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## I Do. Is That Okay with You?: A Look at How Most States Are Circumventing the Full Faith and Credit Clause and Equal Protection Clause to Not Recognize Legal Same-Sex Marriages from Other States and Its Effect on Society

Rebecca Hameroff

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I DO. IS THAT OKAY WITH YOU?:  
 A LOOK AT HOW MOST STATES ARE  
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*Rebecca Hameroff\**

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\* Rebecca Hameroff received her J.D. from Florida A&M University College of Law in May 2013.

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## I. INTRODUCTION

During a perfect day in Worcester, Massachusetts, white and blue roses decorated chairs and a white runner led up to a beautiful gazebo. The traditional prelude in “C” began to play as the wedding party entered. However, there was no groom waiting to greet the bride. There was a bride in a gray and blue women’s cut tuxedo. After the bridesmaids, who wore either a blue bridesmaid’s dress or matching gray and blue women’s cut tuxedo, the other bride began to walk down the aisle with a parent on each side. Her beautiful white satin wedding dress was gorgeous. Tears of joy and amazement ran down the cheeks of those in attendance as Karen continued down the aisle to marry Lisa, the love of her life.

Massachusetts is one of eight states that have legalized same-sex marriage.<sup>1</sup> Everything about the wedding was traditional. A pastor performed the ceremony, there were two sets of father/daughter dances, and the gorgeous white wedding cake sat front and center at the reception. This wedding was like many others, except of course, that it was a same-sex couple. After 10 years, Lisa and Karen were legally married.

Lisa and Karen, however, do not live in Massachusetts. A few days after the wedding they headed back to their home state of Florida. Although they had a legal marriage certificate issued by the State of Massachusetts and signed by a minister, once they were in Florida the marriage was void. Due to statutes, bans, and the Federal Defense of Marriage Act, states do not have to recognize legal same-sex marriages from sister states that recognize same-sex marriage.<sup>2</sup> This paper examines the denial of the fundamental right to marriage for same-sex couples, the violation of the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by not recognizing same-sex marriages legally performed in other states. It starts by looking at the impact these practices have on same-sex couples and the toll it will continue to take on society if not corrected.

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1. STATES THAT ALLOW GAY MARRIAGE, <http://www.statesthatallowgaymarriage.com> (last visited February, 2013).

2. Defense of Marriage Act, 1 U.S.C. § 1738C (1996).

## II. CONSEQUENCES OF STATES DENYING RECOGNITION OF LEGAL MARRIAGES PERFORMED IN OTHER STATES

A married heterosexual couple enjoys approximately 1,400 rights; 1,000 federal rights and 400 state benefits.<sup>3</sup> The benefits include, but are not limited to, the right to: jointly parent, adopt, acquire property and health insurance, have automatic inheritance for children, receive benefits from spouses social security and pension plans, receive spousal exemptions to property tax increases upon death of the other spouse, file joint tax returns, receive wrongful death benefits, have personal leave to care for an ill spouse, and the list continues.<sup>4</sup> Many of these benefits are taken for granted by heterosexual couples and most heterosexual couples probably do not realize just how many benefits legal marriage affords them.

### A. Status of Same-Sex Marriage\*

Seven states, including the District of Columbia, have legalized same-sex marriage; Massachusetts, Vermont, New Hampshire, Connecticut, New York, Washington DC, Maryland and Iowa.<sup>5</sup> However, same-sex couples are not afforded the same federal rights guaranteed to heterosexual couples.<sup>6</sup> Furthermore, same-sex couples must be present in their respective states for the marriage to be recognized<sup>7</sup> due to the 1996 Defense of Marriage Act passed by Congress.

Defense of Marriage Act (“DOMA”) defines marriage, for federal purposes, as a union between a “man” and a “woman.”<sup>8</sup> Same-sex couples who choose to get married in states allowing them to do so receive no federal recognition of their marriages for purposes of rights or benefits.<sup>9</sup>

Of the 43 states that have not legalized same-sex marriage, New Jersey,<sup>10</sup> Rhode Island,<sup>11</sup> Delaware,<sup>12</sup> Hawaii,<sup>13</sup> and Illinois<sup>14</sup> pro-

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3. ONTARIO CONSULTANTS ON RELIGIOUS TOLERANCE, [http://www.religioustolerance.org/mar\\_bene.htm](http://www.religioustolerance.org/mar_bene.htm) (last visited Feb. 15, 2013).

4. *Id.*

\* This article was at the printer when the Supreme Court, in a 5-4 decision, decided that the Defense of Marriage Act was unconstitutional.

5. STATES THAT ALLOW GAY MARRIAGE, *supra* note 1.

6. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 395 (Mass. D. 2010).

7. *Id.* at 395.

8. *Id.* at 396.

9. *Id.*

10. STATES THAT ALLOW GAY MARRIAGE, *supra* note 1.

11. H.B. 7040, 2012 Legis. Sess. (R.I., 2012).

vide same-sex civil union. Civil unions have a negative connotation because while the couples are afforded the same state rights as couples in states that allow same-sex marriage, the traditional institution of marriage is withheld. Instead of amending the state marriage laws to include same-sex couples, civil union is a parallel device.<sup>15</sup>

This dual track is reminiscent of the institutionalization of the *Plessy v. Ferguson* “separate but equal” theory. This case challenged the constitutionality of separate railcars for Caucasians and African Americans.<sup>16</sup> While African Americans had a railcar that transported them from point A to point B, as did the Caucasians, they could not sit in the same railcar as Caucasians.<sup>17</sup> Fifty-eight years later, the Supreme Court, in *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, found the theory of “separate but equal” unconstitutional.<sup>18</sup> The Court found that no race is superior to another and there is no caste system.<sup>19</sup>

Civil unions are unfairly singling out same-sex couples in the same ways African Americans were singled out. Civil unions essentially say that heterosexual couples are superior because they have access to the institution of marriage, but same-sex couples must settle for a less recognized institution. As will be shown throughout this paper, states should allow same-sex couples to marry. As *Brown* highlighted, separate but equal is not equal.<sup>20</sup> While civil unions are a step in the right direction, what same-sex couples want, and deserve, is legal marriage with all of its state and federal benefits. Regardless of a state allows same-sex marriage or civil unions, until the Federal Government repeals DOMA and includes same-sex marriage in the definition of marriage, same-sex couples are also denied the 1,000 federal marriage benefits.

