# THE COUNTERMAJORITARIAN DIFFICULTY OF MARRIAGE EQUALITY: KITCHEN V. HERBERT & BISHOP V. SMITH

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## INTRODUCTION

The Tenth Circuit Court of Appeals' 2014 decision in *Kitchen v. Herbert*[1] is the first time a circuit court of appeals found that the fundamental right to marry encompassed the right of same-sex couples.[2] This decision was quickly followed by *Bishop v. Smith*,[3] which reaffirmed and strengthened the *Kitchen* core holding.[4] In these cases, the Tenth Circuit addressed state constitutional amendments defining and limiting marriage, which were added to the Utah and Oklahoma Constitutions in 2004.[5] These cases brought to the forefront of national debate the long-standing tension between judicial protection of minority rights through judicial review and the will of the majority through the democratic process.

Another way in which the tension between judicial review and the democratic process can be termed is the "countermajoritarian difficulty."[6] The countermajoritarian difficulty comes from the idea that judges, as unelected officials insulated from influence by the will of the majority, and therefore unaccountable and able to make decisions that are contrary to what the majority of people desire.[7]

One way in which the will of the majority is represented is through state constitutional amendments. The process of amending a state constitution is not standard for all states;[8] however, one requirement in every state, except Delaware, is that the prospective amendment be submitted for

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[1] 755 F.3d 1193 (10th Cir. 2014).
[2] *Id.* at 1199.
[3] 760 F.3d 1070 (10th Cir. 2014).
[4] *Id.* at 1080 (holding that "[s]tate bans on licensing of same-sex marriage significantly burden the right to marry" and the state constitutional amendment baring same-sex marriage was not narrowly tailored to achieve the state interests of procreation and for children to be raised by their biological parents). This case addressed an additional argument that was not raised in *Kitchen* of a state interest in children being raised by their biological parents. *Id.*
[5] OKLA. CONST. art. 2, § 35; UTAH CONST. art. 1, § 29.
[6] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998) (describing the meaning of the term "countermajoritian difficulty" as created in 1962 by Alexander Bickel).
[7] *Id.*
[8] Adam H. Morse, *Second-Class Citizenship: The Tension Between the Supremacy of the People and Minority Rights*, 43 J. MARSHALL L. REV. 963, 995–96 (2010) (discussing the constitutional amendment process in various states, whether requiring supermajority or simple majority in legislative proposal, referendum, or initiative as well as supermajority or simple majority for general election ratification).

popular vote, often ratified by a simple majority.[9] Thus, any state constitutional amendment represents the will of the majority, and the countermajoritarian difficulty arises when such amendments are invalidated by the decisions of unelected, federal judges.

This Comment argues that the countermajoritarian difficulty should be considered seriously when invalidating a state constitutional amendment. However, as in the Tenth Circuit cases here, when a fundamental right is denied to a group of people based on an immutable characteristic of that group, then the decision is properly removed from the democratic process and guaranteed through judicial review of state legislation under the United States Constitution.

First, Part I of this comment examines the democratic process in Utah and Oklahoma that created the constitutional amendments at issue in *Kitchen* and *Bishop,* and the applicable case precedent for the Tenth Circuit Court of Appeals when *Kitchen* and *Bishop* were decided as well as the frameworks used when deciding on the constitutionality of amendments under fundamental rights and equal protection. This will be followed by a brief discussion of decisions on this issue by other circuit courts. Part II of this comment summarizes the relevant facts, procedural history, opinion, concurrence, and dissent for both *Kitchen* and *Bishop*. Part III then argues that a great deal of deference should be given to state constitutional amendments, particularly when a supermajority amendment process is required, though minority rights must at times be preserved through judicial review. Finally, Part III concludes that concerns for the countermajoritarian difficulty must be bypassed in the legitimizing of same-sex marriage due to a fundamental right to marry through substantive due process as well as bans on same-sex marriage being a violation of equal protection.

## I. BACKGROUND

In order to fully understand the Tenth Circuit Court of Appeals' decision in *Kitchen* and *Bishop*, it is necessary to understand the state constitutional amendments in Utah and Oklahoma defining and limiting marriage as well as the democratic process in those states for amending their respective constitutions. Additionally, prior decisions involving same-sex marriage from the Supreme Court provide useful background for these cases because the Tenth Circuit is bound to follow applicable Supreme Court

[9] *See Id*. at 996 ("Delaware, unique among the states, allows for amendment by the state legislature without the direct involvement of the people of the state--the legislature must pass a proposed amendment by a two-third majority both before and after an election for its members.").

precedent, and a brief explanation of the doctrinal framework of fundamental rights and equal protection analysis is necessary to understanding the differing methods used by the federal courts.[10] Further, an examination of how the other circuit courts have answered the question of whether state constitutional amendments and statutes barring same-sex marriage are constitutional provides context for the Tenth Circuit decisions in *Kitchen* and *Bishop*.

### *A. Utah and Oklahoma Marriage Amendments*

In 2004, Utah and Oklahoma submitted proposed amendments in the November general election, defining marriage as between a man and a woman, thereby preventing other forms of relationships from being granted the same legal recognition and benefits as marriage.[11] The text of the Utah Constitution reads, "(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."[12]

The Oklahoma Constitution is substantially similar to the Utah Constitution with two important additions.[13] The first addition is a non-recognition clause: "A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage."[14] The second addition is a penalty clause: "Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor."[15]

The democratic process in place for amending the Utah and Oklahoma Constitutions can be found within the respective constitutions of these states.[16] In both states, the legislature can propose constitutional

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[10] *See* Kitchen v. Herbert, 755 F.3d 1193, 1204-07 (10th Cir. 2014) (discussing the applicable precedent in determining whether the court could decide on the merits of the case).
[11] OKLA. CONST. art. 2, § 35; UTAH CONST. art. 1, § 29.
[12] UTAH CONST. art. 1, § 29.
[13] OKLA. CONST. art. 2, § 35 (A) ("Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.").
[14] OKLA. CONST. art. 2, § 35 (B).
[15] OKLA. CONST. art. 2, § 35 (C).
[16] OKLA. CONST. art. 24, § 1; UTAH CONST. art. 23, § 1.

