal government of doing with DOMA.<sup>277</sup> With these points in mind, this

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<sup>268</sup> *Id.* at 338.

<sup>269</sup> *DeBoer*, 772 F.3d at 405 (“The significant feature of rational basis review is that governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question.”).

<sup>270</sup> *See* *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014).

<sup>271</sup> *See, e.g., id.* at 654.

<sup>272</sup> *DeBoer*, 772 F.3d at 404-08.

<sup>273</sup> *See infra* Subsection IV.B.1.

<sup>274</sup> *See infra* Subsection IV.B.2.

<sup>275</sup> *See infra* text accompanying notes 280-282.

<sup>276</sup> *See infra* text accompanying notes 283-287.

<sup>277</sup> *See infra* text accompanying notes 288-294.

subsection presents examples of legitimate government interests that are rationally related to state laws refusing to permit or recognize same-sex marriage.<sup>278</sup> Finally, this subsection concludes by determining that these legitimate interests are sufficient to ensure the survival of the laws under rational-basis review, even though they may be over-inclusive and under-inclusive.<sup>279</sup>

First, as previously discussed with *Loving* in Part I, some have argued that if a state is not authorized to prohibit marriages between individuals of different races, a state similarly is not authorized to prohibit marriages between individuals of the same sex.<sup>280</sup> However, as one scholar noted,

In the context of marriage, sex is different from race because the natural difference between male and female is essential to procreation, and procreation allows for children to be raised by their biological parents. Some people regard this as the optimal condition for childrearing. Short of the optimal condition, those same people think it is best for children to have a father and a mother, rather than two fathers or two mothers.<sup>281</sup>

Hence, while the state lacks a legitimate interest in prohibiting marriage between individuals of different races, the state retains a legitimate interest in limiting marriage to individuals of opposite sex.<sup>282</sup>

Second, as the Sixth Circuit observed, the Supreme Court typically affords wide deference to states and rarely strikes state laws when applying rational-basis review.<sup>283</sup> However, in cases where the Court has struck laws under rational-basis review, it has typically done so because the law was novel and targeted “a single group for disfavored treatment.”<sup>284</sup> The Sixth Circuit argued that, instead of being novel, state laws adhering to a traditional view of marriage

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<sup>278</sup> See *infra* text accompanying notes 295-299.

<sup>279</sup> See *infra* text accompanying notes 300-318.

<sup>280</sup> See *Dry*, *supra* note 59, at 336.

<sup>281</sup> *Id.*

<sup>282</sup> See *id.*

<sup>283</sup> *DeBoer v. Snyder*, 772 F.3d 388, 408 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015).

<sup>284</sup> *Id.*

were just that—traditional.<sup>285</sup> They “codified a long-existing, widely held social norm already reflected in state law.”<sup>286</sup> As even the *Windsor* Court recognized, ““marriage between a man and a woman . . . had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.””<sup>287</sup> Therefore, states should retain this broad deference in the context of defining marriage.

Third, the Sixth Circuit argued that states did not enact such marriage laws out of animus.<sup>288</sup> Rather, the laws were enacted out of “fear that the courts would seize control over an issue that people of good faith care deeply about.”<sup>289</sup> Moreover, the Sixth Circuit noted the impossibility of ferreting out the motives of legislators and, even more so, of voters in statewide initiatives.<sup>290</sup> The court queried, “How in this setting can we indict the 2.7 million Michigan voters who supported the amendment in 2004, less than *one year* after the *first* state supreme court recognized a constitutional right to gay marriage, for favoring the amendment for prejudicial reasons and for prejudicial reasons alone?”<sup>291</sup> In reply, the court argued that “[a]ny such conclusion cannot be squared with the benefit of the doubt customarily give voters and legislatures under rational basis review.”<sup>292</sup> Furthermore, “[i]t is no less unfair to paint the proponents of the measures as a monolithic group of hate-mongers than it is to paint the opponents as a monolithic group trying to undo American families.”<sup>293</sup> Since the court

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* The Sixth Circuit went on to say that those fears were just, as by that time “several state courts had [already] altered their States’ traditional definitions of marriage under the States’ constitutions.” *Id.*

<sup>290</sup> *Id.* at 409.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 410.

determined that a variety of explanations other than animus exist for the laws adhering to traditional marriage, it found the laws constitutional.<sup>294</sup>

There are several legitimate interests that states have for prohibiting same-sex marriage. For example, states may want to “wait and see” the impact of same-sex marriage “before changing a norm that our society (like all others) has accepted for centuries.”<sup>295</sup> Considering that the first state to legalize same-sex marriage did so as late as 2003, a mere twelve years may not suffice to determine whether the impact will be positive or negative.<sup>296</sup> Therefore, states can rationally decide that they need more data regarding the impact of same-sex marriage before they effect such a pronounced change on marriage.

