"'Til Death": A Fight to the Death?

Samuel Brooks

Writer's Comment: *I took the legal writing course, UWP 104B, both to complete my writing requirement and to prepare for my upcoming entrance into law school. The course culminated in a research paper on a legal topic of my choice. I have been interested in the same-sex marriage controversy for years. I campaigned in 2000 for California's Proposition 22, which defined marriage as only between a man and a woman, on religious and moral grounds. More recently, however, I have been more interested in the legal questions surrounding the issue. Does the government have the right to dictate who can marry whom? If so, how far does that right extend and how do we know where to draw the line? Despite my own moral views, I wanted to remove myself from the moralistic, sensational, and volatile feelings that exist on both sides of the controversy and view the problem dispassionately. My conclusions surprised me, indicating that I actually learned something. Enjoy.*

—Samuel Brooks

Instructor's Comment: *For this assignment I allowed the students in UWP 104B to choose a topic that was either of personal interest or of significance in any professional field of their choice and asked them to write a research paper showing the effects of the law on their chosen issue and arguing for any changes in the law they would like to see. Since legal research is not a requirement for 104B, I provided support and instruction as needed in obtaining and citing relevant legal materials. I want the students in this course to discover whether they would truly like to go on to law school, and even if not, to learn how to inform themselves of the law and make a disciplined argument on an issue of importance to themselves as citizens or professionals. Sam tackled all of these tasks with verve and aplomb. He did a great deal of the research himself, and I was pleased to watch this paper evolve as he struggled to reconcile the state of the law with his own opinions on this complex and controversial topic.*

—Jean Thaiss, University Writing Program

I. Introduction

In March and April of 2001, seven couples submitted intentions to marry with the Massachusetts Department of Public Health in order to obtain marriage licenses. Each couple was denied a license because they were of the same sex. The couples filed suit in the Superior Court of Massachusetts, claiming that the department's refusal to grant a marriage license violated their rights under the law. The Superior Court ruled in favor of the Department, reasoning that Massachusetts law could not be interpreted to allow same-sex marriage and that the Massachusetts Constitution did not guarantee the right to marry an individual of the same sex.[1] However, on appeal, the Supreme Court of Massachusetts found no "constitutionally adequate reason for denying civil marriage to same-sex couples."[2] Currently, Massachusetts remains the only state in which same-sex relationships may obtain official legal recognition in the form of marriage.[3]

Same-sex marriage represents one of today's most controversial legal issues. Most opponents of same-sex marriage focus on the perceived threat to "traditional values." While this concern may be legitimate, perhaps more important are the far-reaching consequences that any resolution could have for the way our government works. At least two legal issues pertain to this controversy. Perhaps the most obvious one has to do with equality: Does prohibiting same-sex marriage violate the Equal Protection Clause of the Fourteenth Amendment? We must also ask whether the state has the right to regulate the marriage institution at all. Based on Supreme Court precedent, discussed *infra,* prohibition of same-sex marriage would violate the Equal Protection Clause if the right to marry whom one chooses constitutes a fundamental right guaranteed by the Constitution. On the other hand, Supreme Court precedent also affirms the states' right to regulate marriage so long as such regulation clearly promotes a compelling state interest. This brings up another

[1] *Goodridge v. Dep't of Pub. Health,* 14 Mass. L. Rep. 591 (2002).

[2] *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 312; 798 N.E.2d 941, 948 (2003).

[3] While Massachussetts is the only state that recognizes same-sex "marriage" currently, several states, including California, Vermont, Hawaii, and New Jersey do grant legal status to same-sex unions that substantively provide the same civil benefits as marriage.

important question: Does restricting marriage to heterosexual couples actually promote a fundamental state interest?

In investigating each question, we must first discuss the current law as it pertains to marriage, the different governmental bodies that can decide the issue, and judicial history that might inform us as to how the controversy will be resolved. With these factors in mind, we can predict the most likely outcome of the controversy. I will argue that, regardless of the eventual solution, the states should retain their right to regulate marriage because limiting the states' power in this area would severely undermine the effectiveness of our system of government.