amendments.[17] However, Utah requires a supermajority vote of two-thirds in both the House of Representatives and the Senate, while Oklahoma only requires a majority vote in both the House of Representatives and the Senate.[18] The next step in the amendment process in both states is the submission of the proposed amendment to the voters at the next general election.[19] The proposed amendment will then be added to the text of the constitution if it passes the general election with a simple majority vote.[20]

The Oklahoma Constitution is much easier to amend than is Utah's in two important ways. First, a proposed amendment only needs majority support in the legislature.[21] Second, the people of Oklahoma can also propose amendments through an initiative process.[22] In contrast, Utah does not allow citizen initiatives to amend the state constitution – any amendments may only be proposed by the legislature.[23]

In 2004, the marriage amendment to the Utah Constitution was proposed through a joint resolution of the House of Representatives and Senate and passed by a two-thirds majority.[24] Oklahoma also proposed its marriage amendment through the legislature by referendum.[25] In both states, these amendments were the decision of the majority in response to social changes, particularly the recent decision of Massachusetts to allow same-sex marriage.[26] Utah and Oklahoma were not alone in taking action through the democratic process to define and limit marriage; between 1998 and 2008, twenty-nine states amended their constitutions to define marriage as between opposite sex couples and exclude recognition of same-sex marriages.[27]

### *B. Supreme Court Precedent*

When *Kitchen* and *Bishop* were heard, the Supreme Court had not yet ruled on the constitutionality of state constitutional amendments or state

[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] OKLA. CONST. art. 24, § 1
[22] OKLA. CONST. art 24, § 3.
[23] *See* UTAH CONST. art. 23, §§ 1–3.
[24] H.R.J. Res. 25, 55th Leg., Gen. Sess. (Utah 2004).
[25] H.R. 2259, 49th Leg., 2d Reg. Sess. (Okla. 2004).
[26] *See* S. News Rel., 49th Leg., 2d Reg. Sess. (Okla. May 18, 2004).
[27] Charles M. Cannizzaro, *Marriage in California: Is the Federal Lawsuit Against Proposition 8 About Applying the Fourteenth Amendment or Preserving Federalism*, 38 PEPP. L. REV. 161, 176–78 (2010).

statutes that prohibit same-sex marriage.[28] In 1972, the Supreme Court dismissed an appeal from the Minnesota Supreme Court that had affirmed a ruling that state action to prohibit same-sex marriage was not unconstitutional.[29] This case, *Baker v. Nelson*, was dismissed for lack "of a substantial federal question."[30] A summary dismissal has the precedential effect of a ruling on the merits of a case, though this does not necessarily mean that the dismissing court agrees with the lower court'scourts' opinion.[31] *Baker* became the central precedent by the Supreme Court to bar federal courts from hearing cases involving a constitutional right to same-sex marriage.[32]

Following the *Baker* dismissal, the Supreme Court ruled on other issues involving sexual orientation and same-sex relationships.[33] The (most) recent case, *United States v. Windsor*,[34] is the most applicable to the issue of same-sex marriage because of the Court's rationale in striking down Section 3 of the Defense of Marriage Act (DOMA).[35] There the Court heavily emphasized the role of the states in the regulation of marriage and domestic affairs, and found DOMA to be an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage."[36] However, the Court moderated this emphasis with a reminder from its

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[28] *See, e.g.*, Herbert v. Kitchen, 135 S. Ct. 265, 265 (2014) (mem.) (denying certiorari). Though this has now changed due to the recent circuit split. DeBoer v. Snyder, No. 14-571, 2015 WL 213650 (Jan. 16, 2015) (granting certiorari); *see* DeBoer v. Snyder, Nos. 14–1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990, at *1, *8 (6th Cir. Nov. 6, 2014) (finding no constitutional protections for same-sex marriage).
[29] *See* Baker v. Nelson, 409 U.S. 810 (1972); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).
[30] 409 U.S. at 810.
[31] Kitchen v. Herbert, 755 F.3d 1193, 1205 (10th Cir. 2014) (quoting Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 477 n. 20 (1979)).
[32] *See, e.g.*, Massachusetts v. U.S. Dep't. of Health and Human Servs., 682 F.3d 1, 8 (1st Cir. 2012) (finding that *Baker* precluded the court from hearing arguments that involved "a constitutional right to same-sex marriage.").
[33] The earliest pivotal Supreme Court case involving sexual orientation was *Romer v. Evans*. 517 U.S. 620, 623 (1996) (holding that a provision in the Colorado Constitution prohibiting a protected status for the purposes of discrimination statutes on the basis of sexual orientation was invalid under the Equal Protection Clause). *Lawrence v. Texas* followed in 2003, holding that sodomy statutes were unconstitutional as applied to same-sex couples under substantive due process. 539 U.S. 558, 578 (2003).
[34] 133 S. Ct. 2675 (2013).
[35] Section 3 of DOMA, passed in 1996, provided a definition of the word marriage as between a man and a woman and the word spouse as a person married to a member of the opposite sex for the purposes of federal law and federal benefits, these definitions were codified as 1 U.S.C. § 7 (2012).
[36] *Windsor*, 133 S. Ct. at 2693.

decision in *Loving v. Virginia*[37] that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons."[38]

Next, the Court addressed the constitutionality of Section 3 of DOMA using an analysis similar to that used in *Romer v. Evans*,[39] examining the discriminatory impact of the provision.[40] Though it is unclear what level of scrutiny the Court used here, the reasoning follows what has become known as animus doctrine or "rational basis with bite."[41] The Court concluded that Section 3 of DOMA was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[42] The *Windsor* holding is a decision made on the grounds of equal protection through the Due Process Clause of the Fifth Amendment.[43]