Another legitimate interest that a state would have for adhering to a traditional definition of marriage is encouraging stable relationships for unplanned children. The Sixth Circuit accepted the explanation that the government regulates and incentivizes marriage in part for the purpose of encouraging “stable relationships within which children may flourish.”<sup>297</sup> As the Sixth Circuit argued, incentivizing marriage between opposite-sex couples, but not doing so for same-sex couples, “does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring.”<sup>298</sup> The Indiana Court of Appeals relied on this same reasoning, explaining that the question is “whether allowing same-sex marriage would further the States’ interest in encouraging

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 406.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 404-05.

<sup>298</sup> *Id.*

‘responsible procreation’ by opposite-sex couples, not . . . whether that interest would be harmed” by permitting same-sex marriages.<sup>299</sup>

However, some people object that laws adhering to a traditional definition of marriage are both too under-inclusive and too over-inclusive.<sup>300</sup> Yet, the most important point to consider is that under-inclusion and over-inclusion are completely acceptable under rational-basis review.<sup>301</sup> As the Sixth Circuit explained, “The signature feature of rational basis review is that governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question.”<sup>302</sup> In other words, the court cannot strike a law simply because there is now a better way to accomplish a certain goal.<sup>303</sup>

On the one hand, people claim that traditional-marriage laws are too under-inclusive if the legitimate interest is creating stable families for children.<sup>304</sup> They argue that same-sex couples can also have children through adoption or reproduction.<sup>305</sup> If married parents generally provide a better environment for children, as most people would agree, then why would that be different with same-sex parents?<sup>306</sup> Even though same-sex couples do raise children and have children through adoption or assisted reproductive technology, these children are, necessarily, planned.<sup>307</sup> In contrast, the focus under this legitimate state interest is creating a stable

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<sup>299</sup> *Morrison v. Sadler*, 821 N.E.2d 15, 29-30 (Ind. App. 2005) (taking the position that “opposite-sex marriage is recognized and supported by law in large part to encourage ‘responsible procreation’ by opposite-sex couples, who are the only ones who can, in fact, procreate ‘by accident,’ while those couples, either opposite-sex or same-sex, who must rely on adoption or assisted reproduction technology to have children have already demonstrated a commitment to responsibility without it having to be artificially encouraged by the government”).

<sup>300</sup> *See DeBoer*, 772 F.3d at 405.

<sup>301</sup> *See id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *See Morrison v. Sadler*, 821 N.E.2d 15, 30 (Ind. App. 2005).

<sup>306</sup> *Baskin v. Bogan*, 766 F.3d 648, 663-64 (7th Cir. 2014); *see also Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir. 2014).

<sup>307</sup> *See Morrison v. Sadler*, 821 N.E.2d at 30.



environment for unintended children.<sup>308</sup> Therefore, states can rationally differentiate between same-sex and opposite-sex couples based on their “ability to procreate ‘naturally.’”<sup>309</sup>

Even if the goal of marriage were broadly defined as creating stable families for all children, whether planned or unplanned, it must be understood that a law can be under-inclusive.<sup>310</sup> Although permitting and encouraging marriage between same-sex couples would also further that goal, states need not do everything possible to further their goals.<sup>311</sup> Rather, they have the discretion to choose a rational way to accomplish their goals.<sup>312</sup> Therefore, under rational-basis review, it would still be acceptable for a state to choose only to permit and encourage marriages between opposite-sex couples.

On the other hand, proponents of same-sex marriage have argued that traditional-marriage laws are over-inclusive.<sup>313</sup> They often point out that states do not require people to prove their intent or ability to have children as a precondition of marriage.<sup>314</sup> If this is not required, they argue, then same-sex couples should also be allowed to marry.<sup>315</sup> However, the Supreme Court has upheld similar line-drawing under rational basis review in the past.<sup>316</sup> For instance, the Court found that a mandatory retirement age of fifty for law-enforcement officers was acceptable as a proxy for physical fitness, even though it was both under-inclusive and over-inclusive.<sup>317</sup> As the Sixth Circuit asked, “If a rough correlation between age and strength suffices to uphold exception-free retirement ages (even though some fifty-year olds swim/bike/run

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *See* DeBoer v. Snyder, 772 F.3d 388, 405 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015).

<sup>311</sup> *See id.*

<sup>312</sup> *See id.*

<sup>313</sup> *See, e.g.,* Bostic v. Schaefer, 760 F.3d 352, 381 (4th Cir. 2014).

<sup>314</sup> *See id.*

<sup>315</sup> *See id.*; *see also* Baskin v. Bogan, 766 F.3d 648, 661-62 (7th Cir. 2014).

<sup>316</sup> *See* Mass. Bd. of Ret. V. Murgia, 427 U.S. 307 (1976).

<sup>317</sup> *Id.*

triathlons), why doesn't a correlation between male-female intercourse and procreation suffice to uphold traditional marriage laws (even though some straight couples don't have kids and may gay couples do)?<sup>318</sup>

Moreover, this rough correlation is a non-invasive way for states to approximate whom to permit and encourage to marry. Consider a system where a state required all couples to undergo testing to determine their capability of procreation as a precondition of marriage. Would not most people object to such a law, and rightfully so, as being highly invasive of personal privacy? Consider also a law that required couples to sign an affidavit affirming that they plan to have children after they marry. Would not most people similarly object that their post-marital intent to have children is not the state's business? While the state may be interested in creating a stable environment for children, it could not justify such invasive laws before permitting people to marry. However, with same-sex couples, there is no need to establish the ability of the couple to have children. Hence, the possibility of unplanned children being raised in an unstable environment does not exist with a same-sex couple in the way that it does for the vast majority of opposite-sex couples. Therefore, even though laws adhering to a traditional definition of marriage are both under-inclusive and over-inclusive, they are still rationally related to a legitimate government interest. Accordingly, they survive rational-basis review.