The largest struggle in the fight for same-sex marriage equality lies in the 25 states that not only withhold same-sex marriage or civil union, but have instituted a state-wide ban on same-sex marriage. These states include Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana,

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12. Del. Sen., 2011 146th Gen Assemb., Reg. Sess. (Del. 2011).

13. Haw. Sen., 2011 26th Legis. Reg. Sess. (Haw. 2011).

14. H.B. 3184, 2011 Legis 97-4 (Ill. 2011).

15. N.J. STAT ANN. §37: 1-28 (West 2007).

16. *Plessy v. Ferguson*, 163 U.S. 537, 549 (1896).

17. *Id.* at 554.

18. *Brown v. Bd. of Educ. Of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 495 (1974).

19. *Id.*

20. *Id.*

Maine, Michigan, Minnesota, Mississippi, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington.<sup>21</sup> These states treat same-sex couples as if they were simply roommates with no federal or state marriage rights.<sup>22</sup> Rhode Island is the most interesting of all the states. While it does not recognize gay marriages performed in the state, it will recognize a gay marriage performed in a state such as New York which has legalized gay marriage.<sup>23</sup>

*B. Ramifications of the Divide Between States That Allow Same-Sex Marriage And Those That Do Not*

The refusal of a state to recognize a same-sex marriage legalized in a sister state affects five major areas: divorce, custody/child support, alimony versus palimony, estate planning and financial obligations in general. All of these areas are rights protected by a state so that in states where same-sex marriages are allowed, the couple has access to divorce, custody, etc., just as any heterosexual couple would.<sup>24</sup>

The problem occurs, however, when that couple moves to a state that does not recognize same-sex marriage. The Restatement Second of Conflict of Laws states that “a marriage which satisfies the requirements of the state where the marriage was contracted will be everywhere recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”<sup>25</sup> This is a serious problem for couples like Lisa and Karen, who, while legally married in Massachusetts, are Florida residents, a state that has statutory bans on same-sex marriages.

In the states that do not allow same-sex marriage, couples who separate cannot obtain a divorce.<sup>26</sup> In *Kazmierazak v. Query*, the Fourth District Court of Appeals of Florida held that a woman was a “legal stranger to the minor child she raised with her ex-domestic part-

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21. Andrew Koppleman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 924 (1998).

22. *Id.*

23. STATES THAT ALLOW GAY MARRIAGE, *supra* note 1.

24. *Gill*, 699 F.Supp.2nd at 393.

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

26. *In the Matter of the Marriage of J.B. and H.B. v. In re St. of Tex., Relator*, 326 S.W.3d. 654, 670 (Tex. Ct. App., 2010).

ner.”<sup>27</sup> In states where same-sex couples cannot marry, the protections a married couple is afforded by divorce are not available.<sup>28</sup> There are no protections such as custody agreements, child support judgments, or even alimony for these couples.<sup>29</sup> Essentially in states where a same-sex couple cannot marry, they are treated as roommates.<sup>30</sup> When they break up and go their separate ways they can walk away from each other without obligation to provide child support or alimony-type payments to the other partner.<sup>31</sup>

### C. *Non-Recognition of Marriage and the Fundamental Right to Travel*

There are a few states, however, that recognize a same-sex marriage from another state for purposes of granting divorce as long as the marriage was legal in the state in which it was performed.<sup>32</sup> Prior to 2011, when New York legalized same-sex marriages, it fell into this category regarding divorce. This highlights the lack of uniformity on the issue of same-sex divorce. Essentially whether the same-sex couple may obtain a divorce depends on the state where they move.<sup>33</sup>

In *Sanez v. Roe*, the United States Supreme Court held that the Fourteenth Amendment of the United States Constitution provides a fundamental right to travel.<sup>34</sup> This fundamental right includes the right to freely move to and from any state without substantial burden.<sup>35</sup> Forcing same-sex couples to travel back to the state they were married to procure a divorce is a substantial burden that can require couples take time off of work and incur expenses such as air fare and hotel costs. If they were able to divorce in any state where they relocated, same-sex couples would be able to go to a local court house at their convenience, just as a heterosexual couple may do. Therefore, non-recognition of legal same-sex marriages in other states unreasonably burdens these families’ opportunities to procure a divorce in violation of their fundamental right to travel.

There is also the question of how finances will be divided if a same-sex couple separates. When a heterosexual couple divorces, legal

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27. *Kazmierczak v. Query*, 736 So. 2d. 106, 108 (Fla. Dist. Ct. App. 1999).

28. *In the Matter of the Marriage*, 326 S.W 3d. 654 at 669.

29. *Id.*

30. *Id.*

31. *Id.*

32. *C.M v. C.C*, 21 Misc.3d 926, 927 (N.Y. Sup. Ct., 2008).

33. *Koppleman*, *supra* note 21.

34. *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

35. *Id.*

proceedings determine financial obligations.<sup>36</sup> While same-sex couples may enter into a contract as to how their financial assets should be divided should the couple separate, they lack the same legal protections divorce provides. Divorce and separation are rarely easy, and there is no guarantee that each partner will agree to a fair distribution and come to the same conclusions as far as how to handle the finances.