II. Current Law

Civil marriage in the United States is unique due to the federal nature of American government. Marriages are contracted at the state level, but are generally valid in every state unless deemed to violate the "public policy" of a particular state.[4] However, since marital status can affect an individual's benefits on the federal level, the federal government also regulates marriage to some extent. Traditionally, regulation of marriage has dealt mostly with issues such as age, consanguinity, bigamy or polygamy, and even interracial marriage. Not until the nineties did states begin to address the issue of same-sex marriage. The marriage institution had always just been assumed to apply only to a man and a woman. In 1996, Congress passed the Defense of Marriage Act ("DOMA"),[5] which, for the purposes of "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," defines the word "marriage" as "a legal union between one man and one woman as husband and wife," and defines the word "spouse" as "only . . . a person of the opposite sex who is a husband or a wife."[6] DOMA also relieves any state of the obligation to recognize same-sex marriages legally contracted in another state.[7]

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[4]See Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 Am. J. Comp. L. 257 (2006).

[5]Pub. L. 104-199, 110 Stat. 2419, codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000).

[6]1 U.S.C. § 7 (2000).

[7]28 U.S.C. § 1738C (2000).

At first glance it would seem that this federal law should resolve the controversy, but upon closer inspection it apparently does not. The federal government's definition of marriage applies only to acts of Congress, not to the acts of any state. Since civil marriages are contracted at the state level, a state like Massachusetts that decides to legalize same-sex marriage cannot be overridden by the federal DOMA, except insofar as these marriages conflict with a legitimate federal policy. This act may allow the government to refuse to recognize same-sex marriages as they apply to federal benefits, rights, or privileges, such as joint filing of a federal tax return, but it cannot nullify them.

With that said, many states have made their definition of marriage explicit. At the time of this writing, forty states ban gay marriage either by statute or by constitutional amendment.[8] These definitions have been created by way of popular propositions as well as by action in state legislatures. In California, for instance, Proposition 22 added the words, "Only marriage between a man and a woman is valid or recognized in California," to the California Family Code.[9]

Currently, Massachusetts is the only state that will perform same-sex marriages. As noted in the introduction, this came as a result of *Goodridge v. Dep't of Pub. Health*, *supra,*[10] which held bans on same-sex marriage to be in violation of the equal protection provided by the Massachusetts State Constitution. Some would argue that the Full Faith and Credit clause of the U.S. Constitution, which requires states to "give full recognition to the public acts and records of each other state,"[11] dictates that every state must recognize a valid same-sex marriage contracted in Massachusetts. Both the federal DOMA and Massachusetts law itself, however, limit the right to invoke this constitutional constraint.[12] Nevertheless, the argu-

[8]Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?* 14 Am. U. J. Gender Soc. Pol'y & L. 256 (2006).

[9]Cal. Fam. Code § 308.5 (2004). Nevertheless, California does recognize registered domestic partnerships, which provide same-sex couples with significant civil benefits.

[10]See note 2.

[11]U.S. Const. art. IV, § 1.

[12]M.G.L.A. ch. 207 § 11 (1998) forbids any marriage "contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction…."

ment still carries some force. Consider the practical problems families would face if they moved from the state they were married in to a state that refused to recognize their marriages. The Supreme Court would probably not have too much trouble ruling this provision in DOMA unconstitutional.[13]

III. How the Issue Will Be Decided

In his article, *Who Decides and What Difference Does It Make?: Defining Marriage in "Our Democratic, Federal Republic,"* Kevin Worthen identifies six avenues for the resolution of the gay marriage issue, each having different consequences.[14] As previously noted, this issue can be addressed on either the state or federal level, either in the courts or in the legislatures. Legislative action could take the form of either statutes or constitutional amendments.

Worthen argues in favor of constitutional amendments at the state level, citing the risk of alienating a significant group of people were the federal government to decide the issue.[15] Leaving the decision to the states would allow those who were unhappy with their state's constitution to move to a state whose laws accord with their preferences.[16] He cautions against using statutory or judicial means as a solution because of the threat those methods pose to our democratic system of government.[17] Any statute is subject to review by the judiciary, which could leave the resolution of an extremely important issue to an unelected, and practically unassailable, government body, potentially alienating a majority of Americans.[18]

Worthen is correct in arguing that, ideally, the issue should be resolved at the state level. If the right to regulate marriage falls under the

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[13]See, e.g., Emily Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power under the Full Faith and Credit Clause*, 38 Creighton L. Rev. 507 (2005).

