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Student Comment: “Love Is Patient, Love Is Kind”: A Comparative Study Helping the United States Reach Marriage Equality

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“LOVE IS PATIENT, LOVE IS KIND”¹: A COMPARATIVE STUDY HELPING THE UNITED STATES REACH MARRIAGE EQUALITY

Nicole Rush

ABSTRACT: This paper evaluates same-sex marriage policies in three industrialized countries: the Netherlands, the United Kingdom and Canada. In assessing the legislative and judicial history of same-sex marriage policies in each country, as well as other influential factors leading to these policies, this research helps to create a roadmap to reach a nationwide policy for the United States. By comparing the current history of the United States’ same-sex marriage policies to that of the aforementioned countries, it is possible to develop a plan to achieve marriage equality in the U.S.

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1. MACKLEMORE & RYAN LEWIS, *Same Love, on THE HEIST* (Macklemore, LLC 2012) (citing I Corinthians 13:4 (NIV)).

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**“LOVE IS PATIENT, LOVE IS KIND”²: A
COMPARATIVE STUDY HELPING THE UNITED
STATES REACH MARRIAGE EQUALITY**

Nicole Rush

*The marriage institution cannot exist among slaves, and one sixth of the population of democratic America is denied its privileges by the law of the land. What is to be thought of a nation boasting of its liberty, boasting of its humanity, boasting of its Christianity, boasting of its love of justice and purity, and yet having within its own borders three millions of persons denied by law the right of marriage?*³

Frederick Douglas

I. INTRODUCTION

Frederick Douglas’ thoughts on marriage are now obsolete in American society, but the truth remains that a large population of our society is denied the institution of marriage. A study conducted in 2011 by the Williams Institute at the University of California’s School of Law approximates that about nine million Americans identify themselves as homosexual.⁴ That number, however, is not all-inclusive as there are others who may not have accepted homosexuality as a part of their identity.⁵ For a country claiming to be the “land of the free,”⁶ our society is once again denying freedom as only thirty-

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2. MACKLEMORE & RYAN LEWIS, *Same Love*, on THE HEIST (Macklemore, LLC 2012) (citing I Corinthians 13:4 (NIV)).
 3. FREDERICK DOUGLAS, MY BONDAGE AND MY FREEDOM 302 (John David Smith ed., Penguin Books 2003) (1855).
 4. Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual and Transgender*, THE WILLIAMS INSTITUTE at 1 (April 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.
 5. *Id.*
 6. FRANCIS SCOTT KEY, THE STAR SPANGLED BANNER (1814), available at <http://www.usa-flag-site.org/song-lyrics/star-spangled-banner.shtml>.

two states in the U.S., plus the District of Columbia, allow same-sex marriage.⁷

While 18 states still deny marriage to same-sex couples, other countries have been more generous with this liberty. Currently, seventeen countries allow same-sex marriage.⁸ Although that leaves a number of countries without such freedom, a number of the industrialized countries provide this right to their citizens. If the United States wants to be seen as the freest country in the world, same-sex marriage would be a good nationwide policy to implement. Homosexual couples have been waiting patiently for their right to declare their love through the institution of marriage.⁹ Vice President Joe Biden declared, “It’s the civil rights of our day. It’s the issue of our day.”¹⁰ Continuing to deny this right to same-sex couples will only spread a message of inequality and disapproval to millions of Americans who want nothing more than to demonstrate their love through marriage. This paper evaluates how this issue has been addressed in three industrialized countries: the Netherlands, the United Kingdom, and Canada. Looking at the legislative and judicial history of same-sex marriage policies in each country, as well as any other influential factors which led to the passage of these policies, helps create a roadmap for the U.S. By comparing the current history of the U.S. with these case studies, it is possible to develop a plan to achieve marriage equality. Looking at three democratic nations with slightly varying governmental structures could help to show the U. S. government how to implement similar policies.

All three branches of the U.S. government has had a say in the development of our nation’s policies on same-sex marriage, but the judicial branch provided the most recent input. In 1996, Congress passed the Defense of Marriage Act (DOMA), which defined marriage

7. *States*, FREEDOM TO MARRY (2014), <http://www.freedomtomarry.org/states/>.

8. *The Freedom to Marry Internationally*, FREEDOM TO MARRY (2014), <http://www.freedomtomarry.org/landscape/entry/c/international>.

9. See William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2159 (2002).

10. Ashley Alman, *Joe Biden Calls Gay Marriage ‘The Issue Of Our Day’*, HUFF. POST, Sept. 16, 2013, http://www.huffingtonpost.com/2013/09/15/biden-gay-marriage_n_3932129.html.

as a legal union between a man and a woman.¹¹ DOMA ensured that same-sex couples could not receive the federal benefits that arise from being a married couple. In 2013, this allowed for a constitutional challenge to DOMA.¹² The Supreme Court said that Section 3 of DOMA was unconstitutional because it was a deprivation of liberty under the Fifth Amendment to same-sex couples.¹³ While this decision did not legalize same-sex marriage across the country, it was the first step in changing our policy in the U.S. Since this ruling, six additional states have passed legislation to allow same-sex marriage,¹⁴ but the Supreme Court recently halted same-sex marriages in Utah while the legislation legalizing such marriages reaches a final appeal.¹⁵ Our nation's stance on same-sex marriage appears to be in limbo, so modeling our next steps after countries that have already successfully implemented same-sex marriage policies might be the key to our own nationwide policy.

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11. Defense of Marriage Act, 1 U.S.C. § 7 (1996).
 12. *United States v. Windsor*, 133 S.Ct. 2675 (2013).
 13. *Id.* at 2695.
 14. Kate Zernike, *Same-Sex Marriage in New Jersey Can Begin, Court Rules*, N.Y. TIMES, Oct. 18, 2013, http://www.nytimes.com/2013/10/19/nyregion/same-sex-marriages-in-new-jersey-can-begin-court-rules.html?_r=0; *Hawaii: Same-Sex Marriage Becomes Law*, N.Y. TIMES, Nov. 13, 2013, <http://www.nytimes.com/2013/11/14/us/hawaii-same-sex-marriage-becomes-law.html>; *Illinois: Same-Sex Marriage is Legalized*, N.Y. TIMES, Nov. 20, 2013, <http://www.nytimes.com/2013/11/21/us/illinois-same-sex-marriage-is-legalized.html>; Fernanda Santos, *New Mexico Becomes 17th State to Allow Gay Marriage*, N.Y. TIMES, Dec. 19, 2013, <http://www.nytimes.com/2013/12/20/us/new-mexico-becomes-17th-state-to-legalize-gay-marriage.html?module=Search&mabReward=relbias%3Ar>; Niraj Chokshi, *Gallery: Gay couples wed after Oregon marriage ban struck down*, WASH. POST, May 20, 2013, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/05/20/gallery-gay-couples-wed-after-oregon-marriage-ban-struck-down/>; Niraj Chokshi & Reid Wilson, *Federal judge overturns Pennsylvania same-sex marriage ban*, WASH. POST, May 20, 2013, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/05/20/federal-judge-overturns-pennsylvania-same-sex-marriage-ban/>.
 15. Robert Barnes, *Supreme Court Halts Same-Sex Marriages in Utah Pending Appeal*, WASH. POST, Jan. 6, 2014, http://www.washingtonpost.com/politics/supreme-court-halts-same-sex-marriages-in-utah-pending-appeal/2014/01/06/b1af9794-76e9-11e3-b1c5-739e63e9c9a7_story.html.

II. CASE STUDIES

A. *The Netherlands*

i. Developments in Same-Sex Marriage Policies

The Netherlands was the first country in the world to allow same-sex marriage, beginning on April 1, 2001.¹⁶ The country enacted a law, which was passed by Parliament on December 19, 2000, that enabled residents of the country to enter into same-sex marriages.¹⁷ The law states, “A marriage can be contracted by two persons of the opposite or same-sex.”¹⁸ At the time of the law, 62% of the Dutch population had no objection to same-sex marriage, which was helpful in passing the law.¹⁹ In a 2006 poll, that number drastically increased to an 82% approval rating among Dutch people.²⁰ As time passed, the Dutch came to view same-sex marriage as normal, and realized that giving same-sex couples the right to marry did not impact their way of life.²¹

A major factor behind the enactment of same-sex marriage in the Netherlands was the inequality in same-sex couples and adoption policies.²² If a same-sex couple wanted to adopt a child, only one of the parents actually had full parental custody of the child.²³ This lack of equality spurred the gay community to begin an advocacy campaign, which aided in bringing the issues to the court system.²⁴ The first attack on Dutch law revolved around the fact that the law did not

16. Christy M. Glass, Nancy Kubasek & Elizabeth Kiester, *Toward a “European Model” of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 BERKELEY J. INT’L L. 132, 142 (2011).

17. *Id.* at 142-43.

18. BURGERLIJK WETBOEK [BW] [CIVIL CODE] book 1, art. 30 (Neth.).

19. Glass, *supra* note 16, at 143.

20. Celestine Bohlen, *Pragmatism for Dutch on Gay Marriage*, N.Y. TIMES, Dec. 7, 2000, http://www.nytimes.com/2012/12/08/world/europe/08iht-letter08.html?_r=0.

21. *Id.* (“I think the shift happened when people saw that it didn’t impact society in any way. . . while it made a big difference for the self-recognition and esteem of gay people.”).

22. *Same-Sex Dutch Couples Gain Marriage and Adoption Rights*, N.Y. TIMES, Dec. 20, 2000, <http://www.nytimes.com/2000/12/20/world/same-sex-dutch-couples-gain-marriage-and-adoption-rights.html>.

23. *Id.*

24. Glass, *supra* note 16, at 144.

contain gender classifications as a requirement to marriage.²⁵ The highest court ruled that while the law did not specifically limit marriage to heterosexual couples, the legislative history clearly limited the definition to a man and a woman.²⁶ The next argument in the court system included an argument that international law states marriage is a fundamental right, and that the rights included in the International Covenant on Civil and Political Rights could not be applied in a discriminatory fashion.²⁷ In this instance, the court realized the importance of legalizing same-sex marriage and deferred the issue to Parliament.²⁸ In another case, however, the court dealt with this international law argument by saying the European Court of Human Rights stated that the concept of a fundamental marriage right applies only to the traditional view of marriage.²⁹ Although the court did recognize that there was a possibility that there might be certain benefits that could be argued under this discrimination rationale, since that was not the issue in the case, it was left to the legislature.³⁰

The legislature considered public opinion and began to contemplate alternatives to same-sex marriage which would guarantee to those couples the same benefits as marriage.³¹ The Federation of Dutch Associations for Integration of Homosexuality COC Netherlands (hereinafter, COC), the oldest gay-rights campaign in the world, was also developed to help create a gay rights movement.³² The

25. Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. LAW 141, 143 (2001).

26. *Id.*

27. G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”); All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *Id.* at art. 26.

28. Maxwell, *supra* note 25, at 145.

29. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990).