## 2. *Not Recognizing Same-Sex Marriages Solemnized in Other States*

Specifically addressing the obligation of a state to recognize a same-sex marriage solemnized in another state, the Sixth Circuit concluded that if a state is not required to permit solemnization of same-sex marriage within the state, it need not recognize a same-sex marriage

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<sup>318</sup> See *DeBoer v. Snyder*, 772 F.3d 388, 407 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. 2015).

solemnized in another state.<sup>319</sup> The court argued that the Full Faith and Credit Clause does not require State A to recognize a judgment entered in State B's if that judgment violates State A's legitimate public policy.<sup>320</sup> Therefore, if State A may legitimately refuse to solemnize a same-sex marriage, it is constitutionally acceptable for State A to refuse to recognize a same-sex marriage solemnized in another state on the basis that recognition of such a marriage would violate State A's public policy.<sup>321</sup>

Because of the *Windsor* Court's discussion of dignity conferred by a state to a same-sex marriage, some may argue that recognition of marriages from other states is nonetheless constitutionally required under the Due Process Clause.<sup>322</sup> However, Section III.B already illustrated the weaknesses of this argument.<sup>323</sup> Further, the Sixth Circuit noted that, under rational-basis review, states do have a legitimate interest in defining marriage within their own borders.<sup>324</sup> Adhering to the state's own definition of marriage in determining which out-of-state marriages to recognize prevents individuals from circumventing the state's legitimate marriage law by marrying in another state and then returning.<sup>325</sup> Therefore, if a state law permitting solemnization only of traditional marriages survives rational-basis review, its policy of only recognizing traditional marriages solemnized in other states survives as well.<sup>326</sup>

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<sup>319</sup> *Id.* at 418 (“If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries.”).

<sup>320</sup> *See id.* (“The [Full Faith and Credit] Clause ‘does not require a State to apply another State’s law in violation of its own legitimate public policy.’” (quoting *Nevada v. Hall*, 440 U.S. 410, 422 (1979))).

<sup>321</sup> *See id.* (“If defining marriage as an opposite-sex relationship amounts to a legitimate public policy . . . the Full Faith and Credit Clause does not prevent a State from applying that policy to couples who move from one State to another.”).

<sup>322</sup> *See id.* at 418-19.

<sup>323</sup> *See supra* Section III.B.

<sup>324</sup> *DeBoer*, 772 F.3d at 418-19.

<sup>325</sup> *Id.* at 419.

<sup>326</sup> *See id.*

## CONCLUSION

The United States Supreme Court is poised to resolve the issues of whether states can limit marriage to between one man and one woman, and whether states must recognize same-sex marriages validly created in other states.<sup>327</sup> This Note has shown that the Supreme Court's precedents do not necessarily compel the conclusion that states must permit the solemnization of same-sex marriages. Further, they do not compel the conclusion that states must recognize such marriages that have been validly created in other states.

Rather, as Part I illustrated, the Court can easily distinguish *Loving's* discussion of marriage as a fundamental right by concluding that same-sex marriage does not fall within the concept of marriage that is rooted in history and tradition.<sup>328</sup> Further, as Part II showed, the Court's decision in *Lawrence* was founded on the impermissibility of the state invading the private, intimate choices of consenting adults.<sup>329</sup> In contrast, marriage is a public action in which the state is necessarily involved.<sup>330</sup> Moreover, as Part III demonstrated, *Windsor* was focused on the animus demonstrated by the federal government in taking the unusual step of interfering with the definition of marriage, which by tradition is a matter of state authority.<sup>331</sup> Therefore, when states choose not to permit or recognize same-sex marriages from other states, they are merely acting pursuant to that tradition.<sup>332</sup>

Finally, within that tradition, states' traditional definitions of marriage are rationally related to legitimate government interests of both waiting to see the impact of same-sex marriage and encouraging stability in family relationships for unintended children.<sup>333</sup> Therefore, state laws

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<sup>327</sup> *Id.*

<sup>328</sup> *See supra* Part I.

<sup>329</sup> *See supra* Part II.

<sup>330</sup> *See supra* Part II.

<sup>331</sup> *See supra* Part III.

<sup>332</sup> *See supra* Part III.

<sup>333</sup> *See supra* Part IV.

limiting marriage to between one man and one woman survive rational-basis review and are constitutional.<sup>334</sup> Although Justice Scalia is waiting for the other shoe to drop, that day may never come.<sup>335</sup>

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<sup>334</sup> *See supra* Part IV.

<sup>335</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2709-11 (2013) (Scalia, J., dissenting).