### *C. Fundamental Rights, Equal Protection, and Animus*

In the wake of the *Windsor* decision, many cases have been brought into the federal courts challenging the constitutionality of state constitutional amendments and statutes prohibiting same-sex marriage.[44] Each of these cases has used different methods of arriving at the answer, though an overwhelming number of federal courts have come to the same conclusion.[45]

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[37] 388 U.S. 1 (1967).
[38] *Windsor*, 133 S. Ct. at 2691.
[39] 517 U.S. 620 (1996). *Romer* dealt with an amendment to the Colorado Constitution that did away with and prevented antidiscrimination protections based on sexual orientation. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 910 (2012). The analysis in *Romer* is recognized as animus doctrine and the Colorado amendment at issue was struck down as an unconstitutional denial of legal protections to a single identified group. *See id.* at 913.
[40] *Windsor*, 133 S. Ct. at 2693–96.
[41] *See* Bishop v. Smith, 760 F.3d 1070, 1099, 1101–03 (10th Cir. 2014) (Holmes, C.J., concurring) (providing various names for animus doctrine and examining the analysis used in *Romer* and *Windsor* as well as other Supreme Court decisions in which a heightened level of scrutiny was not explicitly used but the scrutiny was not traditional rational basis scrutiny but some form of heightened rational basis).
[42] *Windsor*, 133 S. Ct. at 2695–96 (holding that in violation of equal protection guaranteed through due process in the Fifth Amendment, DOMA treated legal same-sex marriages as different and inferior to other marriages imposing a disability on a particular class without legitimate purpose).
[43] *Id.*
[44] *See, e.g.*, Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Baskin v. Bogan, Nos. 14–2386, 14–2387, 14–2388, 14–2526, 2014 WL 4359059, at *1 (7th Cir. Sept. 4, 2014).
[45] *Compare Bostic*, 760 F.3d at 367, 377 (finding that the fundamental right to marry includes same-sex marriage and strict scrutiny applies which Virginia's constitutional amendment and statutes do not withstand), *with Baskin*, 2014 WL 4359059, at *4-7, *21 (finding that equal protection is the proper grounds for analysis requiring a heightened level of scrutiny which is not directly specified but resembles animus scrutiny which the state constitutional amendments and statutes do not withstand). *Contra* DeBoer v. Snyder, Nos. 14–1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990, at *1, *8 (6th Cir. Nov. 6, 2014) (finding no constitutional protections for same-sex

The reason for these differing methods is because of the flexibility in how the constitutional question of same-sex marriage is framed. This question can be framed as whether prohibitions on same-sex marriage are a denial of a fundamental right or a denial of equal protection based on sexual orientation.

When the question is framed as whether a fundamental right is being denied, the first step is to determine whether or not the right at issue is fundamental and thus guaranteed through substantive due process.[46] This fundamental rights determination is made by a ruling on whether the right at issue is "deeply rooted in United States history and tradition."[47] Once a right has been deemed fundamental, strict scrutiny applies, which requires that the law at issue further a compelling state interest and that the means chosen be narrowly tailored to further that interest.[48]

In contrast, equal protection analysis is more complex with three traditional levels of scrutiny.[49] The level of scrutiny required depends on whether the classification in the law is based on a suspect or quasi-suspect classification.[50] Suspect classifications, such as race, require the use of strict scrutiny, which requires that the law at issue further a compelling state interest and the classification is narrowly tailored to further that interest.[51] Quasi-suspect classifications, such as gender, require the use of intermediate scrutiny, which requires that the law at issue further an important state interest and that there be a substantial relationship between the classification and the state interest.[52] All other classifications require the use of rational basis scrutiny, which requires that the classification be rationally related to furthering a legitimate state interest.[53]

One variation of rational basis scrutiny is animus doctrine, which is often viewed as a heightened or strengthened form of rational basis scrutiny.[54] In a line of cases starting with *U.S. Department of Agriculture v.*

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marriage); Robicheaux v. Caldwell, 2 F. Supp. 3d 910, (E.D. La. 2014) (holding that Louisiana's constitutional amendment and statute withstand rational basis review on equal protection grounds).

[46] *See* Kitchen v. Herbert, 755 F.3d 1193, 1208–09 (10th Cir. 2014).

[47] *Id.* at 1234 (Kelly, C.J. dissenting) (citing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

[48] *Id.* at 1218 (majority opinion).

[49] *See* Pollvogt, *supra* note 39, at 895–96.

[50] *Id.*

[51] *Id.* at 895. Race, alienage, and national origin are the only suspect classifications recognized in Supreme Court precedent. *Id.*

[52] *Id.* at 895–96. Gender and illegitimacy are the only quasi-suspect classifications recognized in Supreme Court precedent. *Id.* at 895.

[53] *Id.* at 896.

[54] *Supra* note 41.

*Moreno*,[55] the Supreme Court determined that when a law demonstrates a "desire to harm a politically unpopular group," private bias, or stereotypes or fear directed at a particular group, then the law would be struck down even though a suspect or quasi-suspect classification was not involved.[56] Some legal scholars view animus doctrine as an alternative to the levels of scrutiny, rather than a form of rational basis scrutiny, for use when a law evidences an improper purpose based in some form of animus toward a particular group.[57]

### *D. Outcomes in the Circuit Courts of Appeals*

Despite disagreement between the lower federal courts on the basis for the unconstitutionality of state bans on same-sex marriage, three circuit courts of appeals and many federal district courts have agreed that these bans should be struck down, though the Sixth Circuit Court of Appeals recently disagreed with this outcome.[58] The Tenth Circuit Court of Appeals was the first federal court of appeals to rule on same-sex marriage following *Windsor*.[59]