30. Maxwell, *supra* note 25, at 147; *see also* Glass, *supra* note 16, at 145.

31. Glass, *supra* note 16, at 145.

32. *See* Bohlen, *supra* note 20; *see also* *About COC*, COC.NL, <http://www.coc.nl/engels> (last visited Feb. 4, 2014).

group was founded in 1946.³³ Besides helping directly in the Netherlands, the COC has consultative status with the U.N., helping other countries in their own gay-rights movement.³⁴ In 1998, same-sex couples could register their relationship with the government under the title of partnerships.³⁵ There was still one major difference between marriage and partnerships, and that related to children and adoption.³⁶ For example, a male is automatically considered a child's father if the child is born into a marriage, while no such relationship is established in a partnership.³⁷ Adoption also was limited to married heterosexual couples.³⁸ A committee, the Kortmann Committee, was set up to determine the consequences of both same-sex marriage and same-sex adoption in 1997.³⁹ Due to this committee report, a change was made to Dutch Civil Law in 1999,⁴⁰ which allowed a homosexual parent to legally adopt a child of their partner.⁴¹ The report also stated that the only way that equality could be reached for homosexuals was to allow civil marriages; however, the Cabinet decided to ignore the advice of the committee regarding marriage rights.⁴²

While the equality regarding children helped to show the need for change in Dutch law, a transition in political party control was yet another factor that led to the development of same-sex marriage policies. A Dutch legislator, Boris Dittrich, made it his mission to bring same-sex marriage legislation into Parliament.⁴³ Parliament entered an era of more liberal policies that opened the door for same-sex marriage.⁴⁴ Similar to the U.S., there was great debate in Parliament regarding same-sex marriage. The equality argument

33. See Bohlen, *supra* note 20; see also *About COC*, COC.NL, <http://www.coc.nl/engels> (last visited Feb. 4, 2014).

34. See Bohlen, *supra* note 20; see also *About COC*, COC.NL, <http://www.coc.nl/engels> (last visited Feb. 4, 2014).

35. Bohlen, *supra* note 20.

36. Wendy M. Schrama, *Registered Partnership in the Netherlands*, 13 INT'L J. L. POL'Y & FAM. 315, 316 (1999).

37. *Id.*

38. *Id.* at 320.

39. Maxwell, *supra* note 25, at 152.

40. Schrama, *supra* note 36, at 321.

41. BW, *supra* note 18, at book 1, art. 243t.

42. Maxwell, *supra* note 25, at 153-54.

43. Glass, *supra* note 16, at 147.

44. Glass, *supra* note 16, at 147.

became a front-runner in the debate, arguing that not allowing same-sex marriage violated equality under the law.⁴⁵ The rebuttal was that since homosexual couples could not procreate, they were not similarly situated and therefore could not be treated as equals with heterosexual couples.⁴⁶

The lower house of Parliament was angered by the inaction of the Cabinet and commenced legislation granting the right of same-sex marriage.⁴⁷ Unfortunately, this legislation was never introduced because it was started on the final day of Parliament's session.⁴⁸ General elections were held soon after and a more liberal Parliament came into existence.⁴⁹ By July 8, 1999, a bill was introduced into Parliament changing the definition of marriage, at least for civil ceremonies.⁵⁰ In the final debate in Parliament, Otto Vos suggested that the real basis of marriage should be the love between the two partners, and the Dutch Parliament agreed.⁵¹ With the support of 109 members, the lower house passed the legislation.⁵² Three days later, the upper house passed the legislation and the Queen and Minister of Justice signed the law, which enacted the first same-sex marriage law in the world.⁵³

ii. Can the U. S. take notes?

Perhaps, if nothing else, the U.S. can consider the words of the former Mayor of Amsterdam, Job Cohen: "In the Netherlands, we have gained the insight that an institution as important as marriage should

45. Stanley Kurtz, *Going Dutch? (Lessons of the same-sex marriage debate in the Netherlands)*, THE WEEKLY STANDARD, May 23, 2004, <http://www.weeklystandard.com/Content/Public/Articles/000/000/004/126qodro.asp#>.

46. *Id.*

47. Maxwell, *supra* note 25, at 154.

48. Maxwell, *supra* note 25, at 154.

49. Maxwell, *supra* note 25, at 154.

50. Maxwell, *supra* note 25, at 154-55.

51. Glass, *supra* note 16, at 149; *see also* Kurtz, *supra* note 45 ("Proceeding on the basis of the notion that love between two partners forms the most important driving force in selecting one of the forms of relationship, there is absolutely no reason, objectively, to distinguish between heterosexual love and homosexual love.").

52. Glass, *supra* note 16, at 149.

53. Maxwell, *supra* note 25, at 157.

be open to everyone.”⁵⁴ Marriage has always been a fundamental right in this nation,⁵⁵ and with the Supreme Court’s recent ruling to striking down the country’s current definition of marriage, the U.S. might need to apply that right to both hetero and homosexual marriages. Even with the differences between the two governmental systems, most specifically the lack of federalism in the Netherlands, some of the arguments are still applicable to the U.S. The U.S. has a foundation of equality built into our laws,⁵⁶ so looking into the equality argument, for both domestic and international laws, could set the U.S. on the path to achieving equality. It appears that the U.S. has faced a number of obstacles that the Netherlands also faced, so the Netherlands’ history is a positive starting point to show that the U.S. can make a nationwide policy to allow the right of same-sex marriage.

B. The United Kingdom

i. Developments in Same-sex Marriage Policies

While the Netherlands was the first country to allow same-sex marriage, the United Kingdom became the most recent country to allow the right.⁵⁷ In England and Wales, same-sex couples cannot marry until March 29, 2014.⁵⁸ In Scotland, same-sex marriages will begin sometime in autumn.⁵⁹ The debate in the United Kingdom was extremely divided on the topic of same-sex marriage, but it was signed into law in July 2013, for England and Wales.⁶⁰ Scotland more recently granted the right for same-sex couples to marry when it passed

54. Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC CHANGE 53, 94 (2011) (citing *Amsterdam Holds First Legal Gay Marriages*, INDEPENDENT (United Kingdom), Apr. 2, 2001, available at Westlaw 2001 WLNR 7076913).

55. Windsor, 133 S. Ct. at 2711.

56. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1-5.

57. *Same-sex marriage becomes law in England and Wales*, B.B.C. NEWS (July 17, 2013), <http://www.bbc.com/news/uk-politics-23338279>.

58. *Same-sex weddings to begin in March*, B.B.C. NEWS, Dec. 10, 2013, <http://www.bbc.com/news/uk-25321353>.

59. *Scotland’s same-sex marriage bill is passed*, B.B.C. NEWS, Feb. 4, 2014, <http://www.bbc.com/news/uk-scotland-scotland-politics-25960225>.

60. *Same-sex marriage becomes law in England and Wales*, *supra* note 57.

legislation on February 4, 2014.⁶¹ While the legislation passed, it has not yet gone into effect, so same-sex couples must still wait for their right to marry. The United Kingdom had a number of obstacles to overcome throughout the years. Consequently their legislative history may be enlightening for the United States.

The debate in England started as far back as 1981, when the European Court of Human Rights (hereinafter, ECHR) decided a case, *Dudgeon v. United Kingdom*, in which the court decriminalized homosexual sexual conduct.⁶² The ECHR stated that a person must have a protected right for actions regarding his private, family life.⁶³ Even after the rulings from the ECHR, the United Kingdom still ranked last in Europe for discrimination against the gay community.⁶⁴ In *Fitzpatrick v. Sterling Housing Association, Ltd.*, the House of Lords stated that a same-sex partner was not the same as a husband or wife, and therefore, could not succeed in a statutory tenancy.⁶⁵ While seemingly minor, this ruling ensured that any statute that read *husband and wife* would not apply to same-sex couples.⁶⁶

The United Kingdom realized their discriminatory practices regarding same-sex couples and attempted to make strides in the late 1990s.⁶⁷ Same-sex couples slowly gained some rights until the United Kingdom recognized same-sex partnerships in 2001.⁶⁸ These partnerships were given little to no legal acknowledgement until the ruling in *Mendoza v. Ghaidan* overturned *Fitzpatrick*.⁶⁹ Relying on the

61. *Scotland's same-sex marriage bill is passed*, *supra* note 59.

62. Andrew Flagg, *Civil Partnerships in the United Kingdom and a Moderate Proposal for Change in the United States*, 22 ARIZ. J. INT'L & COMP. LAW 613, 617 (2005); *Dudgeon v. United Kingdom*, (1983) Series A, No. 59; 5 E.H.R.R. 573.

63. Flagg, *supra* note 62, at 617.

64. Flagg, *supra* note 62, at 619.

65. Flagg, *supra* note 62, at 620; *Fitzpatrick v. Sterling Housing Association Ltd.*, (2000) 79 P. & C.R. D4 (1999).

66. Flagg, *supra* note 62, at 620.

67. *See generally* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 355 (Univ. of Chicago Press 2002).

68. *Id.*

69. Flagg, *supra* note 62, at 620; *Mendoza v. Ghaidan*, (2003) 1 P. & C.R. DG14 (2002).

Human Rights Act of 1998,⁷⁰ the court used a broad interpretation of husband and wife. Unlike the United States Supreme Court, the court of the House of Lords could not invalidate legislation, but could only mark it with a “declaration of incompatibility,” which had no legal significance.⁷¹ Same-sex couples continued to gain rights in 2002, when the Adoption and Children Act was passed allowing same-sex couples to adopt children.⁷²

Finally, in 2004, the United Kingdom enacted the Civil Partnership Act, which legally recognized same-sex couples.⁷³ This Act gave couples in civil partnerships most of the same rights as married couples.⁷⁴ Although originally civil partnerships had to be completely secular, the law changed with the passage of the Equality Act in 2010.⁷⁵ A church could agree to recognize civil partnerships if they wanted.⁷⁶ Allowing for civil partnerships helped to quiet the gay community, creating an appearance of equality;⁷⁷ however, critics noted that problems existed regarding recognition internationally, which created the effect of a second-rate relationship.⁷⁸ While the United Kingdom would recognize civil partnerships, they would not extend recognition to valid same-sex marriages from other countries.⁷⁹ This showed same-sex couples that civil partnerships were not marriages.⁸⁰

Private international law became a problem soon after the passage of the Civil Partnership Act, when countries would not recognize valid

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70. Human Rights Act, 1998, c. 42, § 3(1) (U.K.) (“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”).
71. Brigitte Clark, *Jurisprudence and Conflicts of Law – Possible Messages For and From the UK Supreme Court*, 18 NEW ENG. J. INT’L & COMP. L. 1, 4-5 (2012).
72. Adoption and Children Act, s. 50 Adoption by couple, UK ST 2002 c. 38 Pt 1 c. 3 s. 50, 2002 (“An adoption order may be made on the application of a couple where both of them have attained the age of 21 years.”).
73. Flagg, *supra* note 62, at 623.
74. Flagg, *supra* note 62, at 623.
75. Clark, *supra* note 71, at 6-7.
76. See Clark, *supra* note 71, at 7.
77. See Flagg, *supra* note 62, at 624.
78. See Clark, *supra* note 71, at 7-9.
79. See Clark, *supra* note 71, at 7-8.
80. See Clark, *supra* note 71, at 8.

same-sex marriages from other places.⁸¹ While the idea of comity appeared to be a uniform practice across the world,⁸² the ability to marry is determined by the law of a party's prenuptial domicile.⁸³ This meant that if a same-sex couple lived in England and went to the District of Columbia to get married, the marriage would not be recognized because England, their place of domicile, did not acknowledge same-sex marriage. The U.S. faces similar problems between states that do and do not recognize same-sex marriage. With the different treatments between homosexual and heterosexual couples, cries of discrimination were becoming more common in the United Kingdom.⁸⁴

Starting in 2013, legislation went before Parliament debating the legalization of same-sex marriage.⁸⁵ Prime Minister David Cameron proposed the plan, which was first passed by the House of Commons.⁸⁶ After a two-day debate the House of Lords also backed the same-sex marriage plan.⁸⁷ The same-sex marriage law gained Royal Assent and became law on July 17, 2013.⁸⁸ The Marriage (Same-sex Couples) Act 2013 said that marriage of same-sex couples is lawful.⁸⁹

While also a part of the United Kingdom, Scotland did not grant the right for same-sex couples to marry with the passage of the Marriage (Same-sex Couples) Act 2013. Rather, that right was granted

81. See Clark, *supra* note 71, at 9.

82. If a marriage is good by the laws of the country in which it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses. See *Berthiaume v. Dastous*, [1930] A.C. 79, 83 (U.K.).

