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Same-Sex Marriage: A Legal Background After *United States v. Windsor*

Alison M. Smith
Legislative Attorney

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Summary

The issue of same-sex marriage generates debate on both the federal and state levels. Either legislatively or judicially, same-sex marriage is legal in more than a dozen states. Conversely, many states have statutes and/or constitutional amendments limiting marriage to the union of one man and one woman. These state-level variations raise questions about the validity of such unions outside the contracted jurisdiction and have bearing on the distribution of state and/or federal benefits. As federal agencies grappled with the interplay of the Defense of Marriage Act (DOMA) and the distribution of federal marriage-based benefits, questions arose regarding DOMA's constitutionality and the appropriate standard (strict, intermediate, or rational basis) of review to apply to the statute.

In *United States v. Windsor*, a closely divided U.S. Supreme Court held that Section 3 of DOMA, which prohibited federal recognition of same-sex marriage, violated due process and equal protection principles. As such, federal statutes that refer to a marriage and/or spouse for federal purposes should be interpreted as applying equally to legally married same-sex couples recognized by the state. However, the Court left unanswered questions such as (1) whether same-sex couples have a fundamental right to marry and (2) whether state bans on same-sex marriage are constitutionally permissible.

In the aftermath of the *Windsor* decision, lower federal courts have begun to address the constitutionality of state statutory and constitutional bans on same-sex marriage. To date, appellate courts in the Fourth, Seventh, Ninth and Tenth Circuits have upheld lower courts' decisions striking down such bans. The Fourth and Tenth Circuit Courts have concluded that the bans in three states (Utah, Oklahoma, and Virginia) violate both the equal protection and due process guarantees of the Fourteenth Amendment by impermissibly infringing on the fundamental right to marry. Relying on a series of "marriage" cases, these courts have taken a broad or expansive view of the fundamental right to marry and found that this right encompasses same-sex marriage and the recognition of these unions across state lines. While district courts were split as to the appropriate level of judicial review, both appellate courts concluded that strict scrutiny is appropriate as a fundamental right is implicated.

Although arriving at the same result as its sister circuits—striking down same-sex marriage bans (Indiana, Wisconsin, Idaho and Nevada)—the Seventh and Ninth Circuits took a different approach. They declined to address the issue of whether the fundamental right to marry encompasses same-sex unions. Instead, they limited their analysis to the equal protection challenge. The courts concluded that discrimination based on sexual orientation warrants heightened scrutiny and that the states' proffered justifications failed to further any legitimate purpose.

Appeals are pending in other circuits. The Sixth Circuit held oral arguments concerning the constitutionality of four states' (Kentucky, Michigan, Ohio, and Tennessee) bans. Some commentators believe that there is a possibility that the Sixth Circuit may uphold one or more of these bans. Recently, the Supreme Court denied review of petitions from the Fourth, Seventh, and Tenth Circuits (covering Indiana, Oklahoma, Utah, Virginia, and Wisconsin). It remains uncertain whether the U.S. Supreme Court will decline to intervene until a circuit split occurs.

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Introduction

The recognition of same-sex marriage generates debate on both the federal and state levels. Either legislatively or judicially, same-sex marriage is legal in more than a dozen states and the District of Columbia.[1] Conversely, many states have statutory[2] or constitutional prohibitions[3] against same-sex marriage. Courts are beginning to address the constitutionality of these "defense of marriage" laws using equal protection and due process analysis. In *United States v. Windsor*,[4] the U.S. Supreme Court struck down the federal ban on benefits for legally married same-sex couples. However, the Court indicated that it was taking no position on a state's authority to forbid same-sex marriages. Lower courts have interpreted *Windsor* broadly and have found such bans to violate equal protection and due process principles.

General Constitutional Principles

Equal Protection[5]

The Fourteenth Amendment provides, in relevant part, that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."[6] Under the Supreme Court's equal protection jurisprudence, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[7] Laws based on suspect classifications such as race or gender, however, typically receive heightened scrutiny and require a stronger, if not compelling, state interest to justify the classification.

Traditionally, courts have not considered sexual orientation to be a suspect category. In theory, therefore, the government need only advance a rational basis for enacting a statute that treats individuals differently depending on their sexual orientation. However, Supreme Court and recent lower court rulings have raised questions about whether classifications involving sexual orientation can meet this most deferential standard of review.

