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

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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 constitutional.

In the aftermath of the *Windsor* decision, lower courts have begun to address the constitutionality of state statutory and constitutional bans on same-sex marriage. To date, federal district courts in Utah, Oklahoma, Virginia, Michigan, and Texas have broadly interpreted *Windsor* and struck down provisions which prohibit same-sex marriages within their borders. The courts noted that while states have the power to regulate marriage within their borders, such regulation must respect individual constitutional rights. These courts have concluded that such bans violate equal protection. However, as in *Windsor*, these courts have declined to use heightened scrutiny and instead concluded that bans on same-sex marriage fail even under the most deferential rational basis level of review. The courts in Utah, Virginia, and Texas went a step further and concluded that the fundamental right to marry encompasses same-sex marriage and that state laws interfering with this right are subject to the strictest judicial scrutiny.

Courts have taken different approaches as to the issue of whether a state is bound to recognize a same-sex marriage validly entered in other jurisdictions. The rulings in Utah, Virginia, and Texas encompass the issue of non-recognition. Federal district courts in Ohio and Kentucky have specifically found non-recognition provisions facially unconstitutional as they violate both due process and equal protection guarantees. While the Ohio and Kentucky decisions are limited to the constitutionality of non-recognition provisions, both contain language which may suggest that the states' prohibitions on performing same-sex marriages within their borders may not survive constitutional scrutiny.

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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 person 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 courts have begun to address the constitutionality of state statutory and constitutional bans on same-sex marriage. To date, federal district courts in Utah,[29] Oklahoma,[30] Virginia,[31] Michigan,[32] and Texas[33] have broadly interpreted *Windsor* and struck down provisions which prohibit same-sex marriages within their borders. These courts have concluded that such bans violate equal protection. However, none have applied heightened scrutiny (currently reserved for judicial review of classifications based on quasi-suspect classes, namely, gender[34] or illegitimacy[35]) in making such determinations, finding instead that such bans fail the most deferential standard of review (rational basis). Building on *Windsor's* and *Loving's* due process findings, the Utah, Virginia, and Texas district courts have concluded that there is a fundamental right to same-sex marriage and that state laws interfering with this right are subject to the strictest judicial scrutiny.

In *Kitchen v. Herbert*,[36] the court found that the reasoning in *Windsor* compelled it to conclude that Amendment 3, which amended the Utah state constitution to bar gay marriage,[37] violated both the Due Process and Equal Protection Clauses of the Constitution. In reaching its decision, the district court concluded that *Windsor's* protection of the rights of gay individuals is "highly relevant," as are a number of other Supreme Court rulings that have struck down laws that target such individuals.

According to the court, the fundamental right to marry includes a right to choose a same-sex marriage partner. Relying on *Loving*, the court concluded that the plaintiffs were not seeking a new fundamental right to marry, but access to an existing one. Rejecting Utah's justifications for enacting Amendment 3 as insufficiently compelling,[38] the court concluded, "All citizens, regardless of their sexual identity, have a fundamental right to liberty and this right protects an individual's ability to marry ... "[39] The district court noted that the *Loving* Court did not create a new right to interracial marriage, but instead considered it to be a subset of "marriage." According to the court, it follows that same-sex marriage is similarly included within the fundamental right to marry.

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[29] *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *1 (D. Utah, December 23, 2013).

[30] *Bishop v. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *1 (N.D. Okla., January 14, 2014).

[31] *Bostic v. Rainey*, Civil No. 2:13cv 395, 2014 WL 561978, at *1 (E.D. Va., February 13, 2014).

[32] *Deboer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *1 (E.D. Mich., March 21, 2014).

[33] *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex., February 26, 2014).

[34] *Miss. Univ. for Women v. Hogan*, 458 U.S. 712 (1982)(applying intermediate scrutiny to classification based on gender); *Craig v. Boren*, 429 U.S. 190 (1976)(same).

[35] *Nguyen v. Ins.*, 533 U.S. 53 (2001)(applying intermediate scrutiny to classification based on illegitimacy); *Clark v. Jeter*, 486 U.S. 456 (1988)(same); *Caban v. Mohammed*, 441 U.S. 380 (1979)(same).

[36] 2013 WL 6697874, at *1.

[37] UTAH CONST. Art. I 29 states:

> Marriage consists only of the legal union between a man and a woman. No other domestic status or union, however denominated, between persons is valid or recognized or may be authorized, sanctioned or given the same or substantially equivalent legal effect as a marriage.

[38] The court noted that "the State of Utah has not demonstrated a rational, much less compelling, reason why the Plaintiffs should be denied their right to marry." Id. at *18.

[39] 2013 WL 6697874, at *1, *18.

Notably, the *Kitchen* court did not end its analysis there. Instead, the court also examined whether Amendment 3 violated the Equal Protection Clause. In conducting its analysis, the court found it unnecessary to apply heightened scrutiny.[40] Instead, it concluded that Amendment 3 failed under a rational basis review.[41] The court found that the state's governmental interests of responsible procreation, optimal child-rearing, and preservation of the traditional definition of marriage are not rationally related to the state's prohibition of same-sex marriage.[42]

Similarly, district courts in Oklahoma, Virginia, Texas, and Michigan have found that state constitutional bans violated due process and equal protection principles. In *Bishop v. United States*,[43] an Oklahoma district court found that similar justifications were not rationally related to the state constitutional prohibition on same-sex marriage.[44] Instead, the court found Part A of the state constitutional amendment[45] "an arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit."[46] In *Bostic v. Rainey*, the Virginia court also found the proffered justifications insufficient. As in *Kitchen*, the *Bostic* court found marriage to be a fundamental right. The court noted that while states have the power to regulate marriage within their borders, such regulation must respect individual constitutional rights.[47]