When the Tenth Circuit decided *Kitchen*, the Eighth and Ninth Circuit Courts of Appeals had previously ruled on same-sex marriage.[60] In 2006, the Eighth Circuit Court of Appeals heard an equal protection challenge to the constitutionality of a Nebraska constitutional amendment prohibiting same-sex marriage, and held that the amendment withstood rational basis scrutiny.[61]

In 2012, the Ninth Circuit Court of Appeals reached a different conclusion in *Perry v. Brown*, holding that California's Proposition 8 was unconstitutional on equal protection grounds.[62] In *Hollingsworth v. Perry*, the Supreme Court later vacated and remanded this Ninth Circuit case for

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[55] 413 U.S. 528 (1973).
[56] *See* Pollvogt, *supra* note 39, at 901–26 (outlining the recognized Supreme Court animus cases and describing the framework laid out in these decisions).
[57] *Id.* at 892, 926.
[58] *Supra* note 45 and accompanying text.
[59] The Tenth Circuit decided *Kitchen v. Herbert* in June 2014, and *Bishop v. Smith* on July 18, 2014. 755 F.3d 1193 (10th Cir. 2014); 760 F.3d 1070 (10th Cir. 2014). The Fourth Circuit decided *Bostic v. Schaefer* on July 28, 2014. 760 F.3d 352, 352 (4th Cir. 2014). The Seventh Circuit decided *Baskin v. Bogan* in September 2014. Nos. 14–2386, 14–2387, 14–2388, 14–2526, 2014 WL 4359059, at *1 (7th Cir. Sept. 4, 2014).
[60] *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652; Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006).
[61] *Bruning*, 455 F.3d at 867–69.
[62] 671 F.3d at 1096 (using animus scrutiny based on *Romer* because Proposition 8 was removing a prior right granted under the California Constitution for same-sex marriage).

lack of standing.[63] Though the Tenth Circuit is not bound to follow other circuit courts, these court of appeals cases provide a glimpse of the conflicting judicial opinions on the issue of same-sex marriage at the time when *Kitchen* and *Bishop* were decided.

## II. KITCHEN V. HERBERT AND BISHOP V. SMITH

*Kitchen* and *Bishop* were both heard by the Tenth Circuit Court of Appeals in the summer of 2014, approximately three weeks apart.[64] These cases were both decided by the same panel of judges on the Tenth Circuit, Circuit Judges Lucero, Holmes, and Kelly.[65] In both cases, Circuit Judge Lucero authored the court's opinion and Circuit Judge Kelly dissented.[66] In *Bishop*, Circuit Judge Holmes authored a concurrence.[67]

### *A. FACTS*

*Kitchen* involved three couples, Derek Kitchen and Moudi Sbeity, Laurie Wood and Kody Partridge, and Karen Archer and Kate Call, all residents of Utah.[68] Two of these couples, Derek Kitchen and Moudi Sbeity, and Laurie Wood and Kody Partridge, applied for marriage licenses from the Salt Lake County Clerk's Office in March 2013.[69] Both couples were denied marriage licenses based on their same-sex status.[70] Karen Archer and Kate Call were married in Iowa in 2011, but Utah would not recognize their marriage.[71] In March 2013, these three couples filed suit in Federal District Court for the District of Utah against the Governor of Utah, the Attorney General of Utah, and the Clerk of Salt Lake County, challenging bans on same-sex marriage in Utah's Constitution and Code.[72]

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[63] 133 S. Ct. at 2659.
[64] *Supra* note 59 and accompanying text. Though both cases raised significant issues of standing, for the purposes of this Comment the focus is on the merits of these cases and the courts reasoning in reaching the holdings based on a fundamental right to marriage. The facts, procedural history, and reasoning that relate only to the issue of standing have been excluded.
[65] Bishop v. Smith, 760 F.3d 1070, 1074 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1198 (10th Cir. 2014).
[66] *Bishop*, 760 F.3d at 1074; *Kitchen*, 755 F.3d at 1198.
[67] *Bishop*, 760 F.3d at 1074.
[68] 755 F.3d at 1199.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1199–200.
[72] *Id.* at 1200 (challenging the bans under fundamental rights and equal protection guarantees in the Constitution).

*Bishop* involved two couples, Mary Bishop and Sharon Baldwin, and Susan Barton and Gay Phillips, all residents of Oklahoma.[73] Mary Bishop and Sharon Baldwin applied for a marriage license from the Tulsa County Court Clerk in February 2009, but were denied based on their same-sex status.[74] Susan Barton and Gay Phillips entered into a civil union in Vermont in 2001, were married in Canada in 2005, and were married in California in 2008.[75] Oklahoma did not recognize Barton and Phillips as married.[76] In November 2004, both of these couples filed suit in Federal District Court for the Northern District of Oklahoma against the Governor of Oklahoma, the Attorney General of Oklahoma, the President of the United States, and the Attorney General, challenging a ban on same-sex marriage in Oklahoma's Constitution and Sections 2 and 3 of DOMA, which provided that states do not have to recognize same-sex marriages performed in other states and defined marriage for federal law.[77]

### *B. Procedural History*

The procedural history of *Kitchen* is fairly direct. Both the plaintiffs and defendants filed cross-motions for summary judgment in the District Court.[78] The court found for the plaintiffs, holding that, "All citizens, regardless of their sexual identity, have a fundamental right to liberty, and this right protects an individual's ability to marry and the intimate choices a person makes about marriage and family."[79] The court additionally found a violation of equal protection under rational basis review.[80] The court granted a permanent injunction barring enforcement of Utah's bans on same-sex marriage.[81]

The District Court did not issue a stay on its ruling pending appeal to the Tenth Circuit because a stay was not requested by defendants, so as a result, same-sex couples immediately began applying for marriage licenses in Utah.[82] The State then filed a motion for a stay on the ruling in the District

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[73] 760 F.3d 1070, 1074–75 (10th Cir. 2014).
[74] *Id*. at 1075.
[75] *Id*.
[76] *Id*.
[77] Bishop v. Oklahoma *ex rel*. Edmondson, 447 F. Supp. 2d 1239, 1244 (N.D. Okla. 2006) (challenging the bans under fundamental rights and equal protection guarantees in the Constitution).
[78] 755 F.3d 1193, 1200 (10th Cir. 2014).
[79] Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1204 (D. Utah 2013).
[80] *Kitchen*, 760 F.3d at 1201.
[81] *Id*. at 1216.
[82] Kitchen v. Herbert, No. 2:13–cv–217, 2013 WL 6834634, at *1 (D. Utah 2013).