For example, in *Romer v. Evans*, the Court held that Amendment 2 of the Colorado constitution, which barred localities from enacting civil rights protections on the basis of sexual orientation,

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[1] California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington.

[2] Indiana, Pennsylvania, West Virginia, and Wyoming.

[3] Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.

[4] 133 S.Ct. 2675 (2013).

[5] The Fifth Amendment applies to the federal government while the Fourteenth Amendment applies to the states. In *Bolling v. Sharpe* (347 U.S. 497 [1954]), the Supreme Court interpreted the Fifth Amendment's Due Process Clause to include an equal protection element. In *Buckley v. Valeo* (424 U.S. 1, 93 [1976]), the Court stated that "[e]qual protection analysis in the Fifth Amendment area, is the same as that under the Fourteenth Amendment."

[6] U.S. Const. amend. XIV, §1.

[7] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

violated the Equal Protection Clause.[8] According to the Court, the Colorado amendment violated the guarantee of equal protection because the law was motivated strictly by animus and because there was otherwise no rational basis for enacting such a sweeping restriction on the legal rights of gays and lesbians.[9]

Substantive Due Process (Right to Privacy)

The Fourteenth Amendment's Due Process Clause has a substantive component which "provides heightened protection against government interference with certain fundamental rights and liberty interests."[10] Although the Constitution does not specifically mention a fundamental right to privacy, courts recognize this right to encompass interpersonal relations.[11] For example, in *Lawrence v. Texas*,[12] the Court considered a constitutional challenge to a Texas statute that made it a crime for individuals to engage in homosexual sodomy. The Court held that the Fourteenth Amendment's due process privacy protections encompass private, consensual gay sex.[13]

While states have the authority to regulate marriage, this authority is not without limits. In a series of cases, the Court has struck down laws that impermissibly burden an individual's ability to exercise the right to marry.[14] For example, in *Loving v. Virginia*[15] the Court found that Virginia's anti-miscegenation statute violated both the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. The Court held that individuals could not be restricted from exercising their existing right to marry on account of the race of their chosen partner.[16] According to the Court,

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival ... To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the

[8] 517 U.S. 620, 635 (1996).

[9] *Id*. at 634.

[10] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

[11] *Loving v. Virginia*, 338 U.S. 1 (1967). In addition to the freedoms explicitly protected by the Bill of Rights, the "liberty" specifically protected by the Due Process Clause includes the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, id.; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); and to abortion, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

[12] 539 U.S. 558 (2003).

[13] *Id.* at 578 stating that:

> The petitioners are entitled to respect for their private lives. The State cannot demean or control their destiny by making their private sexual conduct a crime. The right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government cannot enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

[14] See e.g., *Zablocki v. Redhail*, 434 U.S. 347 (1978) (invalidating a Wisconsin statute that required any Wisconsin resident to prove compliance with any support obligation for non-custodial children); *Turner v. Safley*, 482 U.S. 78 (1987)(invalidating a Missouri regulation that prohibited inmates from marrying unless the prison superintendent approved of the marriage).

[15] 388 U.S. 1 (1967).

[16] *Id.* at 12.

> principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry may not be restricted by invidious racial discrimination. 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.

United States v. Windsor: The Challenge to the Federal Defense of Marriage Act

In *United States v. Windsor*,[17] a closely divided Court struck down a portion of the federal Defense of Marriage Act (DOMA),[18] finding that it violated the equal protection guarantees of the Fifth Amendment. DOMA was enacted "[t]o define and protect the institution of marriage." Section 2[19] allows all states, territories, possessions, and Indian tribes to refuse to recognize an act of any other jurisdiction that designates a relationship between individuals of the same sex as a marriage.[20] Section 3 had required that, for purposes of federal enactments, marriage would be defined as the union of one man and one woman.[21] As federal agencies grappled with the interplay of DOMA and the distribution of federal marriage-based benefits, questions arose regarding DOMA's constitutionality and the appropriate standard (strict, intermediate, or rational basis) of review to be applied to the statute.