In 1971, the United States Supreme Court held that limiting a person's ability to get a divorce violated due process.<sup>37</sup> Divorces can only be granted by a state court and prohibiting a person the access to use the court system to obtain a divorce violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.<sup>38</sup> The Due Process Clause states that no person should be deprived the right to life, liberty, or property without due process of law.<sup>39</sup>

While same-sex couples may divorce in the state where they married, or in a state that recognizes same-sex marriage, the inability to obtain a divorce in one's state of residence is a significant burden.<sup>40</sup> Most states have residency requirements before obtaining a divorce; so, in essence, a same-sex couple must move to the state where they were married or to a state recognizing same-sex marriage and live there for a significant time. Even if there are no residency requirements, there are costs associated with travel back to the state and other issues, such as work leave. This puts an unreasonable burden on same-sex couples' ability to obtain a divorce in the state court of their choice and thus violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.<sup>41</sup>

*D. Additional Ramifications for Same-Sex Couples When Some States Recognize Their Marriage And Others Do Not*

The absence of the legal protections afforded by marriage has other ramifications. For instance, if a partner were injured in a serious car accident, the other partner would have no rights in making the decision to continue extraordinary measures to keep the injured partner alive.<sup>42</sup> In most states they do not even have the right to visit the

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36. C.C., 21 Misc. 3d at 927.

37. *Boddie v. Conn.*, 401 U.S. 371, 383 (1971).

38. *Id.* at 374.

39. U.S. CONST. amend. XIV, § 5.

40. *Boddie*, at 384.

41. *Id.* at 374.

42. Koppleman, *supra* note 21, at 925.



injured partner in the hospital when visitation is limited to family.<sup>43</sup> Even worse, if the injured partner were to die, the surviving partner would not have any custody rights of children they were rearing together if the surviving partner was not the biological parent or a legal parent/guardian of the children.<sup>44</sup>

The two strongest constitutional arguments supporting same-sex marriage are the Full Faith and Credit Clause of Article IV Section 1 of the Constitution and the fundamental right to marry under Due Process and the Equal Protection Clauses of the Fourteenth Amendment. As it stands currently, the Full Faith and Credit Clause of Article IV of the Constitution has been interpreted in such a way to make the case for same-sex marriage difficult. This clause will be examined first.

### III. FULL FAITH AND CREDIT CLAUSE

The Full Faith and Credit Clause of Article IV, Section 1 states: “[f]ull faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof.”<sup>45</sup> The Full Faith and Credit Clause “preserves rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in another state.”<sup>46</sup> While there was considerable debate on this topic in the late nineteenth century, the Supreme Court of the United States ultimately interpreted the original purpose of the clause to prevent a person from avoiding compliance with a judicial decision by moving to another state.<sup>47</sup> By having this clause in place, the judgment can be enforced against the person in any state where they live or visit.<sup>48</sup>

It was not until the early nineteenth century that the Full Faith and Credit Clause was interpreted to include public acts including divorce, custody, and other equitable court decrees along with judgments

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43. Matthew T. Moore, *Long-Term Plans for LGBT Floridians*, 34 NOVA L. REV. 225, 262 (2009) (Discussing what same-sex couples can do to protect their families and receive similar benefits to marriage as possible).

44. Koppleman, *supra* note 21, at 925.

45. U.S. CONST. art. IV, § 1.

46. *Pac. Emp'r Ins. Co. v. Indus. Accident Comm'n.*, 306 U.S. 493, 501 (1939).

47. Ralph U. Whitten, *Full Faith and Credit Clause for Dummies*, 38 CREIGHTON L. REV. 465, 468 (2005).

48. *Id.*

under the Full Faith and Credit Clause.<sup>49</sup> Even then, there was much debate as to whether the Full Faith and Credit Clause applied to anything other than money judgments, and the Supreme Court never gave a definitive answer.<sup>50</sup> Instead, if two states have conflicting statutes dealing with a particular subject, the court uses a balancing approach, which evaluates the interests of each state in the matter.<sup>51</sup> Today, this has morphed into a determination as to which state has the greatest connections to the persons in the matter, with the state having the most connections receiving choice of law priority.<sup>52</sup>

Traditionally, marriage has been treated as a public act under the Full Faith and Credit Clause.<sup>53</sup> According to the Restatement Second of Conflict of Law, a marriage that conforms to the requirements of that state is valid everywhere unless the marriage violates strong public policy in the state of domicile.<sup>54</sup> This presents an issue when the domicile state refuses to recognize the marriage.<sup>55</sup> Therefore, according to the Restatement, a state does not have to recognize same-sex marriages if it's against the state's public policy.<sup>56</sup> State public policy issues relate to protecting the health, welfare, safety, and morals of its citizens. If a state has a statute opposing same-sex marriage, the state may argue that recognition of same-sex marriages violates public policy.<sup>57</sup>

Opponents of same-sex marriage argue that the public policy rationale against same-sex marriage is that marriage is sacred to promote procreation.<sup>58</sup> This argument is flawed in that there are heterosexual couples who are unable to bear children. Proponents of same-sex marriage, however, contend that non-recognition of same-sex marriages performed in other states is an even larger violation of public policy.<sup>59</sup> If a state denies marriage to a same-sex couple on the public policy ground that they cannot procreate, should it also deny the same right to a heterosexual couple who cannot procreate? In fact,

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49. Heather Hamilton, *The Defense of Marriage Act: A Critical Analysis of its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 948 (1998).

50. Whitten, *supra* note 47, at 469.

51. *Id.*

52. *Id.*

53. *Id.* at 479.