Court that was denied because marriages were already taking place.[83] The Supreme Court granted a stay on the District Court's order in January 2014, with the stay effective pending the Tenth Circuit decision.[84] The defendants then appealed to the Tenth Circuit Court of Appeals.[85]

In contrast, the procedural history in *Bishop* is much more circuitous and spanned eight years.[86] After suit was brought in the Northern District of Oklahoma, Oklahoma defendants filed a motion to dismiss on the challenge to Oklahoma's Constitution and the federal defendants filed a motion to dismiss on the challenge to DOMA.[87] The court denied the motions to dismiss for challenges to Section 3 of DOMA and Part A of Oklahoma's constitutional provision, which defined marriage, but all challenges to marriage non-recognition either in DOMA or Oklahoma's Constitution were dismissed for lack of standing.[88] An appeal to the Tenth Circuit resulted on the issue of standing which was remanded to the Northern District of Oklahoma, where a decision on the merits took finally took place in 2014, naming a new defendant, the Court Clerk of Tulsa County.[89]

The District Court determined that Part A of Oklahoma's constitutional amendment was unconstitutional based on what the court termed "deferential rationality review" on equal protection grounds.[90] However, the District Court dismissed challenges to the marriage non-recognition provisions of DOMA and Oklahoma's Constitution for lack of standing.[91] The decision of the District Court was stayed pending appeal to the Tenth Circuit.[92]

### *C. Opinion*

[83] *Id*. at *1–2.
[84] Herbert v. Kitchen, 134 S. Ct. 893 (2014) (mem.).
[85] Kitchen v. Herbert, 755 F.3d 1193, 1201 (10th Cir. 2014).
[86] Bishop v. Smith, 760 F.3d 1070, 1075–76 (10th Cir. 2014).
[87] Bishop v. Oklahoma *ex rel*. Edmondson, 447 F. Supp. 2d 1239, 1244 (N.D. Okla. 2006).
[88] *Id*. at 1258–59.
[89] *Bishop*, 760 F.3d at 1076.
[90] Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014). The courts analysis here resembles animus doctrine. *See id*. at 1288, 1296 (relying on precedents in *Romer v. Evans* as well as referencing a line of cases starting with *Romer* and ending with *United States v. Windsor*, "this Court knows a rhetorical shift when it sees one.").
[91] *Id*. at 1296–97.
[92] *Id*. at 1296.

The *Kitchen* opinion provides the most in-depth analysis of the courts reasoning and ultimate determination that there is a fundamental right to marriage that encompasses the right of same-sex couples to marry.[93] The court began its analysis on the merits of the plaintiffs' constitutional challenge to Utah's Constitution and Code provisions by addressing the Supreme Court's dismissal of *Baker v. Nelson*.[94] Acknowledging that *Baker* has a precedential effect on this issue, the court used *Hicks v. Miranda*[95] to distinguish the current decision, stating, "[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise."[96] The court reasoned that there had been significant doctrinal developments in Supreme Court rulings that superseded *Baker,* because *Baker* was decided prior to both *Lawrence v. Texas*[97] and *Windsor*.[98]

The court noted that in *Lawrence,* the Supreme Court found a fundamental liberty interest in private intimate conduct.[99] The court then examined the Supreme Court's decision in *Windsor*, recognizing that, though it was not directly controlling, there was "similarity between the claims at issue in *Windsor* and those asserted by the plaintiffs in this case."[100] The court found this similarity to be in the claims that Plaintiffs were being treated differently by the state than opposite-sex couples, which denied them equal dignity and demeaned their relationship status.[101] The court also noted that, since *Windsor* was decided, almost every federal court had come to the conclusion that *Baker* was no longer controlling on the question of the constitutionality of same-sex marriage due to doctrinal developments.[102]

Next, the Tenth Circuit Court of Appeals addressed the question of whether there was a fundamental right to marriage that included same-sex marriage in order to determine whether heightened scrutiny was appropriate.[103] The court stated that there was "little doubt that the right to

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[93] This is simply because *Kitchen* was first in time, addressing many of the same arguments brought by Oklahoma in *Bishop*, and providing the basis for the *Bishop* decision.
[94] *Kitchen*, 755 F.3d 1193,1204 (10th Cir. 2014).
[95] 422 U.S. 332 (1975).
[96] *Kitchen*, 755 F.3d at 1204 (quoting *Hicks*, 422 U.S. at 344).
[97] 539 U.S. 558 (2003) (striking down a Texas sodomy statute as unconstitutional in its criminalization of consensual sexual behavior between same-sex couples).
[98] *Id*. at 1205–06.
[99] *Id*. at 1205.
[100] *Id*. at 1207.
[101] *Id*.
[102] *Id*. at 1206.
[103] *Id*. at 1208.

marry is a fundamental liberty."[104] However, the defendants argued that only opposite-sex marriage is a fundamental liberty.[105]

Examining Supreme Court decisions in which the Court had discussed the fundamental right to marriage, the Tenth Circuit Court of Appeals reasoned that the Court had always framed the right to marriage more broadly than the specific category with which the Court was confronted.[106] Specifically, the court looked at the Supreme Court's decisions in *Loving v. Virginia*,[107] *Zablocki v. Redhail*,[108] and *Turner v. Safley*,[109] each of which framed the fundamental right in question as the right to marriage while finding that this right included a certain subset of the population.[110] Additionally, to rebut the defendants' proposition that the fundamental right to marriage only applied to opposite-sex couples because of procreation, the court relied on *Turner* heavily,[111] as well as the fundamental right laid out in prior Supreme Court precedent involving individual choice in reproduction.[112]