In *Windsor*, the plaintiff and her late spouse were New York residents who had been legally married in Canada and whose same-sex marriage was legally recognized in New York. Because of DOMA, the decedent's estate could not claim the unlimited marital deduction for purposes of the federal estate tax. As a result, the estate owed $363,053 in taxes, which were paid. Ms. Windsor sued, claiming that Section 3 of DOMA violated the equal protection clause of the U.S. Constitution. Using a deferential rational basis review and ordering a refund of the taxes paid, the district court granted the plaintiff's motion for summary judgment holding that DOMA's definitional section was unconstitutional.[22] The lower court's ruling was affirmed on appeal; however, the appellate court determined that intermediate scrutiny was the appropriate level of review to apply to the provision.

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[17] 133 S.Ct. at 2696. Section 2 was not challenged.

[18] P.L. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. §7 and 28 U.S.C. §1738C).

[19] 28 U.S.C. §1738C states:

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

[20] Section 2 was not challenged in *Windsor*.

[21] 1 U.S.C. §7 stated:

> 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 a wife.

[22] *Windsor v. United States*, No. 10 Civ. 8435 (S.D.N.Y. June 6, 2012).

In an opinion authored by Justice Kennedy, the Supreme Court relied on federalism, due process, and equal protection principles. The Court declined to determine whether Section 3 of DOMA is an unconstitutional "intrusion on state power." Instead the Court struck down the section on equal protection grounds using a "closer examination" and rational basis analysis.

In its opinion, the Court examined the historical relationship between the federal and state governments concerning domestic relations. Traditionally, states have maintained exclusive control over defining and regulating marriage. While marriage laws may vary among the states, marriages within a state are treated equally. According to the Court, Section 3 of DOMA runs contrary to this practice. Specifically, the Court noted that "[b]y creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect."[23]

After examining DOMA's history, the Court concluded that "its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married ... "[24] As such, the Court found Section 3 invalid, specifically stating that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[25]

In their respective dissents, Chief Justice Roberts emphasized that the majority opinion only applied to actual marriages;[26] Justice Scalia speculated that the decision would lead to a constitutional right to same-sex marriage;[27] and Justice Alito argued that there is no constitutional right for same-sex couples to marry.[28]

While the Court resolved the question of the constitutionality of a federal definition of marriage excluding same-sex couples, it left unresolved several questions: (1) whether same-sex couples have a fundamental right to marry; (2) whether sexual orientation classifications warrant heightened scrutiny or the more deferential rational basis standard of review; (3) whether a state may prohibit same-sex marriages within its borders; and (4) whether a state may refuse to recognize a same-sex marriage validly contracted outside its borders.

[23] 133 S.Ct. at 2694.

[24] *Id.* at 2693.

[25] *Id.* at 2696.

[26] *Id.* at 2696 (Chief Justice Roberts, dissenting)(stating that [t]he Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," *ante, at* 2692," may continue to utilize the traditional definition of marriage.").

[27] *Id.* at 2710 (Scalia, J., dissenting)(explaining that "the majority arms well every challenger to a state law restricting marriage to its traditional definition" and transposing certain portions of the majority opinion to reveal how it could assist these challengers).

[28] *Id*. at 2714 (Alito, J., dissenting)(stating that "[w]hat Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges.").

Post-*Windsor* Litigation

In the aftermath of the *Windsor* decision, lower federal courts have begun to address the constitutionality of state statutory and constitutional bans on same-sex marriage and recognition of such unions.[29] To date, federal appellate courts in the Fourth,[30] Seventh,[31] and Tenth[32] Circuits as well as several federal district courts[33] have broadly construed *Windsor* and struck down state provisions which prohibit same-sex marriages within their borders. In *Kitchen v. Herbert*,[34] *Bishop v. Smith*,[35] and *Bostic v. Schaefer*,[36] both appellate courts affirmed lower court decisions which found that such bans violate both the equal protection and due process guarantees of the Fourteenth Amendment as they impermissibly infringe on the fundamental right to marry. In *Kitchen*, the court concluded that "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."[37] Relying on a series of "marriage" cases, the appellate courts have taken an expansive view of the fundamental right to marry and found that the right encompasses same-sex unions and the recognition of these unions. While most district courts have used a rational basis review, both appellate courts concluded that strict scrutiny is appropriate as a fundamental right is implicated. Conversely, a federal district court upheld Louisiana's prohibition and non-recognition of same-sex marriage against equal protection and due process challenges. [38]

According to the appellate courts, the fundamental right to marry includes the right to choose a same-sex partner and have that union recognized across state lines.[39] The courts relied on a series of cases in which the Supreme Court struck down laws that prohibited interracial marriage,[40] marriage of individuals owing child support,[41] and marriage of prison inmates.[42] Both circuit

[29] *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, *1, *16 (C.A. 10 (Utah)) (stating "we agree with the multiple district courts that have held that the fundamental right to marry necessarily includes the right to remain married.").