83. Clark, *supra* note 71, at 9.

84. Clark, *supra* note 71, at 9.

85. See generally John F. Burns & Alan Cowell, *British House of Commons Approves Gay Marriage*, N.Y. TIMES, Feb. 5, 2013, http://www.nytimes.com/2013/02/06/world/europe/britain-gay-marriage-vote.html?_r=0.

86. *Gay Marriage: Commons passes Cameron's plan*, B.B.C. NEWS, May 21, 2013, <http://www.bbc.com/news/uk-politics-22605011>.

87. *Gay marriage bill: Peers back government's plans*, B.B.C NEWS, June 5, 2013, <http://www.bbc.com/news/uk-politics-22764954>.

88. *Same-sex marriage becomes law in England and Wales*, *supra* note 57.

89. Marriage (Same-sex Couples) Act, 2013, c. 30, § 1(1) (U.K.) ("Marriage of same-sex couples is lawful.").

with the passage of the Marriage and Civil Partnership (Scotland) Bill on February 4, 2014.⁹⁰ The bill contained amendments to their existing Marriage (Scotland) Act 1977 including that a spouse means either, “(a) in the case of a marriage between persons of different sexes, a wife in relation to her husband or a husband in relation to his wife; and (b) in the case of a marriage between persons of the same sex, one of the parties to the marriage in relation to the other.”⁹¹

Legislation was first introduced in June 2013, and was debated in committee for some time.⁹² Alex Neil, Scotland’s Secretary of Health, showed support for the legislation, stating, “A marriage is about love, not gender. And that is the guiding principle at the heart of this bill.”⁹³ Additionally, he declared, “We are striving to create a Scotland that is fairer and more tolerant, where everyone is treated equally. That is why we believe that same sex couples should be allowed to marry.”⁹⁴ Like the legislation passed in England and Wales, Scotland’s legislation showed that equality is a guiding force behind allowing same-sex marriage. For Scotland’s legislation to pass through Parliament, there were three stages of voting.⁹⁵ The first stage was passed on November 20, 2013.⁹⁶ Parliament looked at the general principles of the bill and decided if the bill had enough grounds to continue.⁹⁷ After the bill passed stage one, Parliament examined the bill line by line, and made amendments that they felt were necessary.⁹⁸ In this stage, opponents to the bill made several changes in an attempt to lessen the overall

90. *Scotland’s same-sex marriage bill is passed*, *supra* note 59.

91. Marriage and Civil Partnership (Scotland) Bill, 2014 (A.S.P. 5) § 1.

92. *See Scotland’s gay marriage bill published at Holyrood*, B.B.C NEWS, June 27, 2013, <http://www.bbc.com/news/uk-scotland-scotland-politics-23067324>.

93. *Id.*

94. *Id.*

95. *Stages of a bill*, THE SCOTTISH PARLIAMENT, <http://www.scottish.parliament.uk/visitandlearn/Education/18641.aspx> (last visited Feb. 9, 2014).

96. *Scotland’s same sex marriage bill: How MSPs voted*, B.B.C. NEWS, Nov. 20, 2013, <http://www.bbc.com/news/uk-scotland-scotland-politics-25018895>.

97. *See generally Stages of a bill*, *supra* note 95.

98. *Stages of a bill*, *supra* note 95.

effect of the bill, but those amendments were rejected.⁹⁹ The bill passed stage two on January 16, 2014.¹⁰⁰ The bill finally passed stage three by an overwhelming majority on February 4, 2014.¹⁰¹ The bill still requires Royal Assent to become an official act of Parliament.¹⁰² Since the Queen signed a law last year granting same-sex marriages in England and Wales, Royal Assent should easily be achieved.

ii. Can the U.S. take notes?

Prime Minister David Cameron believes that the whole world can take after the English Parliament.¹⁰³ Mr. Cameron hopes to set an example with this Act, stating, “I’ve told the Bill team I’m now going to reassign them because, of course, all over the world people would have been watching this piece of legislation and we’ve set something, I think, of an example of how to pass good legislation in good time.”¹⁰⁴ While there are still differences in governmental structure, both the United Kingdom and the U.S. are comprised of multiple states, which puts a system of federalism in place. Since the United Kingdom developed their same-sex marriage policy after problems with international recognition of same-sex relationships, the United States might be able to use the same argument. If the U.S. does not recognize valid same-sex marriages, any type of same-sex union the U.S. does allow would be seen as inferior to marriage, and therefore, would give the gay rights movement an equal protection argument. Another helpful factor was that Mr. Cameron took charge and promised this

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99. Rochelle Sampy, *Scottish Parliamentary committee rejects attempts to waterdown same-sex marriage bill*, PINKNEWS, Dec. 19, 2013, <http://www.pinknews.co.uk/2013/12/19/scotland-anti-equal-marriage-amendments-rejected-by-scottish-parliamentary-committee/>.
100. Scott Roberts, *Scottish parliamentary committee votes to remove spousal veto from equal marriage bill*, PINKNEWS (Jan. 16, 2014), <http://www.pinknews.co.uk/2014/01/16/scottish-parliamentary-committee-votes-to-remove-spousal-veto-from-equal-marriage-bill/>.
101. *Scotland’s same-sex marriage bill is passed*, *supra* note 59.
102. *Stages of a bill*, *supra* note 95.
103. Christopher Hope, *David Cameron: “I want to export gay marriage around the world,”* THE TELEGRAPH July 24, 2013, <http://www.telegraph.co.uk/news/politics/10200636/I-want-to-export-gay-marriage-around-the-world-says-David-Cameron.html>.
104. *Id.*

law would be enacted by 2015.¹⁰⁵ Thus, if a policy maker in the U.S. took positive steps to propose same-sex marriage legislation, our country could be on its way to a policy change. In fact, with the latest stand from the Justice Department,¹⁰⁶ Attorney General Eric Holder could be one of the leaders in getting a nationwide same-sex policy.¹⁰⁷ Mr. Holder stated that all federal employers must give marriage benefits to those couples with a valid same-sex marriage regardless of whether their state allows same-sex couples to marry. He also told the States' Attorney Generals that they are not required to defend a state law banning same-sex marriage if they believe it to be discriminatory.¹⁰⁸

C. Canada

i. Developments in Same-sex Marriage Policies

Canada was the fourth country in the world to give same-sex couples the right to marry, when they enacted legislation in July 2005.¹⁰⁹ Canada's gay rights movement was extremely effective and eventually led to the right to marry.¹¹⁰ In 1969, the Canadian government repealed their sodomy laws, which granted the first rights to same-sex couples.¹¹¹ Soon after, gay rights marches began to take place in order to achieve equality in employment, housing, and immigration.¹¹² By 1985, every jurisdiction in Canada prohibited discrimination based on sexual orientation.¹¹³ The provinces relied on

105. *Id.*

106. Sari Horwitz, *Justice Department to give married same-sex couples equal protection*, WASH. POST, Feb. 8, 2014, http://www.washingtonpost.com/world/national-security/justice-department-to-give-married-same-sex-couples-sweeping-equal-protection/2014/02/08/36eafcae-90cc-11e3-b227-12a45d109e03_story.html.

107. *See infra* pp. 26-27.

108. *See supra* note 107 and accompanying text.

109. *Canada Senate backs gay marriage*, B.B.C. NEWS, July 20, 2005, <http://news.bbc.co.uk/2/hi/americas/4699411.stm>.

110. *See generally* Christy M. Glass & Nancy Kubasek, *The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. can Learn from their Northern Neighbor Regarding Same-Sex Marriage Rights*, 15 MICH. J. GENDER & L. 143 (2008).

111. *Id.* at 149 ("There's no place for the state in the bedrooms of the nation.").

112. *Id.* at 156.

113. Mary C. Hurley, *Bill C-38: The Civil Marriage Act*, Law & Gov. Division, Parliament of Can. (Feb. 14, 2005),

Section 15 of the Canadian Charter of Rights and Freedoms,¹¹⁴ and legislative reforms were made based on a principle of equality.¹¹⁵

Starting in 1992, provinces of Canada started to change their definitions of spouse in various statutes to include same-sex couples.¹¹⁶ In 1999, same-sex couples were granted benefit rights, including survivor benefits.¹¹⁷ In 2002, Parliament enacted legislation that allowed federal statutes to apply equally to both unmarried heterosexual and homosexual couples,¹¹⁸ although this legislation specifically stated that it did not affect the existing definition of marriage.¹¹⁹

In Canada, Parliament has always had the exclusive capacity to determine who can enter into marriage, but leaves any formalities of marriage to the provinces.¹²⁰ This is essentially like the federalism system set up in the U.S., except nowhere in the Canadian legislation is there a definition of marriage.¹²¹ One major difference exists between the U.S. system and Canada; the Canadian national government is responsible for making family law,¹²² while that is left to the states in the U.S.¹²³

The first two judicial challenges in Canada failed based on the history of the country defining marriage as a union between a man and

http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c38&Parl=38&Ses=1.

114. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, c. 11 (U.K.) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).
115. Hurley, *supra* note 113.
116. Hurley, *supra* note 113.
117. Hurley, *supra* note 113; Public Sector Pension Investment Board Act, R.S.Q., c. C-78 (Can.).
118. Glass & Kubasek, *supra* note 110, at 167.
119. Modernization of Benefits and Obligations Act, R.S.Q., c. C-23 (Can.) (“For greater certainty, the amendments made by this Act do not affect the meaning of the word “marriage”, that is, the lawful union of one man and one woman to the exclusion of all others.”).
120. Hurley, *supra* note 113.
121. Hurley, *supra* note 113.
122. Glass & Kubasek, *supra* note 110, at 160.
123. See Glass & Kubasek, *supra* note 110, at 160.

a wife.¹²⁴ However, a provincial Ontario court finally ruled that defining marriage in terms of opposite sex couples was an infringement on Section 15 of the Canadian Charter of Rights and Freedoms.¹²⁵ The Ontario Court of Appeals upheld this decision and Ontario was the first province to allow same-sex marriage in Canada.¹²⁶ The province of British Columbia quickly followed suit, when it allowed same-sex marriage to begin in 2003.¹²⁷ Six other Canadian provinces soon enacted similar legislation.¹²⁸

In the federal government, the House of Commons Standing Committee on Justice and Human Rights was formed to debate the policy of same-sex marriage.¹²⁹ After the ruling in the Ontario court system, this committee immediately gave support to the same-sex marriage movement.¹³⁰ In 2003, the Supreme Court of Canada announced that it would not appeal the decisions in Ontario or British Columbia.¹³¹ Additionally, the Court also was given a copy of a bill that would legalize same-sex marriage across the country to determine if Parliament had the power to enact such legislation.¹³² The Supreme Court of Canada issued a decision in 2004, which stated that Parliament did have the necessary power to enact legislation, but that religious institutions would not be required to perform same-sex ceremonies against their will.¹³³

The Civil Marriage Act states, “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.”¹³⁴ The act also guarantees that no religious institution is required to perform

124. See Hurley, *supra* note 113.

125. Glass & Kubasek, *supra* note 110, at 167.

126. See Hurley, *supra* note 113.

127. See Hurley, *supra* note 113.

128. See Hurley, *supra* note 113.

129. Glass & Kubasek, *supra* note 110, at 168.

130. See Hurley, *supra* note 113 (“The recent Ontario Court of Appeal decision which redefines the common-law definition of ‘marriage’ as ‘the voluntary union for life of two persons, to the exclusion of all others,’ while fully respecting freedom of religion, as guaranteed under the Charter of Rights.”).

131. See *id.*

132. Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution*, 20 BYU J. PUB. L. 195, 217 (2006).