54. RESTATEMENT, *supra* note 25.

55. *Id.*

56. *Id.*

57. Hamilton, *supra* note 49, at 960.

58. *Id.*

59. *Id.* at 961.

same-sex couples may be able to procreate through in-vitro fertilization and surrogacy.<sup>60</sup> Therefore the public policy argument against recognition of same-sex marriages is both unfounded and outdated. Unfortunately the Supreme Court has yet to hold that states must recognize same-sex marriages as part of the Full Faith and Credit Clause.<sup>61</sup> Currently, it is left to the states how they interpret the Full Faith and Credit Clause and whether they recognize same-sex marriages.<sup>62</sup>

Florida is an example of a state utilizing this exception to the Full Faith and Credit Clause. In November of 2008, Florida became one of the 26 states that have enacted legislation to define marriage as between a man and a woman.<sup>63</sup> With the passage of this statute, Florida may rely on the public policy exception to the Full Faith and Credit clause as a basis for not recognizing same-sex marriages from other states.

Same-sex couples face a double-standard in states such as Florida. These states deny recognition to same-sex couples married in a state where such marriage is legal, but recognize heterosexual marriages performed in Las Vegas, Nevada that do not conform with state law. For example, Florida Statute 741.0305 states that if a heterosexual couple does not complete a pre-marital preparation course, they must wait three days after filing for a marriage certificate to get married.<sup>64</sup> It can reasonably be inferred that Florida enacted this requirement as moral protection under their state police powers in an effort to lower divorce rates by preventing couples from rushing to get married. In Las Vegas however, heterosexual couples can decide on the spur of the moment to get married and Florida will recognize these marriages even though they violate the state statute. If Florida refuses to recognize same-sex marriage as a violation of public policy, it is only fair they refuse to recognize hasty Las Vegas weddings as well.

Beyond the fact that denying marriage to same-sex couples violates public policy, it also violates the fundamental right to marriage and discriminates on the basis of sexual orientation. The section of this paper on Equal Protection will address this in more detail but fundamental rights are those protected by the United States Constitution. Our rights and privileges protected by the Constitution should not be hindered by public policy arguments.

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60. *Id.*

61. *Id.*

62. *Id.*

63. Fla. Stat. § 27 (2008).

64. Fla. Stat. § 741.0305 (1999).

A. *The Defense of Marriage Act and Its Impact on the Full Faith and Credit Clause*

As stated earlier, DOMA, passed by Congress in 1996, defines marriage as a union between a man and a woman for purposes of federal laws and benefits and give states the power to disregard same-sex marriages performed in states that allow them.<sup>65</sup> This Act, in essence, codified the public policy exception to the Full Faith and Credit Clause. With this piece of federal legislation in place, states are not required to recognize same-sex marriages under the Full Faith and Credit Clause.<sup>66</sup>

The exact wording of DOMA is,

No state, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationships between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>67</sup>

Before it was approved in September 1996, the Act was amended to include,

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.<sup>68</sup>

Although DOMA allows states to refuse recognition of same-sex marriages from other states, they are not required to do so. While state regulations contradicting federal legislation are always trumped, DOMA is worded so that states may choose to follow it or not. DOMA states they "shall not be required to give effect. . ."<sup>69</sup> Therefore since it is not a mandatory act, states that choose to recognize same-sex marriages may do so.

States choosing to allow same-sex marriage are also allowed to create their own statutes that define marriage, so long as the statutes

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65. Defense of Marriage Act, *supra* note 2.

66. *Id.*

67. *Id.*

68. 1 U.S.C. § 7 (1996) (Addendum to the Defense of Marriage Act).

69. Defense of Marriage Act, *supra* note 2.

are passed in accordance with their state laws.<sup>70</sup> States that choose to do so may embrace DOMA as an exception to the Full Faith and Credit Clause stating that their utilization of DOMA makes same-sex marriage contradictory to their state statutes.<sup>71</sup>

*B. Efforts to Repeal The Defense of Marriage Act and the Obama Administration's View on Same-sex Marriage*

States that rely on DOMA to prohibit same-sex marriage may not be able to do so much longer. Whether or not DOMA is constitutional is hotly contested, and which will likely result in DOMA being overturned or repealed in the coming years. In November of 2011, the 10 Democrats on the United States Senate Judiciary Committee voted to repeal DOMA.<sup>72</sup> The vote makes the issue eligible to be brought to the Senate floor in 2012.<sup>73</sup> Unfortunately, there has been no indication by Senate Majority Leader Harry Reid that the issue will be addressed but this is a step in the right direction.<sup>74</sup>

In July of 2011, President Barack Obama formally announced his support for repealing DOMA.<sup>75</sup> The Justice Department also announced it would discontinue defending DOMA in legal challenges and will instead support a Congressional effort to repeal it.<sup>76</sup> Senator Di-  
anne Feinstein introduced a bill entitled "Respect for Marriage Act" which, if passed, will invalidate DOMA.<sup>77</sup> White House spokesperson Jay Carney announced the White House will be supporting Senator Feinstein's bill.<sup>78</sup> The fate of this bill will likely depend on the outcome of the 2012 Presidential election and whether President Obama wins re-election.<sup>79</sup>

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70. Whitten, *supra* note 47, at 478.

71. *Id.*

72. Tom Cohen, *Defense of Marriage Act*, CNN POLITICS (Nov. 10, 2011), [http://articles.cnn.com/2011-11-10/politics/politics\\_senate-doma\\_1\\_defense-of-marriage-act-couples-marriage-between-one-man?\\_s=PM:POLITICS](http://articles.cnn.com/2011-11-10/politics/politics_senate-doma_1_defense-of-marriage-act-couples-marriage-between-one-man?_s=PM:POLITICS).