The court concluded its fundamental rights analysis by further addressing the defendants' argument that ‚a fundamental right to marriage, by definition, could only apply to opposite sex couples.[113] The court rebutted this argument as circular reasoning stating, "To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may

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[104] *Id.* at 1209 (relying on prior Supreme Court holdings in *Maynard v. Hill,* 125 U.S. 190, 205 (1888); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965); and *Loving v. Virginia,* 388 U.S. 1, 12 (1967)). This reliance on an existing fundamental right to marriage allowed the court to bypass the traditional analysis of determining whether there is a fundamental right under substantive due process, which requires the question of whether the right is "deeply rooted in United States history and tradition". *Id.* at 1234 (Kelly, C.J., dissenting) (citing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).
[105] *Id.* at 1209 (majority opinion).
[106] *Id.*
[107] 388 U.S. at 12 (holding that the right to marry includes the right to marry someone of another race).
[108] 434 U.S. 374, 383 (1978) (holding that the right to marry precludes the state from barring the marriage of someone not paying child support).
[109] 482 U.S. 78, 95 (1987) (holding that the right to marry includes the right of prison inmates to marry).
[110] *Kitchen*, 755 F.3d at 1209–11.
[111] *Id.* at 1210–11 (reasoning that in *Turner* the Court held that the right to marry included the right of prison inmates to marry despite that fact that they were already allowed to marry under certain conditions, such as pregnancy).
[112] *Id.* at 1214 (relying on *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); and *Griswold v. Connecticut,* 381 U.S. 479, 485–86 (1965) (finding a right to contraceptive use for married couples).
[113] *Id.* at 1216.

not marry because they have historically been denied the right to do so."[114] The court equated this situation to *Loving* in which it could have just as easily been argued that interracial couples were excluded in the definition of marriage because it had been historically unacceptable.[115] The court found that the fundamental right to marriage included the right of same-sex couples to marry and to have their existing marriages recognized, which required the use of strict scrutiny in the evaluation of Utah's marriage amendment and statute.[116]

Next, the court turned to an analysis of the state interests which the Utah marriage amendment and statute claimed to advance.[117] This analysis was performed to determine a compelling state interest in the marriage amendment that was narrowly tailored to further such interest.[118] Defendants gave four state interests of which they argued that the marriage amendment and statute supported: 1) placing children first in marriages and encouraging parents to place children's interests above their own, 2) children being raised in a stable home by their biological parents or a married mother and father, 3) proper reproduction, and 4) to accommodate religious freedom and to avoid "civil strife."[119]

The court decided that the first three of the state interests could be assumed as compelling though none was narrowly tailored for the purposes of strict scrutiny.[120] These interests were determined to be simultaneously underinclusive and overinclusive because the state failed to account for the many children already being raised by same-sex parents and the many opposite-sex couples that chose not to reproduce.[121] Additionally, the court noted that same-sex marriage would unlikely affect opposite-sex marriages as the court could not "imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child."[122] The court dismissed Utah's fourth state interest because it was not argued as compelling under a fundamental rights analysis, noting that "public opposition cannot provide cover for a violation

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[114] *Id.*
[115] *Id.* ("But 'neither history nor tradition could save a law prohibiting miscegenation from constitutional attack'" (quoting Lawrence v. Texas, 539 U.S. 558, 577–78 (2003)).
[116] *Id.* at 1218–19 (outlining the standard for strict scrutiny that the state's infringement of a fundamental liberty be narrowly tailored to further a compelling state interest with the requirement that there be an exact connection between the state interest and the restriction leaving no room for illegitimate motives).
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* at 1224, 1226.
[122] *Id.* at 1224.

of fundamental rights," and that only civil marriage was at issue, leaving religious organizations unaffected by the court's ruling.[123]

Finally, defendants raised concerns over federalism and the role of the democratic process in regulating marriage, that people in opposition to same-sex marriage would be deemed intolerant, and that same-sex marriage was a "slippery-slope" to polygamist and incestuous marriages.[124] First, the court explained that courts were unable to arbitrarily select issues but must decide cases as they are brought, further stating, "The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box."[125] Second, the court noted that although many people had deeply held beliefs on the morality of same-sex marriage, the court's holding was not a judgment based on those people or any supporters of Utah's marriage amendment.[126] Lastly, the court distinguished same-sex marriage from polygamy and incest through the Supreme Court precedents underlying constitutional protection of same-sex intimacy and relationships that was lacking in the other examples.[127]

Shortly following the *Kitchen* opinion, the court decided *Bishop*, which raised two new arguments regarding the constitutionality of prohibiting same-sex marriage.[128] Here, the defendant argued that *Baker v. Nelson* was still standing because lower courts were unable to determine that doctrinal developments allowed them to hear a case.[129] The court disregarded this argument by looking to the exact wording of *Hicks* which stated, "*inferior federal courts* had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*."[130] The court interpreted this as a directive applying only to the lower federal courts in stating the doctrinal developments exception.[131]

[123] *Id*. at 1227–28.
[124] *Id*. at 1228–29.
[125] *Id*. at 1228 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). The court also reminded that in *Windsor* the Supreme Court had noted that though regulation of marriage was a state responsibility states still must abide by the Constitution. *Id*.
[126] *Id*. at 1229.
[127] *Id*. (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003) and United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).
[128] 760 F.3d 1070, 1079–1080 (10th Cir. 2014).
[129] *Id*. at 1080.
[130] *Id*. (quoting Hicks v. Miranda, 422 U.S. 322, 344 (1975) (emphasis added)).
[131] *Id*.