133. *Id.*

134. The Civil Marriage Act, R.S.Q., c. C-38 (Can.).

same-sex marriages without their consent.¹³⁵ The bill received Royal Assent on July 20, 2005.¹³⁶ Even though the proposed legislation was made law in 2005, it was challenged in 2006.¹³⁷ With an even greater margin of victory than with the original same-sex marriage bill, the challenge was defeated and the law was kept intact.¹³⁸ This result suggested that the same-sex marriage movement has only continued to gain popularity with time.¹³⁹

ii. Can the U.S. take notes?

Canada and the U.S. have very similar governmental systems.¹⁴⁰ The common history of starting as British colonies resulted in similar structure with both governments, including the importance of federalism between the provinces-states and the national government.¹⁴¹ Like the United States, the Canadian provinces have the power to determine the formalities of marriage.¹⁴² Even with this policy in effect, the Canadian Parliament could still pass a nationwide policy to allow same-sex marriage.¹⁴³ While our systems are not exactly the same, the U.S. might be able to follow the path taken by Canada. The U.S. already has states that have enacted same-sex marriage policies. If the federal government takes an interest in the topic, the U.S. could be on its way to marriage equality. In fact, a number of the strides made regarding same-sex marriage cite Canadian jurisprudence to explain the result.¹⁴⁴

135. *Id.*

136. Glass & Kubasek, *supra* note 110, at 168.

137. Glass & Kubasek, *supra* note 110, at 168-69.

138. Glass & Kubasek, *supra* note 110, at 169.

139. Glass & Kubasek, *supra* note 110, at 169.

140. *See generally* Glass & Kubasek, *supra* note 110, at 169.

141. *See generally* Glass & Kubasek, *supra* note 110, at 148.

142. Hurley, *supra* note 113.

143. Hurley, *supra* note 113.

144. *See* Bala, *supra* note 132, at 223-24 (providing examples in both Vermont and Massachusetts citing Canadian jurisprudence).

D. The United States

i. Developments in Same-sex Marriage Policies

Before trying to model U.S. politics after other countries that have successfully implemented same-sex marriage policies a look into the development of our current policy is necessary. Currently thirty-two states and the District of Columbia allow same-sex marriage.¹⁴⁵ Since the enactment of the Constitution, the role of defining domestic relations, such as husband/wife and parent/child, has always belonged to the states.¹⁴⁶ Each state has the power to enact its own legislation regarding marriage, as long as national law does not preempt it.

The gay rights movement in America had a rather recent development, only beginning around the 1950s.¹⁴⁷ In fact, prior to that time, homosexuals were not a targeted group in our society, although sodomy was a crime.¹⁴⁸ America went through a period of fear of homosexuality, and homosexuals no longer wanted to freely identify themselves as gay.¹⁴⁹ Sodomy was not only a crime, but it also carried a threat of imprisonment if the participants were caught.¹⁵⁰ Homosexuals also kept their identity a secret in the areas of employment and housing for fear that their status could impact those aspects of their lives.¹⁵¹ It became difficult for same-sex couples to adopt children, and some homosexual parents even lost custody of their children¹⁵² because people believed that homosexuality would have an adverse effect on the lives of children.¹⁵³ Almost all aspects

145. *Marriage Center*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/marriage-center> (last visited Aug. 1, 2014).

146. *Windsor*, 133 S.Ct. at 2691.

147. Eskridge, *supra* note 9, at 2159.

148. Eskridge, *supra* note 9, at 2159.

149. *See generally* Eskridge, *supra* note 9, at 2159.

150. Edward H. Sadtler, *A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?*, 40 VA. J. INT'L L. 405, 409 (1999).

151. *Id.*

152. *Id.*; *see generally* *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995); *see also* Mark Strasser, *Fit to be Tied: On Eskridge Custody, Discretion, and Sexual Orientation*, 46 AM. U.L. REV. 841, 842 (1997).

153. *Bottoms*, 249 Va. at 420 (stating, “We have previously said that living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the “social condemnation” attached to such an

of life were affected for people just by identifying as homosexual and no real strides were made in the gay rights movements until the 1990s.¹⁵⁴

The first step in same-sex policies in the U.S. actually came from an interracial marriage case.¹⁵⁵ The court ruled in *Loving v. Virginia* that marriage is a fundamental right and to deny that right to people is a deprivation of due process of law.¹⁵⁶ *Loving* gives the same-sex marriage movement an argument that everyone has a right to marry; as stated clearly by the Supreme Court. However, that argument did not hold much muster for same-sex couples. The road for gay activists was not easy, with the Supreme Court handing down a decision upholding the criminalization of sodomy in *Bowers v. Hardwick* in 1986.¹⁵⁷ Arguably, this ruling put the gay rights movement into motion because it designated homosexuals as a minority group, which created another argument for same-sex couples to use in their struggle.¹⁵⁸

While the Supreme Court stated that sodomy was still illegal, many states attempted to make their own rulings regarding same-sex marriage. In 1993, Hawaii was the first state that successfully stated that denying a marriage license solely on the fact that a couple was the same sex was unconstitutional according to their existing marriage laws.¹⁵⁹ The Hawaii court determined this was discrimination founded on sex, a standard which required the state to justify its denial of the right to marriage at a heightened level of scrutiny.¹⁶⁰ Unfortunately for the people of Hawaii, an amendment to their state constitution quickly took away this victory for same-sex couples.¹⁶¹ The amendment stated,

arrangement, which will inevitably afflict the child's relationships with its "peers and with the community at large."") (citing *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)).

154. See generally Sadtler, *supra* note 150.

155. Sarah Mazzochi, *The Great Debate: Lessons to be Learned from an International Comparative Analysis on Same-Sex Marriage*, 16 ROGER WILLIAMS U. L. REV. 577, 579 (2011).

156. *Loving*, 388 U.S. at 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.").

157. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

158. Eskridge, *supra* note 9, at 2183.

159. See *Baehr v. Lewin*, 74 Haw. 530, 536-37 (1993).

160. Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589, 616-17 (2004).

161. HAW. CONST. art. 1, § 23.

“The legislature shall have the power to reserve marriage to opposite-sex couples.”¹⁶² However, this case showed the nation that same-sex couples wanted to fight for their relationships to be recognized by the rest of society.¹⁶³

Alaska was also on the forefront for same-sex marriage reform. In 1998, a judge ruled that there was a fundamental right to choose one’s partner, and a state had to show a compelling interest as to why same-sex marriage was not allowed.¹⁶⁴ This struck fear into a number of residents, and, like Hawaii, Alaska quickly enacted an amendment to their constitution banning same-sex marriage.¹⁶⁵ Even though neither of these rulings changed any laws in these states, they showed that if discrimination based on sexual orientation required passing strict scrutiny, states were going to have a difficult time meeting their burden of proof.

In 1996, the federal government took a stance on same-sex marriage through the passage of DOMA.¹⁶⁶ Section 3 defined marriage as a union between a man and a woman.¹⁶⁷ Additionally, section 2 of DOMA allowed states to refuse to recognize same-sex marriages from other states.¹⁶⁸ This section was to ensure that, in the event one state granted same-sex couples the right to marry, the Full Faith and Credit Clause in the Constitution would not require the remaining states to do

162. *Id.*

163. Wojcik, *supra* note 160, at 616.

164. Wojcik, *supra* note 160, at 618-19.

165. ALASKA CONST. art. 1, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”).

166. Lynn D. Wardle, *Involuntary Imports: Williams, Lutwak, the Defense of Marriage Act, Federalism, and “Thick” and “Thin” Conceptions of Marriage*, 81 *FORDHAM L. REV.* 771, 773 (2012).

167. Defense of Marriage Act, 1 U.S.C. § 7 (1996) (“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.”); *invalidated by* U.S. v. Windsor, 133 S.Ct. 2675 (2013).

168. Defense of Marriage Act, 28 U.S.C. §1738C (1996) (“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.”).

so.¹⁶⁹ Signed into law by President Clinton, DOMA did not ban same-sex marriage, but rather, for the purposes of federal law, declared same-sex marriages invalid.¹⁷⁰ This law was supposed to help clarify the necessary recognition between states and the federal government for valid same-sex marriages.¹⁷¹ A number of states followed the federal government and enacted a version of DOMA that applied to their state laws.¹⁷² As time passed, policies regarding same-sex marriage began to change, and the constitutionality of DOMA began to be questioned.¹⁷³

While not directed at same-sex marriage, the Supreme Court handed down a decision in *Romer v. Evans* that started to help the gay rights movement.¹⁷⁴ In the 1996 ruling, the Supreme Court stated that the Colorado constitutional amendment that denied homosexuals the right to be protected from discrimination was unconstitutional because it denied the group equal protection under the law.¹⁷⁵ The Court relied on the fact that the amendment did not even pass rational basis, but the Court refused to state which scrutiny test was proper for discrimination based on sexual orientation.¹⁷⁶ This ruling would eventually lead to the first state in the U.S. to allow same-sex marriage.¹⁷⁷

In 1999, the Vermont Supreme Court ruled that denying benefits to same-sex partners that were offered to married couples was a violation of the Common Benefits Clause of the Vermont Constitution.¹⁷⁸ The Common Benefits Clause had similarities to both the Equal Protection Clause in the U.S. Constitution and Section 15 of Canada's Charter, and the court stated that both groups deserved to be given equal treatment under the law.¹⁷⁹ In reaction to this ruling, the

169. Wardle, *supra* note 166, at 789-90.

170. See *Windsor*, 133 S.Ct. at 2683.

171. Wardle, *supra* note 166, at 788.

172. See Wojcik, *supra* note 160, at 620.

173. See Wojcik, *supra* note 160, at 620.

174. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

175. *Id.* (“We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.”).

176. *Id.* at 632.

177. See Wojcik, *supra* note 160, at 626.

178. Bala, *supra* note 132, at 223.

179. Bala, *supra* note 132, at 223.

Vermont legislature created civil unions in 2000, which granted same-sex couples all of the rights of married couples under state law.¹⁸⁰

In 2003, same-sex marriage advocates gained another victory when the Supreme Court overturned *Bowers* in *Lawrence v. Texas*.¹⁸¹ Most states had stopped following the law set out in *Bowers*, but it was still an achievement for the gay rights movement.¹⁸² The most interesting development from this case was the Court's rationale. First, the Court looked to the fact that the European Court of Human Rights ignored the Supreme Court's ruling in *Bowers*, and granted the right of sodomy as a right to privacy in the home.¹⁸³ This showed the Court's willingness to take other countries' policies into consideration. It also created a right to privacy in the home that would eventually become an argument in same-sex marriage debates.¹⁸⁴ In addition, the Court said that moral disapproval was not a legitimate state interest,¹⁸⁵ making it difficult for state governments to produce a legitimate interest that kept homosexuals from their fundamental right to marry.¹⁸⁶ Justice Scalia, who authored a dissent in *Lawrence*, stated that, "Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."¹⁸⁷

In 2004, Massachusetts made national news as the first state to legalize same-sex marriage.¹⁸⁸ At this point, five states and the District of Columbia recognized domestic partnerships, four states had civil unions, and one state granted reciprocal benefits to same-sex couples, but no state had reached the point of granting same-sex marriages.¹⁸⁹

180. Wojcik, *supra* note 160, at 635-36

181. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (Scalia, J., dissenting) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."); *Bowers*, 478 U.S. 186.

182. Eskridge, *supra* note 9, at 2181.

183. *Lawrence*, 539 U.S. at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.")

184. Wojcik, *supra* note 160, at 651.

185. See *Lawrence*, 539 U.S. at 582.

186. See *Lawrence*, 539 U.S. at 604-05.

187. *Lawrence*, 539 U.S. at 604.