73. Larry Margasak, *DOMA Repeal Bill Clears Senate Judiciary Committee Vote*, HUFFPOST POLITICS (Nov. 10, 2011, 1:30pm), [http://www.huffingtonpost.com/2011/11/10/defense-of-marriage-act-repeal-bill-democrats-\\_n\\_1086237.html](http://www.huffingtonpost.com/2011/11/10/defense-of-marriage-act-repeal-bill-democrats-_n_1086237.html).

74. *Id.*

75. David Nakamura, *Obama backs bill to repeal Defense of Marriage Act*, WP POLITICS (July 19, 2011), [http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI\\_story.html](http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI_story.html).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

In early May of 2012, President Obama took a further step forward and became the first President to announce his support for same-sex marriage.<sup>80</sup> He gave an interview to ABC News stating “For me personally it is time for me to go ahead and affirm that I think same-sex couples should be able to get married”.<sup>81</sup> It is likely that should the Respect for Marriage Act fail to pass, the White House will support other efforts to repeal DOMA. Should President Obama be re-elected, the White House will likely continue its push for the repeal of DOMA.<sup>82</sup>

Should Congress fail to repeal DOMA, it may still be struck down as unconstitutional. On May 31, 2012, the United States Court of Appeals for the First Circuit in Boston, Massachusetts became the first federal appeals court to hold DOMA to be unconstitutional.<sup>83</sup> The court held that the meaning and interpretation of DOMA deprives same-sex couples of rights granted to opposite-sex couples and this is a direct contradiction to the United States Constitution.<sup>84</sup> Specifically the court mentioned the denial of same-sex couples’ abilities to file joint tax returns and receive other federal marriage benefits.<sup>85</sup> This action by the Court of Appeals for the First Circuit is a major step in the right direction and set the stage for the unconstitutionality of DOMA to be brought in front of the Supreme Court of the United.<sup>86</sup> As controversial as this topic is, it is likely the Supreme Court will grant the writ of certiorari once one is filed.

If the Supreme Court finds DOMA to be unconstitutional, or the Respect for Marriage Act or a similar bill is passed, states will no longer be able to use DOMA as a basis for denying recognition to same-sex marriage as a statutory exception to the Full Faith and Credit Clause exception. As long as the Supreme Court of the United States interprets the Full Faith and Credit Clause as stating so, all states will be required to recognize marriages legally performed in other states regardless of the gender of both partners. It can be reasonably assumed that if they find DOMA to be unconstitutional they will interpret the Full Faith and Credit Clause to require recognition of same-sex marriages.

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80. Michael O’Brien, *Obama: ‘I think same-sex couples should be able to get married.’* FIRSTREAD ON NBCNEWS.COM (May 9, 2012 4:50pm), [http://firstread.msnbc.msn.com/\\_news/2012/05/09/11621156-obama-i-think-same-sex-couples-should-be-able-to-get-married?lite](http://firstread.msnbc.msn.com/_news/2012/05/09/11621156-obama-i-think-same-sex-couples-should-be-able-to-get-married?lite).

81. *Id.*

82. *Id.*

83. *Mass. v. Dep’t of Health & Human Serv.*, 682 F. 3d 1, 3 (1st. Cir. 2012).

84. *Id.*

85. *Id.*

86. *Id.*

## IV. EQUAL PROTECTION AND OUR FUNDAMENTAL RIGHTS

The Equal Protection Clause of the Fourteenth Amendment states “no State shall deny any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>87</sup>

In *Loving v. Virginia*, the U.S. Supreme Court recognized that the right to marry encompassed the right to marry the person of one’s choosing.<sup>88</sup> While the *Loving* case dealt with interracial marriage instead of same-sex marriage, the court held that to deny such a fundamental freedom as the right to marry on an unsupportable basis such as racial classifications embodied in these statutes, is surely to deprive all State’s citizens of liberty without due process of law under the Fourteenth Amendment.<sup>89</sup> This amendment requires that “the freedom of choice to marry not be restricted by invidious discrimination.”<sup>90</sup> While racial classifications are reviewed under strict scrutiny and sexual orientation receives rational basis review, denying the right to marry violates a fundamental right and any time a fundamental right is violated, strict scrutiny should be utilized.

Fundamental rights are those either enumerated in the United States Constitution, or unnamed rights recognized by the Supreme Court as being vital to our history and tradition or deeply imbedded in the moral consensus.<sup>91</sup> Those rights enumerated in the Constitution include those listed in the First Amendment such as right to free speech and the Second Amendment right to bear arms.<sup>92</sup> Fundamental rights determined by the Supreme Court include the right to travel, the right to privacy, and even the right to marry.<sup>93</sup>

A. *Strict Scrutiny versus Rational Basis*

The states that prohibit same-sex marriage argue that the fundamental right to marry does not include same-sex marriage.<sup>94</sup> Currently, sexual orientation is not considered a suspect class and therefore legislation against gay rights is reviewed with rational ba-

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87. U.S. CONST. amend. XIV, §1.

88. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

89. *Id.*

90. *Id.*

91. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 695 (Aspen Publishers, 3d ed. 2006).