[30] *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (C.A.4 (Va.)), *1, *13.

[31] *Baskin v. Brogan*, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 WL 4359059 (C.A.7 (Ind.)), *1 (covering challenges to Indiana and Wisconsin bans).

[32] *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, *1, *16 (C.A. 10 (Utah)); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (C.A. 10 (Okla.)).

[33] *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *1 (D. Utah, December 23, 2013); *Bishop v. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *1 (N.D. Okla., January 14, 2014); *Bostic v. Rainey*, Civil No. 2:13cv 395, 2014 WL 561978, at *1 (E.D. Va., February 13, 2014); *Deboer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *1 (E.D. Mich., March 21, 2014); *Latta v. Otter*, 2014 WL 1909999, at *1 (D. Idaho 2014); *Geiger v. Kitzhaber*, 2014 WL 2054264, at *1 (D. Or. May 19, 2014); *Wolf v. Walker*, 2014 WL 2558444 (W.D. Wis., June 6, 2014); *De Leon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex., 2014).

[34] No. 13-4178, 2014 WL 2868044, *1, *1 (C.A. 10 (Utah)).

[35] Nos. 14-5003, 14-5006, 2014 WL 3537847 (C.A. 10 (Okla.)).

[36] Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (C.A.4 (Va.)).

[37] *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, *1, *1 (C.A. 10 (Utah)); see also, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (C.A.4 (Va.)), *1, *1; *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (C.A. 10 (Okla.)).

[38] *Robicheaux v. Caldwell*, Nos. 13-5090, 14-97, 14-327, 2014 WL 4347099, *1, *1 (E.D. La. September 3, 2014).

[39] CF, *Borman v. Plyes-Borman*, No.2014CV36 located at http://sblog.s3.amazonaws.com/wp-content/uploads/2014/08/complete-copy-Tennessee-ruling.pdf (last visited August 14, 2014). Tennessee state court finding that the state's Anti-Recognition Law does not violate equal protection using a rational basis analysis.

[40] *Loving v. Virginia*, 388 U.S. 1 (1967).

[41] *Zablocki v. Redhail*, 434 U.S. 347 (1978)(invalidating a Wisconsin statute requiring any Wisconsin resident to prove compliance with any support obligation for non-custodial children).

courts have determined that these cases demonstrate a broad right to marry "not circumscribed based on the characteristics of the individuals seeking to exercise that right."[43] The courts noted that the *Loving* Court did not create a new right to interracial marriage, but instead considered it to be a subset of "marriage." Accordingly, it follows that same-sex marriage is similarly included within the fundamental right to marry. According to the Fourth Circuit, these cases support the notion that the right to marry is a matter of an individual's freedom of choice.[44]

Both appellate courts applied strict scrutiny as the standard of review for equal protection and due process analysis, which requires the state to demonstrate that its classification is narrowly tailored to serve a compelling interest.[45] The states advanced several justifications including responsible procreation, optimal child-rearing, and civil strife. The courts rejected the states' justifications as they were mostly predicated on a link between marriage and procreation.[46] In essence, the court found the bans under inclusive as procreation is not a prerequisite to marriage for opposite-sex couples. As to the "civic strife" justification, the court in *Kitchen* noted that Supreme Court precedent has "repeatedly held that public opposition cannot provide cover for a violation of fundamental rights."[47] For these reasons, the appellate courts found that the bans violated both the equal protection and due process guarantees of the Fourteenth Amendment.