188. Bala, *supra* note 132, at 223.

189. Glass & Kubasek, *supra* note 110, at 176-77).

The Supreme Court of Massachusetts ruled that denying marriage to same-sex couples could not pass rational basis in respect to the Due Process and the Equal Protection Clauses.¹⁹⁰ The Massachusetts court gave the legislature a certain time frame to comply with their ruling.¹⁹¹ The Massachusetts senate inquired whether civil unions would meet the necessary requirements for equality.¹⁹² In an advisory opinion, the court stated that civil unions created a stigma of exclusion, and only marriage would result in full equality for same-sex couples.¹⁹³

The Massachusetts law was said to be “the wedding bell heard around the world.”¹⁹⁴ As a result, a number of constitutional challenges arose across the country.¹⁹⁵ Unfortunately, most of these challenges ended unsuccessfully, dissatisfying gay right activists who only gained the right to domestic partnerships or civil unions instead of marriage.¹⁹⁶ Even more disheartening, seven states banned same-sex marriage in 2006.¹⁹⁷ Progress was made, for example, when the California Supreme Court ruled in 2008 that same-sex couples had a right to marry. However, that progress later came to a halt,¹⁹⁸ specifically when California voters passed Proposition 8, which banned same-sex marriages.¹⁹⁹

Finally in 2008, Connecticut joined Massachusetts and stated that same-sex couples were entitled to the right to marry.²⁰⁰ This ruling

190. Wojcik, *supra* note 160, at 657.

191. Bala, *supra* note 132, at 224.

192. Bala, *supra* note 132, at 224.

193. Bala, *supra* note 132, at 224.

194. Tracy Baim, *Massachusetts Marriage Victory*, WINDY CITY TIMES, Nov. 19, 2003, <http://www.windycitymediagroup.com/lgbt/Massachusetts-Marriage-Victory/480.html>.

195. Bala, *supra* note 132, at 225.

196. See Wojcik, *supra* note 160, at 679.

197. Wyatt Buchanan, *Same-sex marriage: 7 states OK ban – but it trails in Arizona*, SFGATE, Nov. 8, 2006, <http://www.sfgate.com/news/article/Same-sex-marriage-7-states-OK-ban-but-it-2484348.php>.

198. Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California’s Existing Same-Sex Marriages*, 60 HASTINGS L.J. 1063, 1063 (2009).

199. *Hollingsworth v. Perry*, 130 S.Ct. 705, 707 (2010).

200. Daniela Altimari, *Moods of a Milestone; A Variety of Emotions as Same-Sex Marriage Licenses Become Available Today; Gay Rights*, HARTFORD COURANT, Nov. 12, 2008, at A1, also available at http://articles.courant.com/2008-11-12/news/gaywed1112.art_1_same-sex-marriage-marriage-licenses-gay-rights.

resulted in a number of other states granting marriage equality. In 2009, Iowa,²⁰¹ Vermont,²⁰² New Hampshire,²⁰³ and the District of Columbia²⁰⁴ all passed legislation that allowed same-sex couples to marry. Massachusetts, Connecticut, and Iowa were based on rulings from the highest court in the state and said same-sex couples had a legal right to marry.²⁰⁵ The changes in Vermont and New Hampshire were the result of actions taken directly by the state legislature.²⁰⁶ The Maine legislature passed a law allowing same-sex marriage in 2009, but the voters in Maine struck down the legislation in referendum.²⁰⁷

After this initial influx of actions that allowed for same-sex marriage, the topic seemed to cool off in the U.S. In 2010, Judge Vaughan Walker, a U.S. District Court Judge in California, ruled that Proposition 8 was unconstitutional because it denied same-sex couples due process and equal protection.²⁰⁸ Besides that action, no real progress was made in the U.S. regarding same-sex marriage. According to a Gallup Poll in 2010, 53% of the country still opposed legalizing gay marriage.²⁰⁹

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201. Christopher Burbach, *Vows Exchanged Across State: Waiting period over for Iowa same-sex marriages*, LEXINGTON CLIPPER HERALD, May 1, 2009, http://lexch.com/news/regional/vows-exchanged-across-state/article_ed85c598-9a2d-5702-b8fa-ccf59a8c794a.html.
 202. John Curran, *New era dawns for Vermont*, THE HUFFINGTON POST, Sept. 2, 2009, http://www.huffingtonpost.com/2009/09/01/same-sex-marriages-begin_n_273580.html.
 203. Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 3, 2009, http://www.nytimes.com/2009/06/04/us/04marriage.html?_r=0.
 204. Ian Urbina, *Gay Marriage is Legal in the U.S. Capital*, N.Y. TIMES, Mar. 3, 2010, <http://www.nytimes.com/2010/03/04/us/04marriage.html>.
 205. *19 States with Legal Gay Marriage and 31 States with Same-Sex Marriage Bans*, PROCON.ORG (last updated July 30, 2014, 2:28 PM).
 206. *Id.*
 207. *See A Setback in Maine for Gay Marriage, But Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 4, 2009, <http://www.nytimes.com/2009/11/05/us/politics/05maine.html>.
 208. Joe Garofoli, John Wildermuth & Demian Bulwa, *Prop. 8 judge strikes down same-sex marriage ban*, SF GATE, Aug. 5, 2010, <http://www.sfgate.com/news/article/Prop-8-judge-strikes-down-same-sex-marriage-ban-3179346.php>.
 209. Jeffrey M. Jones, *American's Opposition to Gay Marriage Eases Slightly*, GALLUP POLITICS (May 24, 2010), <http://www.gallup.com/poll/128291/Americans-Opposition-Gay-Marriage-Eases-Slightly.aspx>.

In 2011, the federal government finally encouraged progress for the gay community. President Obama stated that DOMA was unconstitutional and that the Department of Justice would no longer defend cases against same-sex couples.²¹⁰ In fact, U.S. Attorney General Eric Holder informed Congress that the Justice Department's official position would be that DOMA was a violation of the Equal Protection Clause.²¹¹

This federal stance again sparked the same-sex marriage debate across the country. New York became the next state to pass legislation that authorized same-sex marriage in June of 2011.²¹² In 2012, Washington State became the seventh state to legalize same-sex marriage.²¹³ Like New York, same-sex marriage was achieved by actions of the legislature but had to survive a referendum challenge by the people of Washington.²¹⁴ In November of 2012, the Washington voters approved gay marriage with Referendum 74 getting 52% of the vote.²¹⁵ Two more states also left the decision in the hands of their voters. On the 2012 ballots for Maryland and Maine there was a referendum on same-sex marriage.²¹⁶ Both states ratified the referenda, with Maryland reaching 52% approval and Maine achieving 53%

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210. Ian Saleh, *Defense of Marriage Act: Obama Administration will no longer defend legality of measure*, WASH. POST, Feb. 23, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022305361.html>.
211. Letter from Eric H. Holder, Att'y Gen., to John Boehner, Speaker of the House (Feb. 17, 2012), available at <http://www.justice.gov/ag/boehner02-17-12.pdf>.
212. Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all>.
213. *Washington state legalizes same-sex marriage*, SF GATE, Feb. 14, 2012, <http://www.sfgate.com/nation/article/Washington-state-legalizes-same-sex-marriage-3319199.php>.
214. *Id.*
215. *Washington Approves Gay Marriage In Referendum 74 Vote*, HUFF. POST-GAY VOICES, Nov. 7, 2012, http://www.huffingtonpost.com/2012/11/07/washington-referendum-74-gay-marriage_n_2050539.html.
216. Edith Honan, *Maryland, Maine, Washington approve gay marriage*, REUTERS, Nov. 7, 2012, <http://www.reuters.com/article/2012/11/07/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107>.

approval.²¹⁷ These three were the first states that were able to pass legislation by popular vote.²¹⁸

Voters could have been helped by the fact that President Obama came out to publicly support gay marriage earlier in 2012.²¹⁹ When the President spoke on DOMA he never expressly made a statement regarding gay marriage, but he did finally state that same-sex couples should have the right to get married.²²⁰ In his 2013 inaugural address, President Obama said, “Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law — for if we are truly created equal, then surely the love we commit to one another must be equal as well.”²²¹ That statement showed America that the Obama Administration was clearly in support of taking action to ensure equality by allowing same-sex couples to marry.

The U.S. Supreme Court finally granted certiorari in two cases on the topic of same-sex marriage for their 2013 term.²²² The Supreme Court ruled on the California case regarding the legality of Proposition 8, as well as the case considering the legality of DOMA regarding the denial of federal benefits to legally married same-sex couples.²²³ While the Court was still deciding the appropriate outcome of these cases, three additional states authorized the right for same-sex couples to marry. Rhode Island became the next state in the nation to allow

217. *Id.*

218. *Id.*

219. Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES, May 9, 2012, http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?pagewanted=all&_r=1&.

220. *Id.* (“At a certain point, I’ve just concluded that for me personally it is important for me to go ahead and affirm that I think same-sex couples should be able to get married. I had hesitated on gay marriage in part because I thought that civil unions would be sufficient. I was sensitive to the fact that for a lot of people, the word marriage was something that invokes very powerful traditions and religious beliefs.”).

221. Barack Obama, President, United States of America, Inaugural Address (Jan. 21, 2013).

222. Adam Liptak, *Justices to Hear Two Challenges on Gay Marriage*, N.Y. TIMES, Dec. 7, 2012, <http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html>.

223. *Id.*; *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2668 (2013); *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).

same-sex marriages through action by the legislature.²²⁴ Delaware became the eleventh state to legalize gay marriage shortly after Rhode Island.²²⁵ Like Rhode Island, Delaware enacted this policy through legislative action.²²⁶ Shortly after Delaware, the Governor of Minnesota signed same-sex marriage into law in Minnesota.²²⁷

Prior to the Supreme Court's rulings, twelve states had legalized gay marriage. On June 26, 2013, the Supreme Court handed down two victories to the gay rights movement.²²⁸ First, the court struck down section 3 of DOMA, which meant that the federal government had to now recognize valid same-sex marriages in regards to federal benefits.²²⁹ The Court ruled that DOMA acted to create "second-class marriages" under federal law.²³⁰ The Court added, "DOMA writes inequality into the entire United States Code."²³¹ In justifying its ruling, the Court stated that DOMA was an unconstitutional deprivation of liberty under the Fifth Amendment.²³² This ruling is believed to be a stepping-stone to potential arguments for a nationwide same-sex marriage policy.²³³

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224. Katharine Q. Seelye, *Rhode Island Joins States That Allow Gay Marriage*, N.Y. TIMES, May 2, 2013, http://www.nytimes.com/2013/05/03/us/rhode-island-joins-states-that-allow-gay-marriage.html?_r=0.
225. Rachel Weiner, *Delaware legalizes gay marriage*, WASH. POST, May 7, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/05/07/delaware-to-legalize-gay-marriage/>.
226. *Id.*
227. *Minnesota Legalizes Gay Marriage: Gov. Mark Dayton Signs Bill Into Law*, HUFF. POST, May 15, 2013, http://www.huffingtonpost.com/2013/05/14/minnesota-gay-marriage-legal-_n_3275484.html.
228. Robert Burns, *At Supreme Court, victories for gay marriage*, WASH. POST, June 26, 2013, http://www.washingtonpost.com/politics/supreme-court/2013/06/26/f0039814-d9ab-11e2-a016-92547bf094cc_story.html.
229. *Id.*
230. U.S. v. Windsor, 133 S.Ct. 2675, 2695 (2013).
231. *Id.*
232. *Id.* ("This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.").
233. *Id.* at 2709 ("In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable,

The other victory for same-sex couples came from California and Proposition 8. The Supreme Court ruled that only California officials could appeal the decision of the District Court ruling Proposition 8 unconstitutional.²³⁴ Since the public officials decided not to appeal the ruling of the District Court, the petitioners did not have standing to appeal the ruling.²³⁵ This meant that the appeals were without basis and the ruling of the District Court stands, making Proposition 8 unconstitutional.²³⁶ This ruling, which legalized same-sex marriage in California, was extremely limited because the Court did not rule on the merits of the case.²³⁷ If a properly appealed case makes its way through the legal system, hopefully the Court will grant certiorari and rule on the merits.