92. *Id.*

93. U.S. CONST. amend. §1.

94. *Andersen v. King County*, 138 P.3d 963, 976 (Wash. 2006).

sis.<sup>95</sup> In *Romer v. Evans*, however, the Supreme Court applied a level of scrutiny that was higher than rational basis but not quite as high as intermediate scrutiny.<sup>96</sup> The level of review they used is commonly referred to as “rational basis with a bite.”<sup>97</sup>

In *Romer*, the cities of Aspen and Denver, Colorado enacted ordinances that prohibited any form of discrimination against persons due to their sexual orientation.<sup>98</sup> In response, the state of Colorado passed an amendment to the state Constitution “repealing ordinances that prohibit discrimination on the basis of homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships.”<sup>99</sup> The state argued laws and ordinances protecting homosexuals’ gave them special rights not afforded to heterosexuals as there were no special ordinances prohibiting discrimination against heterosexuals.<sup>100</sup> The state’s argument failed in this case because there is an obvious level of discrimination against homosexuals that heterosexuals do not face.<sup>101</sup> Homosexuals are often ridiculed and discriminated against simply for their sexual orientation, which is something heterosexuals do not face and therefore do not need protection.<sup>102</sup> In passing this amendment, the state of Colorado denied necessary safeguards to homosexuals against discrimination in their everyday lives.<sup>103</sup> The protections Aspen and Denver were extending to homosexuals are the kind heterosexuals take for granted every day, such as protection against employment discrimination, housing discrimination, and unequal access to public accommodations.<sup>104</sup>

The state also argued that they only needed to meet the standard of rational basis for this amendment to stand.<sup>105</sup> Their legitimate interest as stated above was to keep homosexuals and heterosexuals on an even playing field by ensuring neither group had “special treatment.”<sup>106</sup> The Court, however, held the amendment failed rational basis completely. The only basis the Court saw for the amendment was animus towards homosexuals and it appeared that Colorado was at-

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95. *Id.* at 973.

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

97. See *CHEMERINSKY supra* note 91, at 688.

98. *Romer*, 517 U.S. at 633.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 629.

104. *Id.*

105. *Id.* at 631.

106. *Id.* at 626.



tempting to use this amendment to hinder a politically unpopular group.<sup>107</sup> This type of action is never condoned as a legitimate governmental interest.<sup>108</sup>

The Court took its analysis slightly above rational basis by discussing sexuality as a trait. Traits are normally defined as an immutable characteristic that a person cannot control about himself or herself.<sup>109</sup> Most other traits are given either intermediate scrutiny, such as gender, or strict scrutiny, such as race.<sup>110</sup> While the Court purported to apply rational basis, this was the first time the Supreme Court intimated that sexual orientation may be an immutable characteristic therefore entitled to a higher level of scrutiny than simple rational basis. The Court said it is inappropriate to classify a person based on a specific trait and then deny them certain protections just based on that trait.<sup>111</sup> The Supreme Court has yet to determine if same-sex marriage is included in the fundamental right to marry, and has not found sexual orientation to be a suspect class.

### B. *History and Tradition are Just the Beginning*

In *Lewis v. Harris*, the Superior Court of New Jersey held that limiting marriage to opposite-sex couples is not a constitutional violation beyond a clear and reasonable doubt.<sup>112</sup> They held that expanding the definition of the right to marry to same-sex couples would contradict the intent of the framers of the Constitution.<sup>113</sup>

While including same-sex marriage within the fundamental right to marry may be inconsistent with the framers intent, the Constitution is an ever-evolving document.<sup>114</sup> It is up to the Supreme Court of the United States to interpret the Constitution.<sup>115</sup> The Superior Court of New Jersey also held that to determine if a right is fundamental, one must look to "the traditions and collective conscious of our people to determine whether a principle is so rooted there as to be ranked fundamental."<sup>116</sup> The court held same-sex marriage is certainly

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107. *Id.* at 634.

108. *Id.*

109. See Andersen *supra* note 94, at 976.

110. See CHEMERINSKY, *supra* note 91, at 671.

111. *Romer*, 517 U.S. at 635.

112. *Lewis v. Harris*, 188 N.J. 415, 441 (2006).

113. *Id.*

114. See CHEMERINSKY, *supra* note 91, at 11.

115. *Id.*

116. *Lewis*, 188 N.J. at 463.

not deeply rooted in the state's legal traditions and there is no current consensus in the state favoring its recognition.<sup>117</sup>

The Superior Court of New Jersey's holding to allow same-sex couples access to civil unions and not to marriage in the *Lewis* case was based upon history and tradition as the source of fundamental rights.<sup>118</sup> The court held that since the framers did not provide for same-sex marriage, it cannot be included in the fundamental right to marry.<sup>119</sup> Had this reasoning been followed with interracial marriage, it would likely still be outlawed. As Justice Kennedy proclaimed in the case of *County of Sacramento v. Lewis*, "History and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry."<sup>120</sup>

While states like Washington and New Jersey have not recognized same-sex couples as having the fundamental right to marry, that right has been ever-evolving and will likely include same-sex couples in the near future. In fact, during the writing of this article, the Supreme Court of Washington held DOMA to be unconstitutional. Washington State Governor Christine Gregoire signed legislation making Washington the seventh state to recognize same-sex marriage. She was quoted as saying, "Is it not time that we stand proud for equality?"<sup>121</sup> By denying same-sex couples the opportunity to marry, they were not treated as equals which is a violation of their constitutional rights.<sup>122</sup>

Starting June 7, 2012, same-sex couples were able to marry in the state of Washington.<sup>123</sup> Up until this point, Washington like New Jersey, allowed same-sex civil unions which gave these couples some similar state rights as married couples, but not all the same rights.<sup>124</sup> Due to this change in legislation, these civil unions have effectively become marriages and future same-sex couples are allowed to marry.<sup>125</sup>

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117. *Id.*

118. *Id.*

119. *Id.*

120. *County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998).

121. Nicole Neroulias, *Washington State's Governor Signs Gay Marriage Law*, (Feb. 13, 2012, 6:36 PM), <http://www.reuters.com/article/2012/02/13/us-gaymarriage-washington-id-USTRE81C15L20120213>.

122. *Id.*

123. 2012 Wash. Legis. Serv. ch.3 (S.S.B. 6239) (West).