In *Deboer v. Snyder*,[48] the Michigan court conducted a trial in which both sides presented testimony regarding the impact same-sex parental relationships have on children. The court concluded that the evidence "convincingly shows that children of same-sex couples do just as well in school as the children of heterosexual married couples, and that same-sex couples are just as stable as heterosexual couples."[49] The court found the ban violates equal protection principles inasmuch as it does not "advance any conceivable legitimate state interest."[50]

In granting plaintiffs' motion for preliminary injunction, a Texas district court followed similar reasoning to find that Texas's prohibition conflicts with the Constitution's equal protection and due process guarantees. According to the court, "Texas' current marriage laws deny homosexual couples the right to marry, and in doing so, demean their dignity for no legitimate reason."[51]

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[40] The *Kitchen* court contended that it was bound by Tenth Circuit precedent, which applies only rational basis review to classifications based on sexual orientation. Id. at *20.

[41] Id. at *19.

[42] Id. at *25.

[43] The DOMA challenges were dismissed. The court found that the plaintiffs' claim regarding Section 3 was moot. Also, the court found that plaintiffs lacked standing to challenge Section 2 of DOMA.

[44] 2014 WL 116013, at *1.

[45] Part A of the Oklahoma constitutional amendment reads in relevant part that marriage "shall consist only of the union of one man and one woman." Part B is the non-recognition provision which provides that same-sex marriages performed elsewhere "shall not be recognized as valid and binding."

[46] Id. at *33.

[47] Id. at *15; *see, Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)(stating that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

[48] No. 12-CV-10285, 2014 WL 1100794, at *1 (E.D. Mich., March 21, 2014).

[49] Id. at *4.

[50] Id. at *10.

[51] No.SA-13-CA-00982-OLG, 2014 WL 715741, *1 (W.D. Tex., February 26, 2014).

However, it should be noted that all decisions have been stayed until the appellate process is concluded.

Courts have also grappled with the issue of whether a state is bound to recognize same-sex marriages validly entered in other jurisdictions. The rulings in Utah, Virginia, and Texas encompass the issue of recognition. Courts in Ohio,[52] Illinois,[53] and Tennessee[54] have issued limited "as applied"[55] rulings finding non-recognition provisions unconstitutional. Courts in Ohio[56] and Kentucky[57] have issued broader rulings finding such provisions facially[58] unconstitutional. In *Henry v. Himes* a federal district court in Ohio found the state's non-recognition provisions violated equal protection and due process guarantees. Expanding on an earlier decision striking down Ohio's ban on recognizing out-of-state marriages as it applies to state birth certification, *Himes* the court stated:

> Ohio's refusal to recognize same-sex marriage performed in other jurisdictions violates the substantive due process rights of the parties to those marriages because it deprives them of their rights to marry, to remain married, and to effectively parent their children, absent a sufficient articulated state interest for doing so.[59]

In its due process analysis, the court noted that marriage recognition is not a fundamental right warranting strict scrutiny. It concluded that intermediate scrutiny is appropriate in instances where the state intrudes into and seeks to erase "already-established marital and family relations."[60]

Similarly, a federal district court found Kentucky's refusal to recognize such unions unconstitutional.[61] Following the rulings in Utah, Oklahoma, and Texas, the court found that the purported legitimate interest of preservation of the institution was not rationally related to the challenged law.[62] In addition, the Kentucky opinion suggests that the state's prohibition on performing same-sex marriages within its border may not survive constitutional scrutiny.

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[52] *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 997 (S.D. Ohio 2013)(ruling that state's non-recognition provision violates due process and equal protection guarantees). This decision is limited to the recognition of valid out of state marriages on Ohio death certificates.

[53] *Lee v. Orr*, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014)(declaring state's celebration ban unconstitutional on equal protection grounds). This decision is limited to Cook County.

[54] *Tanco v. Haslam*, 2014 Wl 997525, at *6, 9 (M.D. Tenn. Mar. 14, 2014)(enjoining enforcement as to plaintiffs' enforcement of Tennessee anti-recognition provisions on equal protection grounds).

[55] An "as applied challenge" to the constitutionality of a law limits the relief to the particular circumstances of the plaintiff. *Obergeefell v. Wymyslo*, 962 F. Supp.2d 976.

[56] *Henry v. Himes*, Case No. 1:14-cv-129, slip op (stating that "[t]he Court's analysis in *Obergefell* controls here, and compels not only the conclusion that the marriage recognition ban is unenforceable in the birth certificate context, but that it is facially unconstitutional and unenforceable in any context whatsoever.").

[57] Id. at *1, *7.

[58] A "facial challenge" to the constitutionality of a law generally seeks to declare or enjoin a law as unconstitutional in all respects. *Obergeefell v. Wymyslo*, 962 F. Supp.2d 976.

[59] Id. at 27.

[60] Id. at 21 (quoting *Obergefell v. Wymyslo*, 962 F. Supp. 2d at 979).

[61] *Bourke v. Beshear*, No. 3:13-CV-750-H (W.D. Ky. February 12, 2014). The plaintiffs advanced several constitutional theories including failure to recognize valid public records of other states in violation of the Full Faith and Credit Clause of Article IV, Section 1. However, the court concluded that the Equal Protection Clause provided the "most appropriate analytical framework." Id. at *3.

[62] Id. at *1, *7.

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.

# 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) 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,[63] 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 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. Additional rulings from the courts, including perhaps the Supreme Court, will likely be forthcoming before the validity of these state bans is definitively resolved.

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[63] 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.