The second new argument asserted by the *Bishop* defendant was of an Oklahoma state interest "that children have an interest in being raised by their biological parents."[132] In addressing this argument, the court again assumed a compelling state interest but found that Oklahoma's marriage amendment was not narrowly tailored to achieve this goal.[133] Here, the court found the state's amendment to be both underinclusive and overinclusive.[134] The court noted that Oklahoma had several laws that allowed for children to be raised by non-biological parents.[135] Additionally, the court found the amendment to be ambiguous in that it denied same-sex couples the ability to marry regardless of whether or not they would have children, noting: "As with opposite-sex couples, members of same-sex couples have a constitutional right to choose against procreation."[136] The court concluded that nothing in these new arguments persuaded the court to change the *Kitchen* holding.[137]

### *D. Dissent*

Circuit Judge Kelly's dissents in *Kitchen* and *Bishop* focused on three main points.[138] First, in *Kitchen*, Judge Kelly argued that *Baker* would preclude the court from hearing the question of the constitutionality of prohibitions on same-sex marriage.[139] Second, he argued that due to traditional definitions of marriage, there was no fundamental right to marriage that included same-sex marriage.[140] Lastly, he argued that on equal protection grounds only rational basis scrutiny would apply.[141]

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[132] *Id*. The Oklahoma state interest is very similar to the interest articulated in *Kitchen* of a state interest that biological parents or a married mother and father raise children in a stable home. *See Kitchen*, 755 F.3d at 1219.

[133] *Id*. at 1081.

[134] *Id*. at 1081–82.

[135] *Id*. at 1081 (examining legislation allowing for children resulting from human embryo implantation and sperm donation to be deemed legally the same as naturally conceived children).

[136] *Id*.

[137] *Id*. at 1082.

[138] As with the opinion in both cases, reasoning and analysis related only to standing have been excluded.

[139] 755 F.3d 1193, 1231 (10th Cir. 2014) (Kelly, C.J., dissenting).

[140] This argument was the primary focus of the merits analysis for Circuit Judge Kelly's dissent in both *Kitchen* and *Bishop*, as primary rebuttal to the majority opinion's holding based on a fundamental right to marriage that included same-sex marriage. 760 F.3d at 1112–14 (Kelly, C.J., dissenting); 755 F.3d at 1234–36 (Kelly, C.J., dissenting).

[141] This analysis was laid out in depth in the *Kitchen* dissent, while the dissent in *Bishop* referenced her earlier arguments and focused on fundamental rights. 760 F.3d at 1112–14 (Kelly, C.J., dissenting); 755 F.3d at 1233, 1236–37 (Kelly, C.J., dissenting).

The first of Circuit Judge Kelly's arguments, that *Baker* barred the court from hearing the constitutional question, was based on his reasoning that the Supreme Court had not made it clear that doctrinal developments had occurred in the area of same-sex marriage.[142] He argued that none of the Supreme Court precedents by the majority in *Kitchen* to establish doctrinal developments was specifically on point to the question of same-sex marriage, particularly where "the Court's traditional deference to the States in the field of domestic relations" was at issue.[143]

Circuit Judge Kelly's second argument centered on a fundamental right to marriage which the states have the responsibility of regulating and controlling.[144] He noted that the majority framing of a fundamental right to marriage could include bigamy.[145] He determined that regardless of how the Supreme Court had framed the issue of the rights in the marriage cases relied on by the majority, "the Supreme Court announced a right with objective meaning and contours."[146] He argued that a complete fundamental rights analysis was required and the majority erred in bypassing this analysis in their determination that the Supreme Court had already found a fundamental right to marriage.[147]

Additionally, in his *Bishop* dissent, he built on this fundamental rights analysis and argued that historically marriage had included four factors, "(1) exclusivity, (2) monogamy, (3) non-familial pairs, and (4) gender complementarity, distinct from procreation."[148] He used these factors

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[142] 755 F.3d at 1232. ("The Supreme Court is certainly free to re-examine its precedents, but it discourages lower courts from concluding it has overruled earlier precedent by implication.") (citing Agostini v. Felton, 521 U.S. 203, 237 (1997)).

[143] *Id*. at 1232–33 (distinguishing *Lawrence*, *Romer*, and *Windsor*, as none of these cases address the question of same-sex marriage or, in the case of *Windsor*, apply that decision to the states because the Court in *Windsor* explicitly expressed deference to state regulation of marriage, and concluding that "At best, the developments relied upon are ambiguous and certainly do not compel the conclusion that the Supreme Court will interpret the Fourteenth Amendment to require every state to extend marriage to same-gender couples, regardless of contrary state law.").

[144] *Id*. at 1234.

[145] *Id*. ("Of course, the difficulty with this is that marriage does not exist in a vacuum; it is a public institution, and states have the right to regulate it. That right necessarily encompasses the right to limit marriage and decline to recognize marriages which would be prohibited; were the rule as the Plaintiffs contend, that marriage is a freestanding right, Utah's prohibition on bigamy would be an invalid restriction").

[146] *Id*. (determining that merely because the Court did not explicitly say "a right to interracial marriage" or "a right to inmate marriage" did not mean that was not the fundamental right found).