While the Seventh Circuit also struck down same-sex marriage bans before it in *Baskin v. Bogan*,[48] it took a different approach. The court declined to address the due process challenge and whether the fundamental right to marry encompasses same-sex unions. Instead, it focused on the equal protection challenge. In determining the appropriate level of review, the court found that "homosexuals are among the most stigmatized, misunderstood, and discriminated against minorities...."[49] Therefore, the court concluded that those individuals who seek to enter into a same-sex marriage are part of a quasi-suspect class requiring the government to advance a sufficiently persuasive justification for discrimination. The court found unpersuasive the proffered reasons for the bans: child welfare, preservation of traditional marriage, and procreation.[50] Moreover, the court noted that the "discrimination against same-sex couples is

(...continued)

[42] *Turner v. Safley*, 482 U.S. 78 (1987)(invalidating a Missouri regulation prohibiting inmates from marrying without the prison superintendent's approval).

[43] *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (C.A.4 (Va.)), *1, *13.

[44] CF, *Robicheaux v. Caldwell*, Nos. 13-5090, 14-97, 14-327, 2014 WL 4347099, *1, fn 13 (E.D. La. September 3, 2014)(distinguishing listed cases).

[45] *Id.* at *6 - *8 (E.D. La. September 3, 2014)(upholding Louisiana's prohibition and non-recognition of same-sex marriage using a rational basis analysis as the relevant provisions do not implicate the fundamental right to marry).

[46] *Id.* at *8 (stating that "Louisiana has a legitimate interest...whether obsolete in the opinion of some, or not, in the opinion of other ... in linking children to an intact family formed by their two biological parents, as specifically underscored by Justice Kennedy in *Windsor*.").

[47] *Kitchen v. Herbert*, 2014 WL 2868044, at *30.

[48] Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 WL 4359059 (C.A.7 (Ind.)), *1 (covering challenges to Indiana and Wisconsin bans).

[49] *Id* at*1, *5.

[50] *Id.* (stating that "[t]he challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously."); *see also, Latta v. Otter*, No. 14-35420, 2014 WL 4977682, *1, *1 (C.A. 9 (Idaho)) (finding that states' (Idaho and Nevada) bans on same-sex marriage fail to further any legitimate purpose, unjustifiably discriminate on the basis of sexual orientation, and are in violation of the Equal Protection Clause).

irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny...."[51]

Implications

A state's recognition of same-sex marriage implicates a myriad of benefits, rights, and responsibilities on both the federal and state levels. For example, for federal programs under the Social Security Administration's (SSA's) purview (Social Security, Medicare, and Supplemental Security Income), the agency generally defers to a state's definition of marriage. SSA guidance now allows for the payment of Social Security spousal benefits when the number holder (1) was married in a state that permits same-sex marriage; and (2) is domiciled (at the time of application, or while the claim is pending a final determination) in a state that recognizes same-sex marriage. On the state level, there may be tax implications as same-sex couples would be able to file a joint state tax return to match their federal return,[52] as well as implications for the holding, transfer, and inheritance of property.

Conclusion

The Supreme Court has not expressly resolved the issue of the constitutionality of state prohibitions or non-recognition of same-sex marriages. However, rulings in *Loving*, *Romer*, *Lawrence*, and *Windsor* appear to call into question the constitutionality of such prohibitions. Collectively, these cases prohibit states from passing laws based on animus toward gays and lesbians, extend constitutional protection to sexual choices of homosexuals, and prohibit the federal government from treating opposite-sex and same-sex marriages differently. Lower federal courts that have addressed the issue of state prohibitions on same-sex marriage have unanimously concluded that such bans violate equal protection and due process principles. While these courts recognize a state's power to regulate marriage, such regulation must comport with an individual's constitutional rights. These courts have rejected states' asserted governmental interests and instead found them not rationally related to the states' prohibitions of same-sex marriage. Two appellate courts have broadly interpreted the fundamental right to marriage to encompass same-sex marriages and the recognition of such unions. These courts concluded that the right to marry is a matter of an individual's freedom of choice. Rulings requiring states to recognize same-sex marriages entered in other states would apparently supercede and call into question the validity of Section 2 of DOMA, which permits the non-recognition of such unions. Additional rulings from the courts, including the Supreme Court, may be forthcoming before the validity of these state bans is definitively resolved.

[51] *Id.*

[52] CRS Report R43157, *The Potential Federal Tax Implications of United States v. Windsor (Striking Section 3 of the Defense of Marriage Act (DOMA)): Selected Issues*, by Margot L. Crandall-Hollick, Molly F. Sherlock, and Carol A. Pettit.

Author Contact Information

Alison M. Smith
Legislative Attorney
amsmith@crs.loc.gov, 7-6054