The Supreme Court rulings acted to allow federal recognition of valid same-sex marriages and legalized same-sex marriages in California, but the reactions in a number of states might be more important to achieving a nationwide same-sex marriage policy. New Jersey was the first state to react, with a Superior Court judge ruling that the state had to allow gay marriage because the Supreme Court stated that same-sex couples had to receive the same federal benefits as heterosexual couples.²³⁸ While the state had enacted civil unions, couples in civil unions could not receive the same benefits as married couples, and, therefore, same-sex couples were not given equal protection under the law.²³⁹ The governor of New Jersey decided against an appeal, noting, signals from the court and the march of

to reach the same conclusion with regard to state laws denying same-sex couples marital status.”).

234. *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2668 (2013) (“We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.”).

235. *Id.* at 2656.

236. *Id.*

237. Robert Burns, *Supreme Court strikes down key part of Defense of Marriage Act*, WASH. POST, June 26, 2013, http://www.washingtonpost.com/politics/supreme-court/2013/06/26/f0039814-d9ab-11e2-a016-92547bf094cc_story.html.

238. Kate Zernike & Marc Santora, *As Gays Wed in New Jersey, Christie Ends Court Fight*, N.Y. TIMES, Oct. 21, 2013, http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html?pagewanted=all&_r=0.

239. *Id.*

history were against him.²⁴⁰ New Jersey became the fourteenth state to legalize same-sex marriage.²⁴¹

Hawaii was the next state to pass a same-sex marriage policy.²⁴² The Governor of Hawaii called the legislature for a special session to reach a compromise measure on same-sex marriage.²⁴³ Since DOMA was overturned, the legislature was able to reach a consensus and enacted legislation on same-sex marriage.²⁴⁴ Shortly after this victory in Hawaii same-sex marriage activists got another victory in Illinois.²⁴⁵ The Illinois legislature passed a measure creating what the Illinois governor hopes could be a model for the rest of the United States.²⁴⁶ Next, New Mexico joined the marriage equality movement when the New Mexico Supreme Court ruled that the “protections and responsibilities that result from the marital relationship shall apply equally” to both same-sex and opposite-sex couples.²⁴⁷ New Mexico relied on the equal protection clause of its state constitution as justification for the ruling.²⁴⁸

The Oregon courts also made a ruling that their ban against same-sex marriage was unconstitutional.²⁴⁹ The Oregon attorney general said there was no basis for an appeal, and when a third party organization attempted to halt the start of marriages, the Supreme

240. *Id.*

241. *Id.*

242. Reid Wilson, *Hawaii is 15th state to legalize gay marriage*, WASH. POST, Nov. 12, 2013, <http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/12/hawaii-will-legalize-gay-marriage-as-soon-as-tuesday/>.

243. *Id.*

244. *Id.*

245. Sophia Tareen, *Illinois Gay Marriage Bill Signed into Law, State Becomes 16th to Legalize Same-Sex Marriage*, HUFF. POST, Nov. 20, 2013, http://www.huffingtonpost.com/2013/11/20/illinois-gay-marriage-bil_1_n_4312368.html.

246. *Id.* (“We understand in our state that part of our unfinished business is to help other states in the United States of America achieve marriage equality. . . love is not relegated to a second class status to any citizen in our country.”).

247. Fernanda Santos, *New Mexico Becomes 17th State to Allow Gay Marriage*, N.Y. TIMES, Dec. 19, 2013, <http://www.nytimes.com/2013/12/20/us/new-mexico-becomes-17th-state-to-legalize-gay-marriage.html>.

248. *Id.*

249. Adam Liptak, *Justices Reject Call to Halt Gay Marriages in Oregon*, N.Y. TIMES, JUNE 4, 2014, <http://www.nytimes.com/2014/06/05/us/politics/supreme-court-rebuffs-call-to-end-same-sex-marriages-in-oregon.html>.

Court denied the request.²⁵⁰ The Supreme Court issued a one-line statement without explanation, but scholars believe the request was from a party lacking standing.²⁵¹ This denial officially made same-sex marriages legal in Oregon. Pennsylvania became the nineteenth state to legalize same-sex marriage.²⁵² A federal district court judge ruled the Pennsylvania ban unconstitutional and Governor Tom Corbett stated he would not appeal the decision.²⁵³ The judge noted that it is time to make all state same-sex marriage bans a part of the past.²⁵⁴

A number of other states have had recent court decisions challenging constitutional bans. A Utah judge ruled that the state law banning same-sex marriage was unconstitutional.²⁵⁵ The judge stated, “The State’s current laws deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason.”²⁵⁶ This indicated that the court found due process and equal protection violations within their law, and that the statute could not withstand even rational review. Since rational basis review is the lowest tier of scrutiny that can be applied by the courts, it meant that the law cannot possibly stand. Unfortunately, Utah same-sex couples have to wait before running down the aisle. The Supreme Court issued a two-sentence order that halted same-sex marriages.²⁵⁷ Giving no explanation, the Court stated that marriages resulting from the Utah court ruling needed to wait until after the appeal process had finished.²⁵⁸ Scholars suggested that this could be the first sign that the Supreme Court will not say that same-

250. Adam Liptak, *Justices Reject Call to Halt Gay Marriages in Oregon*, N.Y. TIMES, JUNE 4, 2014, <http://www.nytimes.com/2014/06/05/us/politics/supreme-court-rebuffs-call-to-end-same-sex-marriages-in-oregon.html>.

251. *Id.*

252. Trip Gabriel, *Pennsylvania Governor Won’t Fight Ruling That Allows Gay Marriage*, N.Y. TIMES, May 21, 2014, <http://www.nytimes.com/2014/05/22/us/pennsylvania-governor-will-not-appeal-same-sex-marriage-ruling.html>.

253. *Id.*

254. *Id.* (“It is time to discard them into the ash heap of history.”).

255. Niraj Chokshi, *Federal judge rules Utah’s same-sex marriage ban unconstitutional*, WASH. POST, Dec. 20, 2013, <http://www.washingtonpost.com/blogs/govbeat/wp/2013/12/20/federal-judge-rules-utahs-same-sex-marriage-ban-unconstitutional/>.

256. *Id.*

257. Barnes, *supra* note 15.

258. Barnes, *supra* note 15.

sex marriage is required under our Constitution.²⁵⁹ On June 25, 2014, the U.S. Court of Appeals for the Tenth Circuit affirmed the ruling of the Utah court.²⁶⁰ Utah officials are appealed directly to the Supreme Court from this Tenth Circuit ruling, giving the Court another opportunity to rule on same sex marriage by next year.²⁶¹ The Justice Department has stated that the federal government would recognize all marriages that occurred in Utah before the stay was issued, and stated that these couples should not have to wait in limbo through a possible lengthy appeal process.²⁶²

Other state courts have made similar rulings to the Utah court. An Oklahoma judge stated that the constitutional amendment to their state constitution violated the federal Constitution.²⁶³ The judge handed down the ruling which said that the ban on gay marriage was “an arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit.”²⁶⁴ The appeal process must be completed before same-sex couples could officially marry, but this case could also ensure that the Supreme Court would have to rule on same-sex marriage in the near future.²⁶⁵ Oklahoma’s case might be able to achieve nationwide same-sex marriage because if a ban on same-sex marriage violated the Constitution, no other state’s ban would be able to stand. A federal appeals court affirmed the district court’s ruling, stating that gay couples have a fundamental right to

259. Amy Dardashtian, *Utah Ruling May Foreshadow Supreme Court Defeat for Gay Marriage*, HUFF. POST, Jan. 8, 2014, http://www.huffingtonpost.com/amy-dardashtian/utah-ruling-may-foreshado_b_4551598.html.

260. Michael Muskal, *Utah to seek U.S. Supreme Court review of gay marriage ruling*, L.A. TIMES, July 9, 2014, <http://www.latimes.com/nation/nationnow/la-na-nn-utah-same-sex-marriage-appeal-20140709-story.html>.

261. *Id.*

262. Sari Horwitz, *Holder: Same-sex marriages in Utah legal under federal law*, WASH. POST, Jan. 10, 2013, http://www.washingtonpost.com/world/national-security/holder-same-sex-marriages-in-utah-legal-under-federal-law/2014/01/10/f08f363a-7a19-11e3-af7f-13bf0e9965f6_story.html.

263. Erik Eckholm, *Oklahoma’s Ban on Gay Marriage Is Unconstitutional, Judge Rules*, N.Y. TIMES, Jan. 14, 2014, <http://www.nytimes.com/2014/01/15/us/federal-judge-rejects-oklahomas-gay-marriage-ban.html>.

264. *Id.*

265. *Id.*

marry.²⁶⁶ A Virginia judge also ruled that Virginia's ban on marriage equality was unconstitutional.²⁶⁷ The judge stated, "Our Constitution declares that 'all men' are created equal, surely this means all of us."²⁶⁸ If an appellate court affirmed this ruling, it could void other marriage laws in the 4th Circuit and eventually the rest of the nation.²⁶⁹ Similarly, a Texas court struck down their constitutional ban on same-sex marriage.²⁷⁰ "Without a rational relation to a legitimate governmental purpose," declared the judge, "state-imposed inequality can find no refuge in our United States Constitution."²⁷¹ By making a similar ruling to Oklahoma's court, the Texas court ensured that the Supreme Court would be hearing another case on same-sex marriage in the near future.

On March 21, 2014, a Michigan court heard a constitutional challenge to their amendment that defines marriage as between a man and a woman.²⁷² The Michigan suit attacked the amendment through the adoption policies,²⁷³ which is similar to the route that the Netherlands took when pursuing same-sex marriage policies.²⁷⁴ The judge ruled that the marriage ban violated the Equal Protection Clause of the Constitution.²⁷⁵ Michigan's attorney general decided to appeal the ruling, meaning same-sex couples will be waiting through the appeal process before same-sex marriage is officially legal.

266. Jack Healy & Adam Liptak, *Court Finds Oklahoma Cannot Ban Gay Nuptials*, N.Y. TIMES, July. 18, 2014, <http://www.nytimes.com/2014/07/19/us/gay-marriage-oklahoma-federal-court.html>.

267. Erik Eckholm, *Federal Judge Overturns Virginia's Same-Sex Marriage Ban*, N.Y. TIMES, Feb. 14, 2014, <http://www.nytimes.com/2014/02/14/us/federal-judge-overturns-virginias-same-sex-marriage-ban.html>.

268. *Id.*

269. *See id.*

270. Manny Fernandez, *Federal Judge Strikes Down Texas' Ban on Same-Sex Marriage*, N.Y. TIMES, Feb. 26, 2014, <http://www.nytimes.com/2014/02/27/us/texas-judge-strikes-down-state-ban-on-same-sex-marriage.html>.

271. *Id.*

272. Erik Eckholm, *Federal Judge Strikes Down Michigan's Ban on Same-Sex Marriage*, N.Y. TIMES, Mar. 21, 2014, <http://www.nytimes.com/2014/03/22/us/michigan-ban-on-same-sex-marriage-is-struck-down.html>.

273. Ed White, *Michigan gay-marriage ban at stake in rare trial*, WASH. TIMES, Feb. 25, 2014, <http://www.washingtontimes.com/news/2014/feb/25/2-week-trial-to-begin-on-michs-gay-marriage-ban/?page=all>.

274. *Same-Sex Dutch Couples Gain Marriage and Adoption Rights*, *supra* note 22.