124. N.J. STAT ANN. §37: 1-28 (2007).

125. See 2012 Wash. Legis. Serv., *supra* note 122.

C. *The Impact of Loving v. Virginia on the Fundamental Right to Marriage*

The Supreme Court case of *Loving v. Virginia*, a landmark case, expanded the fundamental right to marriage to include interracial couples.<sup>126</sup> The Court held that while states have the power to regulate marriage, this power is not unlimited.<sup>127</sup> It determined that the freedom to marry the person of one's choosing is a fundamental aspect of existence.<sup>128</sup> Denying this fundamental liberty on something as trivial as racial classification was so contrary to what the Constitution stands for as to deprive the couple of liberty without due process of law.<sup>129</sup> Had the Supreme Court limited its analysis to history and tradition, this case would likely have turned out differently. The Framers of the Constitution owned African American slaves and it is highly unlikely they would have condoned interracial marriage. In this case, the Supreme Court realized times had changed and there was a greater governmental and societal interest in eradicating racial discrimination than trying to adhere so closely to what the framers intended.

When the issue of same-sex marriage reaches the Supreme Court of the United States, the holding in *Loving* should be determinative. The Court at that time correctly held that the right to choose whom you wish to marry is fundamental to a person's existence. Although the framers of the Constitution would likely have opposed same-sex marriage, societal interests are evolving. As the first section of this article pointed out, the denial of the right to a legal marriage makes day-to-day life unfairly challenging for same-sex couples.

D. *Homosexuals and Intermediate Scrutiny*

Even if the Supreme Court does not find that the fundamental right to marriage should include same-sex couples, DOMA should also be reviewed under intermediate scrutiny, as classifications based upon sexual orientation should receive heightened scrutiny. Intermediate scrutiny is somewhere in between strict scrutiny and rational basis and is utilized when classifications are based on gender or treat non-marital children differently.<sup>130</sup> In *Andersen v. King County*, the Supreme Court of Washington held same-sex couples do not fall into a

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126. *Loving*, 388 U.S. at 12.

127. *Id.* at 7.

128. *Id.* at 12.

129. *Id.*

130. See CHEMERINSKY, *supra* note 91, at 671.

suspect class.<sup>131</sup> The court held that to consider a group of people a suspect class they must “have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to the ability to perform or contribute to society, and show that it is a minority or powerless class.”<sup>132</sup>

On the other hand, The Supreme Court of Iowa held in *Varnum v. Brien*, that homosexuals are in fact a suspect class.<sup>133</sup> The court applied the same elements referred to in *Andersen* concluding that homosexuals fit each criterion. As to a history of discrimination against homosexuals, the court held it was impossible to dispute in good faith that this class of people has been the victim of intense discrimination due to their sexual orientation.<sup>134</sup> One of the strongest examples of this was the recently repealed “Don’t Ask Don’t Tell” policy in the military.<sup>135</sup> Any person identified as a homosexual would be dismissed dishonorably simply because they were gay.<sup>136</sup> The court felt that “any legislative burdens placed on lesbians and gay people as a class are more likely than other to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.”<sup>137</sup>

The second element determines if the characteristic at issue affects the class’ ability to contribute to society.<sup>138</sup> “Heightened scrutiny should be applied when the classification bears no relationship to the persons’ ability to contribute to society.”<sup>139</sup> There is no connection the court could find between a person’s same-sex orientation and their ability to contribute to society.<sup>140</sup> The Iowa court found that a law that singles out homosexuals on the basis of their sexual orientation is based on stereotypes and is thus incompatible with the state’s values.<sup>141</sup>

The third element, whether sexual orientation is an immutable characteristic, is the most disputed of the four.<sup>142</sup> The Supreme Court of Iowa held immutable traits cannot be limited to traits that exist solely by accident of the birth or a trait that a person is absolutely not

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131. *Andersen*, 138 P.3d at 973.

132. *Id.* at 974.

133. *Varnum v. Brien*, 763 N.W. 2d 862, 889 (Iowa 2009).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 890.

139. *Id.*

140. *Id.*

141. *Id.* at 892.

142. *Id.*

able to change.<sup>143</sup> Instead this court held immutable traits should be defined as traits so central to a persons' identity that it would be abhorrent for government to penalize a person for refusing to change it. Because a person's sexual orientation is so integral an aspect to one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.<sup>144</sup>

Forcing a person to try to change her sexual orientation is extremely dangerous, if possible at all. Without engaging in the "nature vs. nurture debate," Superior Court of Iowa recognized that sexual orientation is so integral to a person's identity that it should be considered immutable and therefore satisfies this element of suspect class membership.<sup>145</sup>

The fourth and final element for defining a class as suspect is analogizing their political power.<sup>146</sup> The less political power a group has, the more important it is for them to be considered a suspect class.<sup>147</sup> Although homosexuals have received some political protections against discrimination the fact that they are not completely powerless politically does not automatically bar them from this element.<sup>148</sup> All that is required is the class show they "lack sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means."<sup>149</sup> Taking all four of these elements together the Superior Court of Iowa held that sexual orientation is a suspect class and therefore it deserves an elevated level of scrutiny if not strict scrutiny.<sup>150</sup>

### *E. The Defense of Marriage Act Under Rational Basis Review*

Even if sexual orientation receives only rational basis scrutiny, the Supreme Court should still hold DOMA unconstitutional as violating equal protection. As discussed above, all United States citizens have the fundamental right to marry and telling people who they can and cannot marry is violating that right which therefore violates equal protection. For a statute to withstand rational basis review it must be

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143. *Id.*

144. *Id.* at 893

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 894.