[14]Kevin Worthen, *Who Decides and What Difference Does it Make?: Defining Marriage in "Our Democratic, Federal Republic,"* 18 BYU J. Pub. L. 273, 274 (2004).

[15]*Id.* at 291.

[16]*Id.* at 303.

[17]*Id.* at 292.

[18]*Id.*

police power of the states guaranteed in the Tenth Amendment,[19] then those states which sanction gay marriage could allow it and those who shun gay marriage could ban it. Both same-sex couples and traditionalists can feel satisfied with the compromise. However, this solution would require the Supreme Court to maintain some very important, but not necessarily secure, doctrines. First, the Supreme Court would have to reverse its central holding in *Loving v. Virginia,* discussed *infra,* that freedom to marry constitutes a fundamental right. Secondly, the Supreme Court would have to uphold the provision of DOMA that allows states to refuse to recognize other states' same-sex marriages.

So, while it might be ideal for each state to decide whether or not to legalize same-sex marriage, it may be necessary for the issue to find resolution at the federal level, either by constitutional amendment, or by the Supreme Court. Given the difficulty of passing a constitutional amendment, particularly in regard to such a divisive issue, it seems most likely that the Supreme Court will eventually have the last word.

IV. Relevant Judicial Precedent

The strongest argument for legalizing same-sex marriage rides on the equal protection clause of the Fourteenth Amendment. Not surprisingly, the Supreme Court decisions that have set the stage for this issue revolve around equal protection. The most relevant cases for the gay marriage issue are *Loving v. Virginia*, *Romer v. Evans*, and *Lawrence v. Texas,* each discussed *infra*. However, *Reynolds v. United States, infra,* offers an alternative way of looking at the controversy; it deals, not with equal protection, but rather with the State's right to regulate the actions of its citizens.

Loving v. Virginia

Loving v. Virginia[20] involved a white man and a black woman who, in 1958, married in Washington D.C. and then returned to Virginia, where it was illegal for a white person to marry anyone of a different race. The Lovings pled guilty to charges of miscegenation but moved to vacate the sentences because of the unconstitutionality of the law. The Supreme

[19]U.S. Const. amend. X.

[20]388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed.2d 1010 (1967).

Court, in a nearly unanimous opinion, ruled that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the equal protection clause."[21] Furthermore, the Court identified freedom to marry as "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[22]

The extent to which the equal protection precedent from *Loving v. Virginia* applies to the same-sex marriage issue depends on how the Supreme Court views homosexuality. Anti-miscegenation laws were found unconstitutional, not because they restricted who could marry, but because they arbitrarily restricted rights "solely because of racial classifications."[23] The Court could take a narrow reading of *Loving*, in which case the precedent in *Loving* would extend to same-sex marriage only so far as homosexuality resembles race. For instance, if the court considers sexual orientation, like race, to be biologically determined, then the precedent would apply. If, however, the court considers sexual orientation to be a choice, then perhaps it wouldn't. While the Court could go either way in its reading of *Loving*, *Loving* is not the only case that could influence its perspective. A look at *Romer v. Evans* can further inform us as to how the Court views homosexuals.

Romer v. Evans

In *Romer v. Evans*, [24] the Supreme Court considered a Colorado state constitutional amendment that forbade granting homosexuals status as a minority group, protected from discrimination. The amendment effectively repealed existing laws that protected individuals from discrimination based on sexual orientation.[25] The Court ruled the amendment invalid because it violated the equal protection clause of the Fourteenth Amendment.[26] The Court reasoned that the amendment placed homosexuals in a "solitary class" and removed legal protection from homosexuals but no others.[27] In effect, the Court granted homosexuals status

[21] *Id.,* 388 U.S. at 12.

[22] *Id.* at 12.

[23] *Id.*

[24] 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed.2d 855 (1996).

[25] Generally, these were municipal ordinances banning discrimination in housing, employment, health services and the like. *Id.,* 517 U.S. at 624.

[26] *Id.* at 635.