275. Eckholm, *supra* note 273.

More recently, seven states have made similar rulings in regards to same-sex marriage. On May 9, 2014, an Arkansas judge ruled that the state ban was unconstitutional,²⁷⁶ stating:

Our freedoms are often acquired slowly, but our country has evolved as a beacon of liberty in what is sometimes a dark world. These freedoms include a right to privacy. It is time to let that beacon of freedom shine brighter on all our brothers and sisters. We will be stronger for it.²⁷⁷

However, the Arkansas Supreme Court issued a stay to same-sex marriages pending the appeal process.²⁷⁸ Idaho, Wisconsin, Indiana and Colorado followed similar paths, with a judge striking down the constitutional ban,²⁷⁹ and a higher court halting same-sex marriages awaiting the appeal process.²⁸⁰

Kentucky had a slower progression in their battle for marriage equality. In a decision on February 12, 2014, a judge ruled that

276. Bill Mears, *Arkansas ban on same-sex marriage struck down by state judge*, CNN, May 9, 2014, <http://www.cnn.com/2014/05/09/us/arkansas-same-sex-ban-overturned/>.

277. *Id.*

278. *Arkansas: Same-Sex Marriages Are Halted*, N.Y. TIMES, May 16, 2014, <http://www.nytimes.com/2014/05/17/us/arkansas-same-sex-marriages-are-halted.html>.

279. Greg Botelho, *Federal judge declares Idaho's gay marriage ban unconstitutional*, CNN, May 14, 2014, <http://www.cnn.com/2014/05/13/justice/idaho-gay-marriage/>; *Wisconsin: Another Same-Sex Marriage Ban Falls*, N.Y. TIMES, June 6, 2014, <http://www.nytimes.com/2014/06/07/us/wisconsin-another-same-sex-marriage-ban-falls.html>; John Newsome, *Same-sex marriages put on hold in Indiana by federal appeals court*, CNN, July 1, 2014, <http://www.cnn.com/2014/06/27/us/same-sex-marriage-indiana/>; Greg Botelho & Bill Mears, *Colorado's same-sex marriage ban shouldn't stand, judge rules*, CNN, July 9, 2014, <http://www.cnn.com/2014/07/09/justice/colorado-same-sex-marriage/>.

280. Greg Botelho, *Same-sex marriages on hold in Idaho, given go-ahead in Arkansas*, CNN, May 15, 2014, <http://www.cnn.com/2014/05/15/us/same-sex-marriage/>; Dana Ford, *Judge halts same-sex marriages in Wisconsin*, CNN, June 14, 2014, <http://www.cnn.com/2014/06/13/us/wisconsin-same-sex-marriage/>; Newsome, *supra* note 280; *Supreme Court Halts Gay Marriages While Ban Remains In Place*, HUFF. POST, July 18, 2014, http://www.huffingtonpost.com/2014/07/18/colorado-gay-marriage_n_5600676.html.

Kentucky must recognize valid gay marriages.²⁸¹ On July 1, 2014, Kentucky went a step further and declared their ban on same sex marriage violated the constitutional rights of same-sex couples.²⁸² Most recently, a Florida court ruled that their state ban was unconstitutional, however, the ruling applies to only one county in Florida.²⁸³ Currently fourteen states are waiting for the appeal process to see if their same-sex citizens will be granted the right to marry.²⁸⁴

Unfortunately, not all states moved in the progressive direction. The Kansas House of Representatives passed a measure that would allow businesses to refuse services to same-sex couples based on their religious disagreement with gay unions.²⁸⁵ The measure was sent to the Senate to be debated.²⁸⁶ The Kansas Senate understood the need to protect religious beliefs but also believed the bill is going too far and would be extremely harmful to Kansas businesses.²⁸⁷ While this measure did not actually become good law, it showed that the battle for same-sex marriage is far from over. The Arizona legislature passed similar legislation through both houses.²⁸⁸ Fortunately for Arizona and

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281. Robert Barnes, *Kentucky must recognize gay marriages from other states, federal judge rules*, WASH. POST, Feb. 12, 2014, http://www.washingtonpost.com/politics/kentucky-must-recognize-gay-marriages-from-other-states-federal-judge-rules/2014/02/12/8ec79508-9410-11e3-b46a-5a3d0d2130da_story.html.
282. Niraj Chokshi, *Federal judge strikes down Kentucky's ban on same-sex marriage*, WASH. POST, July 1, 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/01/federal-judge-strikes-down-kentuckys-same-sex-marriage-ban/>.
283. *Ruling Allows Same-Sex Marriages for Florida Keys*, TIME, July 17, 2014, <http://time.com/3001923/ruling-allows-same-sex-marriages-for-florida-keys/>.
284. *States, supra* note 7.
285. John Hanna, *Anti-gay marriage bill wins Kan. House's approval*, WASH. TIMES, Feb. 13, 2014, <http://www.washingtontimes.com/news/2014/feb/12/kan-house-plans-final-vote-on-gay-marriage-bill/?page=all>.
286. *Id.*
287. John Milburn, *Kan. Senate leader: Discrimination bill won't pass*, HUFF. POST, Feb. 14, 2014, http://www.huffingtonpost.com/2014/02/14/kansas-senate-gay-bill_n_4789482.html.
288. Leigh Ann Caldwell, *Arizona Gov. Jan Brewer weighs options on anti-gay measure*, CNN, Feb. 25, 2014, <http://www.cnn.com/2014/02/25/politics/arizona-brewer-anti-gay-bill/>.

the rest of the United States, Governor Jan Brewer vetoed the bill.²⁸⁹ Brewer stated, “Religious liberty is a core American and Arizona value, so is no discrimination.”²⁹⁰ While these bills were unsuccessful, six additional states have proposed legislation along similar lines.²⁹¹ Missouri, Illinois, South Dakota, Tennessee, Oregon and Hawaii introduced legislation that would enable businesses to discriminate against same-sex couples.²⁹² While most of America moved forward, some states continued to be adamantly against the idea of marriage equality.

In an unusual decision, the Supreme Court recently helped the battle for same-sex marriage by denying certiorari in five cases involving same-sex marriage.²⁹³ The Supreme Court actually advanced the same-sex marriage movement because it allowed the lower courts’ decisions to stand, including three federal appeals’ decisions that may have a more expansive result.²⁹⁴ The decision legalized same-sex marriage in Indiana, Oklahoma, Utah, Virginia and Wisconsin.²⁹⁵ Additionally, the court cleared the way for same-sex marriage to pass in Alaska, Arizona, Colorado, Idaho, Nevada, North Carolina, West Virginia, and Wyoming.²⁹⁶ Further, Kansas, Montana and South Carolina have precedents from their judicial circuits that favor same-sex marriage policies.²⁹⁷ This decision essentially marks the beginning of the end for same-sex marriage bans. Justice Ruth

289. Fernanda Santos, *Arizona Governor Vetoes Bill on Refusal of Service to Gays*, N.Y. TIMES, Feb. 26, 2014, http://www.nytimes.com/2014/02/27/us/Brewer-arizona-gay-service-bill.html?_r=1.

290. *Id.*

291. Katy Steinmetz, *6 Proposals Denying Service to Gays You Haven’t Heard About*, TIME, Feb. 27, 2014, <http://time.com/10140/arizona-kansas-same-sex-bill-refusal-of-service-gay/>.

292. *Id.*

293. Adam Liptak, *Supreme Court Hands Gay Marriage a Tacit Victory*, N.Y. TIMES, Oct. 6, 2014, <http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html?hp&action=click&pgtype=Homepage&version=Banner&module=span-ab-top-region®ion=top-news&WT.nav=top-news>.

294. *Id.*

295. *Id.*

296. *Same Sex Marriage Fast Facts*, CNN, Nov. 7, 2014, <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/>.

297. *States*, FREEDOM TO MARRY (2014), <http://www.freedomtomarry.org/states/>.

Bader Ginsberg has commented that there is no urgency to have the court rule on the issue because there has not been a split by federal courts.²⁹⁸ She has also stated that the court needs to move slowly on social issues because if a ruling is issued that drastically changes the law, there can be a lot of backlash from the public.²⁹⁹ The court handled interracial marriages in a similar manner, not delivering an ultimate ruling on the matter until 34 states already allowed interracial marriages.³⁰⁰ The Court leaves the U.S. in an interesting situation regarding same-sex marriage. While the Court did advance same-sex marriage in a number of states, there will not be a nationwide ruling on same-sex marriage in the near future. In fact, it appears that until a court upholds a same-sex marriage ban, the Supreme Court will not take a case. This leaves the decisions up to the states to overturn their same-sex marriage bans, which may be difficult in states that have not had any judicial proceedings regarding same-sex marriage bans.

While the U.S. appears to be on a path towards nationwide same-sex marriage, the 6th Circuit Court recently gave the Supreme Court the controversy that Justice Ginsberg alluded to, by upholding same-sex marriage bans.³⁰¹ This ruling acts to overturn the rulings of the lower courts in Michigan, Ohio, Tennessee and Kentucky.³⁰² The majority opinion said same-sex marriage is a topic that should be left up to the public and not made by a judicial decision.³⁰³ Even though this ruling appears to be a roadblock in reaching a nationwide policy, Justice Breyer says that the battle on same-sex marriage is far from over.³⁰⁴ This new ruling may be exactly what the U.S. needed for the Supreme Court to decide on the merits of same-sex marriage.

298. *States*, FREEDOM TO MARRY (2014), <http://www.freedomtomarry.org/states/> (discussing the backlash over the 1973 decision, *Roe v. Wade*).

299. *Id.*

300. *Id.*

301. Jonathan Capehart, *Hurray for the 6th Circuit Rejection of Gay Marriage*, NPR, Nov. 7, 2014, <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/07/hurray-for-the-6th-circuit-rejection-of-gay-marriage/>.

302. *Id.*

303. *Id.*

304. Hilary Krieger, *Supreme Court Justice Stephen Breyer Signals Gay Marriage Case Not Closed*, POLITICO, Nov. 10, 2014, <http://www.politico.com/story/2014/11/supreme-court-gay-marriage-justice-stephen-breyer-112736.html>.

Today Americans stand divided. According to the latest Gallup Poll, about 55% of Americans support same-sex marriage.³⁰⁵ The executive branch backed gay marriage, while the Supreme Court gave mixed signals. In the most recent stance, the Justice Department has stated that federal employers across the nation should treat married same-sex couples the same as heterosexual couples regardless of whether the state recognizes gay marriage.³⁰⁶ This new policy covered a variety of areas, including spousal privilege in court proceedings, extra benefits for incarcerated individuals dealing with their spouses, and the ability of same-sex couples to file jointly for bankruptcy.³⁰⁷ Eric Holder declared, “This means that, in every courthouse, in every proceeding and in every place where a member of the Department of Justice stands on behalf of the United States — they will strive to ensure that same-sex marriages receive the same privileges, protections, and rights as opposite-sex marriages under federal law.”³⁰⁸ Holder continued, “[A]s all-important as the fight against racial discrimination was then, and remains today, know this: My commitment to confronting discrimination based on sexual orientation or gender identity runs just as deep.”³⁰⁹ The Attorney General recently expounded on his stance when he told the attorneys’ general of the states that they are not required to defend bans on same-sex marriage if they believed those bans are discriminatory.³¹⁰

While thirty-two states and the District of Columbia authorize same-sex marriages, a number of states still restrict them. Following other countries’ successful paths to same-sex marriage may be exactly what the United States needs to do to reach our own nationwide policy.

305. Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP POLITICS, May 21, 2014, <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx>.

306. Horwitz, *supra* note 106.

307. Horwitz, *supra* note 106.

308. Horwitz, *supra* note 106.

309. Horwitz, *supra* note 106.

310. Matt Apuzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES, Feb. 24, 2014, http://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html?_r=0.