149. *Id.*

150. *Id.* at 895.

rationally related to a legitimate governmental interest.<sup>151</sup> Most states that adhere to DOMA to prohibit same-sex marriage rely on DOMA's position that the legitimate governmental interest is ensuring children are raised in an optimal setting and encouraging people to create traditional families.<sup>152</sup>

The Supreme Judicial Court of Massachusetts said it best in the case of *Goodridge v. Department of Public Health*, where Massachusetts became the first state to allow same-sex marriages.<sup>153</sup> The court held limiting marriage to a union between a man and a woman

lacked rational basis and violated state constitutional equal protection principles; the limitation was not justified by state's interest in providing favorable setting for procreation and had no rational relationship to state's interests in ensuring that children be raised in optimal setting and in conservation of state and private financial resources.<sup>154</sup>

The court went on to say, "the best interests of the child did not turn on parents' sexual orientation."<sup>155</sup> They reasoned that the idea of what makes a family has morphed over the years and there is evidence that same-sex parents can be just as great a set of parents as any heterosexual couple.<sup>156</sup> Same-sex couples have children, either through assisted natural means such as surrogacy, in-vitro fertilization, or adoption, for the same reasons any heterosexual couple does.<sup>157</sup> These couples want to love the children, care for them, and leave a legacy, just like any other parents.<sup>158</sup> What is harsh and unjust is to deny these families the benefits of marriage. Unlike heterosexual couples, if same-sex relationships dissolve there is no legal protection for either partner.<sup>159</sup> It is solely up to each partner whether they want to be amicable or not.<sup>160</sup> There are plenty of situations where one partner may be the breadwinner of the relationship, and the other partner becomes accustomed to staying home, either to raise the children or for other reasons.<sup>161</sup> If this couple were to separate, the partner who has not been working has no legal recourse to receive any alimony, custody or

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151. *Andersen*, 138 P.3d at 982.

152. *Id.*

153. *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 961 (Mass. 2003).

154. *Id.*

155. *Id.* at 963.

156. *Id.*

157. *Id.* at 961.

158. *Id.* at 963.

159. *Id.* at 336.

160. *Id.*

161. *Id.*

child support, etc.<sup>162</sup> As discussed earlier, because the couple was never legally married, they are not afforded divorce protections.<sup>163</sup> *Goodridge* opened the door for Massachusetts to become the first of the United States to allow same-sex marriage.

Additionally, DOMA violates a citizen's constitutionally guaranteed fundamental right to travel. Because DOMA permits states to disregard marriages legally performed in foreign states, it also limits a same-sex couple's ability to relocate. As discussed earlier in *Sanez*, the Supreme Court of the United States held that the fundamental right to travel as part of the Fourteenth Amendment of the United States Constitution includes the right to enter or leave a state freely.<sup>164</sup> If a same-sex couple were to marry in Massachusetts and the family were forced to move to a state such as Florida that does not recognize same-sex marriages, that family would lose all rights and privileges they had as a married couple. Therefore, their right to enter and leave any state of their choice freely is substantially burdened. If DOMA were repealed, and the Full Faith and Credit Clause was interpreted to include the recognition same-sex marriages, Florida would be forced to recognize the Massachusetts same-sex marriage and the couple would be entitled to state marriage benefits in Florida.

A common argument is that same-sex marriage will destroy the sanctity of marriage. There is no evidence, however, that allowing same-sex marriages negatively affects heterosexual couples in any way. If anything, the only couples who are suffering by this prohibition are the same-sex couples who are being denied the opportunity to create a stable family unit. There is no evidence that the alleged legitimate interest of encouraging people to create traditional families is furthered by prohibiting same-sex marriage.

## V. CONCLUSION

The right to same-sex marriage still has a long fight ahead of it, but times seem to be changing. This is evidenced by the eight states that now allow same-sex marriage and one additional state, Rhode Island, which recognizes same-sex marriages legally performed in any one of those eight states. *Goodridge*, which paved the way for same-sex marriage in Massachusetts, is a state case and has so far not been appealed to the Supreme Court of the United States. So far there have been no federal challenges to DOMA. The current sentiment is the

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162. *Id.* at 367.

163. *In the Matter of the Marriage*, 326 S.W. 3d at 669.

164. *Sanez*, 526 U.S. at 500.

need to wait for the right time to bring this issue to the Supreme Court. Currently the Supreme Court is evenly divided so it would be a big risk to bring this case there now. It is advantageous to wait until the court is more liberal and there is a better chance of having DOMA overturned. When a suit does make it through the federal court system the courts should follow the rationale of *Goodridge*, holding there is no basis, rational or otherwise, to allow DOMA to stand. It serves no purpose other than to discriminate against same-sex couples.

If and when DOMA is repealed it will be a major victory for the gay community. If the federal courts cannot find a legitimate interest that this legislation is rationally related to, DOMA must be overturned. States would no longer be able to rely on DOMA as their basis for circumventing the Full Faith and Credit clause by invalidating marriages legally performed in another state. It would force each state to pass legislation limiting marriages to a union between a man and a woman. However, if the Supreme Court determines these interests are invalid there would be strong ammunition for same-sex couples to use to prevent these statutes from passing in their states.

Finally, if the Supreme Court does ultimately include same-sex marriages within the fundamental right to marry, or if sexual orientation is ultimately found to be a suspect class, states that are successful in passing new legislation prohibiting same-sex marriage will be forced to use strict scrutiny whenever a same-sex couple brings a constitutional challenge against the statute. It will be difficult for a state to be successful in arguing a statute prohibiting same-sex marriage furthers a compelling and overriding state interest, especially after the federal court system says it does not even survive a rational basis review.

While it may be some time before a successful challenge reaches the United States Supreme Court, hopefully it will be in Lisa and Karen's lifetime. They are a loving, caring, hardworking couple just like any heterosexual couple, and deserve the right to create a stable family recognized as married no matter where they go.



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