[27] *Id.* at 627.

as a protected class under the Equal Protection Clause. If the law protects homosexuals from discrimination in a way similar to the protection given to racial minorities, then the same-sex marriage issue would closely resemble the issue in *Loving*. However, the Court has not yet made clear what level of review is applicable to this new suspect category, whether the highest level applicable to categories based on race, the intermediate level of review applied to gender classifications, or something else.[28]

Lawrence v. Texas

Lawrence v. Texas[29] is arguably the most important case for predicting a resolution of the same-sex marriage controversy. Indeed, the Massachusetts Supreme Court in large part based its decision in *Goodridge* on the rule established in *Lawrence*.[30] This rule requires the state to show a legitimate interest in regulating private, consensual sexual behavior—something the Texas anti-sodomy law could not demonstrate.[31] In *Lawrence*, the U.S. Supreme Court held that this law violated the equal protection and due process clauses of the Fourteenth Amendment.[32]

In regards to the current controversy, *Lawrence* essentially nullifies the argument that states can ban same-sex marriage simply because a majority sees it as immoral:

> The fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; for example, neither history nor tradition could save a law prohibiting miscegenation from attack under the Federal Constitution. In reviewing such a law, the United States Supreme Court's obligation is to define the liberty of all, not to mandate the court's own moral code. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own

[28]See Jeremy B. Smith, Note: *The Flaws Of Rational Basis With Bite: Why The Supreme Court Should Acknowledge Its Application Of Heightened Scrutiny To Classifications Based On Sexual Orientation*, 73 Fordham L. Rev. 2769 (2005).

[29]539 U.S. 558, 123 S.Ct. 2472, 156 L. Ed.2d 508 (2003).

[30]*Goodridge v. Dep't Pub. Health*, 440 Mass. at 312–13.

[31]*Lawrence v. Texas*, 539 U.S. at 567.

[32]*Id.* at 575.

> moral code." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 850, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992).[33]

Furthermore, the Court foreshadowed a possible application of its decision to the marriage controversy by indirectly comparing the case at hand to *Loving v. Virginia*. The rule in *Lawrence* would seem to extend to the marriage controversy unless states could justify prohibiting same-sex marriage as a furtherance of a compelling state interest—something the state could not prove in *Loving v. Virginia*.

Reynolds v. United States

In spite of the judicial trend represented by *Loving*, *Romer*, and *Lawrence*, the Court could still legitimately uphold bans on same-sex marriage by following the reasoning of *Reynolds v. United States*.[34] In this case, the Supreme Court upheld laws that prohibited polygamy in spite of the defendant's claim that the law infringed on his freedom to practice his religion. The Court reasoned, "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law."[35] This reasoning affirms the states' right to regulate marriage. Furthermore, the Court asserted, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[36] While *Lawrence* established the rule that the government cannot regulate personal decisions regarding sexuality, it did not mandate that the state must officially approve of that behavior by granting the right to marry. The precedent from *Reynolds* naturally extends to regulation of incestuous marriages as well, which most states currently prohibit.

While legalizing polygamy or, for that matter, incestuous marriage is not a salient issue like same-sex marriage, in principle the issues are closely related. If the court were to rule that states must allow same-sex marriage, would that mean they must also allow polygamous or incestuous marriages? From a constitutional standpoint, such a ruling would have that consequence. Banning polygamy or incest does not further any fundamental state interest any more than banning same-sex mar-

[33] *Id.* at 571.
[34] 98 U.S. 145, 25 L. Ed. 244 (1878).
[35] 98 U.S. at 165.
[36] *Id.* at 166.

riage does, particularly since *Lawrence* prevents states from criminalizing any kind of private, consensual sexual intimacy—even between family members or multiple partners. Unless the Supreme Court is prepared to legalize polygamy and incestuous marriage, it may want to reconsider legalizing same-sex marriage.

Some might argue that *Reynolds* should not apply to the same-sex marriage issue because polygamists have never enjoyed the protected minority group status that *Romer* granted to homosexuals. However, the reasoning in *Romer* could easily extend to both polygamists and those who practice incest. According to this reasoning, the state and its agencies cannot discriminate against a person based on their private "conduct, practices, or relationships."[37] Also, the Court found the Colorado constitutional amendment denying homosexuals protection from discrimination invalid because it sought to harm a politically unpopular group and no others.[38] If polygamists or those who practice incest were to sue for protection from discrimination, then the state could not deny it simply because they were politically unpopular. It could be argued that polygamists should not receive protection because polygamy is illegal. However, if the state cannot issue an individual a license to marry more than one person at a time, then polygamous "marriages" could never legally occur in the first place. While polygamists may view themselves as married, the state does not legally recognize the unions, so as far as the state is concerned, the relationships do not actually violate the law.