III. POSSIBILITIES TO BRING NATIONWIDE SAME-SEX MARRIAGE TO THE UNITED STATES

A. Customary International Law

Customary international law could be a key to get the United States to pass a nationwide same-sex marriage policy. In a number of cases, courts around the U.S. have cited international cases; therefore, using customary international law may be the logical next step for same-sex marriage. Customary international law is created out of the need to have consistent beliefs between states.³¹¹ Customary law binds all states that have not shown objections to the established norms, which means it can apply more broadly than treaty law, which only applies to countries that ratify the treaties.³¹² The United States, through Restatement 3 of the Foreign Relations Law, states that customary international law can be incorporated into the “law of the land” pursuant to Article VI of the Constitution.³¹³ In fact, customary international law is seen as federal common law and, therefore, would trump conflicting state law under the Supremacy Clause of the U.S. Constitution.³¹⁴ This means that if making a nationwide policy on marriage does not seem possible, it might be easier to implement international law in state same-sex marriage cases because it is superior to the laws of the states. If the U.S. courts find that customary international law grants the right for same-sex marriage, state laws that are contrary to that finding can be challenged.

The International Court of Justice says, “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law.”³¹⁵ This statute states that, when deciding cases, customary international law can be taken into consideration,

311. Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT’L L. 1, 3 (1992).

312. *Id.*

313. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

314. Sadtler, *supra* note 150, at 444.

315. Statute of the International Court of Justice, art. 38, para 1(b).

although some scholars argue that customary law may be unclear and confusing to apply.³¹⁶ However, customary international law can develop from norms created in international treaties, including U.N. Documents, which can help to make clear international customs.³¹⁷

To date, no international document expressly grants the right to same-sex marriage.³¹⁸ The U.N. has issued the Universal Declaration of Human Rights, which creates ideals of equality that should be extended to same-sex couples. Article 7 states that all people are equal under the law and should be free to equal protection without discrimination.³¹⁹ Article 12 protects a right to privacy, especially in the home and family.³²⁰ Finally, Article 16 states that the right to marry is without limitation and should be granted to everyone of full age.³²¹ Taken together, these three articles point to a policy allowing same-sex marriage. Article 16 does not state that marriage between a man and a woman is the only type of marriage protected by the Declaration of Human Rights; rather, it states that men and women have a right to get married. Reading that, in combination with a right to privacy in the home and the right to equal protection, Article 16 can mean that all men and all women have the right to marry whomever they please and to start a family.

Another international document that may even go a step farther for gay rights is the International Covenant on Civil and Political Rights (ICCPR).³²² The ICCPR includes rights to equality regardless

316. MARK W. JANIS, INTERNATIONAL LAW, 44-45 (2008).

317. *See id.* at 43-57.

318. Green, *supra* note 54, at 86.

319. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art 20, para 1 (Dec. 10, 1948) (“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”).

320. *Id.* (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”).

321. *Id.* (“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”).

322. Green, *supra* note 54, at 87.

of sexual orientation.³²³ The first interpretation of the ICCPR by the U.N. Human Rights Committee (the Committee) showed that the ICCPR was not enacted to protect gay rights.³²⁴ However, in *Toonen v. Australia*, the Committee specifically stated that provisions 2 and 26 protect sexual orientation.³²⁵ A provision in the ICCPR now exists that grants the right to marry.³²⁶ Since the ICCPR can be interpreted to include a protection for sexual orientation, a protection for same-sex marriages can easily be inferred.³²⁷ While a strict reading of the marriage provision does not directly grant the right to same-sex marriage, the provision does not directly state that the fundamental right to marry is only between a man and a woman; rather, it is the right for men and women to get married but not necessarily to each other.³²⁸

These two documents taken together could be the spark to American law that would allow for the passage of same-sex marriage. While interpretations by the Committee are not binding law for the U.S., their rulings are persuasive and U.S. courts will have to find a justification as to why they are not following the Committee's

323. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N.Doc. A/6316, at 173 (1996), 999 U.N.T.S. 171. (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”) (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”)

324. Sadtler, *supra* note 150, at 418-419.

325. Sadtler, *supra* note 150, at 419. ; *see also* Toonen v. Australia, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess. Supp. No. 40, vol II, at 235, U.N. Doc. A/49/40 (Mar. 31, 1994) (“The Committee confines itself to noting, however, that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”).

326. International Covenant on Civil and Political Rights, *supra* note 311 (“ 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.”).

327. *See* Toonen, *supra* note 314.

328. *See* Sadtler, *supra* note 150, at 424.

decisions.³²⁹ Even if the international law is not settled as to whether same-sex marriage is a custom, there are similarities to American law that should at least be persuasive to the U.S. For example, the Fifth Amendment states that the federal government cannot deny life, liberty or property without due process of law.³³⁰ Similarly, the Fourteenth Amendment states that states cannot deny life, liberty or property without due process of law and cannot deny its citizens equal protection under the laws.³³¹ The Supreme Court has stated that there is a fundamental right to marry.³³² These three facts can be interpreted as to establish the same rights that both the Universal Declaration of Human Rights and the ICCPR grants. If the U.S. already has similar laws in place, it can make the idea of customary law more persuasive because we believe in the same ideals. Finding a protection of same-sex marriage in international law can mean that U.S. courts will be able to find the same rights in our own laws.

While customary international law can be a factor in determining same-sex marriage policies in the U.S., there are a number of inferences that must be made to say that there is a fundamental right to same-sex marriage. Unfortunately, no international tribunal has been as expansive as the Committee's ruling on the ICCPR prohibiting discrimination based on sexual orientation.³³³ Thus, without a strong backing that same-sex marriage is a norm in international law, it might be a stretch to say that customary law requires a right for same-sex couples to marry.

B. Goodbye DOMA

Since its enactment in 1996, DOMA gave states a way around same-sex marriage. If the federal government could limit benefits to marriages between a man and a woman, then the states could limit the right of marriage to the same definition. In fact, that was exactly why it was enacted. It calmed fears that same-sex marriage would suddenly

329. See Sadtler, *supra* note 150, at 428-429.

330. U.S. CONST. amend. V.

331. U.S. CONST. amend. XIV, § 1.

332. See *Loving*, 388 U.S. at 12 (1967).

333. Sadtler, *supra* note 150, at 429.

be legalized everywhere if one state adopted that policy.³³⁴ DOMA was a safeguard to heterosexual marriages, and if the federal government allowed for a distinction, the public agreed. In 1996, an overwhelming 68% of people agreed that marriage should only be between a man and a wife.³³⁵ This was evident through the number of states that passed state DOMA laws.³³⁶ DOMA offered a protection that meant, if nothing else, the federal government felt that equality could be reached without granting same-sex couples the right to marry.

DOMA never made same-sex marriage legal or illegal, but now that the Supreme Court ruled that defining marriage as a union between a man and a woman (at least in regard to federal benefits) is unconstitutional, it might lead the way for authorizing same-sex marriage. Justice Scalia stated it was only a matter of time before the Court said that same-sex marriage was needed in order to create equality for homosexual couples.³³⁷ The latest stance by the Justice Department showed that Justice Scalia's statement had some truth behind it. Ensuring that same-sex married couples have all of the same federal benefits as heterosexual married couples regardless of the state in which the couple resides showed a need to recognize same-sex marriages to achieve equality.³³⁸ This new stance could be the first step that our nation needs in order to tackle marriage equality at a national level.

Just because DOMA is no longer good law, the road is not without challenges for same-sex activists. Marc Solomon, the national campaign director of Freedom to Marry, states, "We're going to be entering an era where most of the legislative fights are over, and we're going to have to undo constitutional amendments, and do that at the ballot box."³³⁹ Since a number of states have legislation that says

334. See Wardle, *supra* note 166, at 789.

335. Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP POLITICS (May 13, 2013), <http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx>.

336. See Juliet Eilperin, *Why legalizing gay marriage is going to get harder*, WASH. POST, Nov. 6, 2013 (stating that currently twenty nine states have voter approved constitutional bans on same-sex marriage).

337. See Windsor, *supra* note 12.

338. Horwitz, *supra* note 106.

339. Eilperin, *supra* note 325.

marriage is between a man and a woman, it is unlikely that the legislature is just going to change the policy with which their constituents have been happy. This leaves the change in the hands of the American people. While gaining more acceptance across the U.S., only three states have successfully achieved same-sex marriage through popular vote.³⁴⁰ This means that unless the Supreme Court handles another case and actually gives a ruling on the merits of same-sex marriage, it may be an uphill battle to change the policy on a state-by-state basis.

C. Model for the U.S. to Follow

All three case studies show similar pathways to legalizing same-sex marriages. Through rulings in court or legislative action, same-sex marriage has become policy. The popular vote has not been the method chosen for achieving same sex marriage in these countries. While the public opinion supporting same-sex marriage has reached over 52% in America, it does not appear that leaving the vote to the people will be a potential way to achieve same-sex marriage. A spokesperson from the Human Rights Campaign says, “No one is under any illusions that marriage is going to come to all 50 states through any other venue than the United States Supreme Court.”³⁴¹

If court action is the way to go, Canada may be the best model to follow. The Canadian Supreme Court gave the legislature permission to enact legislation.³⁴² The Court told the legislature that they did have the power to enact a nationwide marriage policy.³⁴³ However, this might come from the fact that family law is controlled by the national government in Canada.³⁴⁴ While each state can make its own family law in the U.S., if we are giving the power to the Supreme Court to decide if a policy is constitutional, they would be able to make a sweeping decision. This means that if the Court can find that same-sex marriage bans are unconstitutional because they are a deprivation of liberty, no state would be allowed to continue with its marriage bans. The national government would not be stepping on the toes of the

340. See Honon, *supra* note 216.

341. See Honon, *supra* note 216.

342. See HURLEY, *supra* note 113.

343. See Bala, *supra* note 132, at 217-18.

344. Glass & Kubasek, *supra* note 110, at 160.

states, but marriage equality could be reached by attempting to have congruence with our Constitution.

While the Netherlands did not have our federalism problem, their rationale could be the most helpful information from their same-sex marriage crusade. Equality was the reigning theme and could be one of the best arguments for the United States, with both the Fifth and Fourteenth Amendments granting equal protections under the law. Taking the words of Otto Vos, marriage should be about love, not gender.³⁴⁵ Experts have said that same-sex marriages in the United States have been associated with “dignity, identity and love.”³⁴⁶ If love was part of the winning argument in the Netherlands, American attorneys should take notes and include a theme of love in their arguments because everyone is entitled to be happy and to be loved.

Like the Netherlands, the most helpful aspect of the United Kingdom’s gay rights movement was their rationale. Discrimination was the winning argument for the United Kingdom because they would not recognize same-sex marriages that were validly entered into in other countries.³⁴⁷ Like the Netherlands, the need for equality won out in the same-sex marriage debate. So with multiple countries agreeing that true equality could only be reached by allowing same-sex marriage, the U.S. could find a combination of international and domestic reasoning needed to pass marriage equality.

IV. CONCLUSION

The U.S. has made progress in marriage equality, but there are still eighteen states that do not allow same-sex marriage. International law can, at the least, be persuasive authority if the Supreme Court decides another same-sex marriage case. Whether following the rulings in Canada, where the court stated that the national government had the right to enact a marriage bill even with a similar system of federalism, or following the United Kingdom or the Netherlands with a ruling that same-sex marriage is necessary to truly have equality, the U.S. could easily achieve marriage equality. The U.S. should take these other countries’ reasoning about same-sex marriage, rather than try and copy their direct paths. The idea of equality and a fundamental right to

345. Kurtz, *supra* note 45.

346. Mazzochi, *supra* note 155, at 598.

347. Clark, *supra* note 71.

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marry should be enough to get the U.S. on a path to a nationwide policy. If the U.S. wants to guarantee equality under the law, marriage equality must be the next step.