V. Likely Result

If the Supreme Court follows the reasoning used in *Loving v. Virginia*, *Romer v. Evans*, and *Lawrence v. Texas*, it will probably rule laws that ban same-sex marriage unconstitutional on the grounds of equal protection and due process. However, the make-up of the Supreme Court has changed significantly since these decisions were made, and a new, more ideologically conservative, majority may depart from earlier courts' reasoning. Perhaps the more conservative character of the Court explains why the issue has not yet come up. On the one hand, proponents of gay marriage may recognize that the court will not side with them despite the precedents set by *Loving*, *Romer*, and *Lawrence* and are waiting for

[37] *Romer v. Evans,* 517 U.S. at 624.
[38] *Id.* at 627, 635.

the right moment to tackle the issue. On the other hand, the Court may avoid granting certiorari on this issue if it knows a majority decision would involve departing from a trend that focuses on Fourteenth Amendment protections.

If the court favors upholding bans on same-sex marriage, it would have to shift the attention from equal protection and due process and focus on the states' police powers. This move, however, would require the court to demonstrate a legitimate state interest in prohibiting same-sex marriage. The argument put forward by opponents of same-sex marriage is that homosexuality is immoral and the Tenth Amendment to the Constitution gives states the right to make laws that preserve good morals.[39] However, *Lawrence v. Texas* explicitly forbids government from mandating a moral code,[40] so the argument that denying homosexuals the right to marry preserves morality cannot stand. If opponents of gay marriage argue that heterosexual marriage promotes the state interest of procreation and raising children, they must then explain why states allow homosexuals and non-married couples or individuals to adopt children or beget children by non-coital methods. The traditional purpose of marriage as the only legitimate place for sexual relationships and for families has eroded enough that it would be difficult to argue that prohibiting same-sex marriage furthers a state interest. If the Supreme Court wants to be consistent, the most likely decision would result in a ruling that finds laws prohibiting same-sex marriage in violation of the Fourteenth Amendment.

VI. The Ideal Outcome

It seems like the Supreme Court is on a one-way track to legalizing gay marriage unless it can use cases such as *Reynolds* to switch tracks. Assuming that the court were to find prohibition of same-sex marriage unconstitutional, we might then ask, what are the consequences of legalizing gay marriage? In all probability, the lives of those who oppose gay marriage would not change much. The long-term damage to society that they predict, if it were to happen at all, would be a slow and imperceptible occurrence. Even if the courts were to affirm the states' right to prohibit same-sex marriage, it would probably not be long before many,

[39]U.S. Const. amend. X.

[40]*Lawrence v. Texas,* 539 U.S. at 571.

if not all, states end up legalizing it anyway as the younger, more pro-gay generation replaces its forebears.[41]

The important consequence, then, is not whether or not homosexuals gain the right to marry. Rather, the important consequence has to do with whether or not the states will retain the power to regulate the actions and conduct of their citizens. The rhetoric in *Lawrence* focuses on individual liberty protected by the Constitution and the impropriety of making laws that mandate a moral code.[42] What the Court does not address is the fact that government is nothing other than a restriction of personal liberty in exchange for personal security, and that all laws mandate a moral code by defining which actions are acceptable and which are not. The U.S. Constitution grants U.S. citizens great liberties, but that does not mean it grants anyone the right to do whatever he wants to do. Laws govern conduct—whether that conduct is, in fact, immoral does not matter. What matters is whether lawmakers perceive it to be appropriate or not. If regulating marriage falls within the states' police power to any degree, then each state should be justified in either banning or allowing same-sex marriage, depending on the views of the lawmakers. If, on the other hand, freedom to marry whomever one chooses constitutes a fundamental right, then why should the state retain any claim to regulation of marriage? Individuals must be protected from persecution, but stripping the state of its power to make laws according to its own discretion severely undermines its effectiveness as a governing body. Therefore, the best course of action for the Supreme Court to take when, or if, it addresses the same-sex marriage issue will be the one that leaves the power to decide with the states.

[41]Lester, note 8 at 255.

[42]*Lawrence v. Texas,* 539 U.S. at 567, 571.