[147] *Id*. at 1234–35. This means that the recognition of a new fundamental right through substantive due process would require the analysis of whether it is "a right deeply rooted in United States history and tradition, and a careful and precise definition of the right at issue." *Id*. at 1234 (citing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[148] 760 F.3d 1070, 1113 (10th Cir. 2014) (Kelly, C.J., dissenting).

to distinguish prior Supreme Court cases involving a fundamental right to marriage from same-sex marriage.[149]

Circuit Judge Kelly's final argument was that on equal protection grounds only rational basis scrutiny would apply because classification based on sexual orientation was not subject to heightened scrutiny and gender classification, was not subject to intermediate scrutiny, and was not implicated by Utah's marriage amendment or statute.[150] He then analyzed each of Utah's governmental interests in its marriage amendment and statute under rational basis scrutiny.[151] He determined that Utah's marriage amendment and statute would withstand rational basis scrutiny because whether there was poor fit between the state interest and the law at issue or the motivations of the legislature was irrelevant under this analysis.[152]

### *E. Concurrence*

In *Bishop*, Circuit Judge Holmes wrote a concurrence to clarify why fundamental rights were appropriate grounds to decide the constitutionality of state prohibitions on same-sex marriage rather than animus doctrine.[153] Judge Holmes commended the federal district court that decided *Bishop* for refraining from using animus doctrine and pointed out that a number of federal courts had struck down state prohibitions on same-sex marriage using this analysis.[154]

Circuit Judge Holmes explained animus doctrine by breaking it down into three questions, "(1) what is animus; (2) how is it detected; and (3) what does a court do once it is found."[155] To address the first question, Judge Holmes looked to Supreme Court cases that have used this unusual form of rational basis scrutiny and determined that each case involved an equal protection challenge for a non-suspect class, and rather than examine what "could conceivably have justified the laws, the Court focused on the

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[149] *Id.*

[150] *Kitchen*, 755 F.3d at 1233 (finding that the amendment and statute at issue applied to female and male same-sex couples in the same way, there was no Supreme Court precedent for heightened scrutiny for classification based on sexual orientation, and that the Tenth Circuit had specifically found that heightened scrutiny would not apply to sexual orientation) (citing Price–Cornelison v. Brooks, 524 F.3d 1103, 1113 n. 9 (10th Cir. 2008)).

[151] *Id.* at 1235–39.

[152] *Id.* at 1237 ("Accordingly, an enactment may be over-inclusive and/or under-inclusive yet still have a rational basis. The fact that the classification could be improved or is ill-advised is not enough to invalidate it; the political process is responsible for remedying perceived problems.").

[153] 760 F.3d at 1096–97 (Holmes, C.J., concurring).

[154] *Id.*

[155] *Id.* at 1097.

motivations that *actually* lay behind the laws."[156] Under Judge Holmes' analysis, the only legislative motives that trigger animus are those that show some level of hostility to a particular group.[157]

To answer the second question of how animus is detected, Circuit Judge Holmes noted two categories which would alert courts to a "structural abnormality" that could be based in a hostile legislative motive, "(1) laws that impose wide-ranging and novel deprivations upon the disfavored group; and (2) laws that stray from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive."[158] According to Judge Holmes, once either of these categories was found and some sort of hostile legislative motive identified, the answer to the third question of what the court should do is find the law at issue unconstitutional because "[a] legislative motive qualifying as animus is never a legitimate purpose."[159]

Circuit Judge Holmes then applied this animus doctrine framework to the state marriage amendment at issue and determined that the prohibition on same-sex marriage could not be said to impose a wide-ranging or novel deprivation, or stray from the historical territory of the lawmaking sovereign.[160] First, he distinguished between the state marriage amendment and the legislation in *Romer* because the marriage amendment only barred same-sex couples access to marriage rather than the wide-range of political protections barred in the *Romer* legislation.[161] Additionally, prohibitions on same-sex marriage could not be considered novel, unlike the *Romer* legislation, which changed the ability to rely on or promulgate anti-discrimination legislation based on sexual orientation.[162] Next, Judge Holmes distinguished the state marriage amendment from the *Windsor* decision because the states have traditionally controlled and regulated marriage while the federal government had acted unusually in the passage of

[156] *Id.* at 1099 (emphasis in original) (relying on Supreme Court decisions in *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)).
[157] *Id.* at 1099–100 (including different levels of hostility, from the desire to separate out a group from participation in the community to "irrational prejudice" to "desire to harm").
[158] *Id.* at 1100 (relying on *Romer* for the first category and *United States v. Windsor* for the second category).
[159] *Id.* at 1103 (relying on Supreme Court decisions in *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)).
[160] *Id.* at 1104–09.
[161] *Id.* at 1104.
[162] *Id.* at 1105 ("Even before the States made the rule explicit, marriage laws that lacked express gender limitations had the same force and effect as bans on same-sex marriage.").

Section 3 of DOMA, intruding into an area of state control.[163] He concluded that state prohibitions on same-sex marriage did not fit within animus doctrine under this analysis and concurred with the courts decision under a fundamental rights analysis.[164]

## III. ANALYSIS

The decisions of the Tenth Circuit Court of Appeals in *Kitchen* and *Bishop* do not fully address the Utah and Oklahoma's arguments that decisions involving marriage and particularly same-sex marriage should be made through democratic process.[165] The Tenth Circuit erred when they failed to give greater deference to state constitutional amendments as representative of the will of the people through the popular vote because of the counter-majoritarian difficulty and an interest in preserving the legitimacy of the courts.[166]

First, this section examines the interests of federalism, the democratic process, and the concern for the counter-majoritarian difficulty arguing that the Tenth Circuit could have strengthened the holdings of *Kitchen* and *Bishop* by explicitly facing these legitimate concerns. Next, this section examines the legitimizing of same-sex marriage through the democratic process and explores the basis for judicial review of state prohibitions on same-sex marriage. Finally, this section concludes that the use of judicial review for the issue of same-sex marriage is necessary for the protection of minority rights and the Tenth Circuit Court of Appeals was correct in finding a fundamental right to marriage that included the right of same-sex couples to marry, though the court could additionally have found the state marriage amendments unconstitutional on equal protection grounds.[167]

### *A. FEDERALISM AND THE DEMOCRATIC PROCESS*

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[163] *Id*. at 1108–09.
[164] *Id*. at 1109.
[165] *See* discussion *supra* pp. 17–18.
[166] *See supra* note 9.
[167] The reason the Tenth Circuit Court of Appeals avoided an equal protection analysis for the issue of same-sex marriage is because precedent in the Tenth Circuit precludes the use of heightened scrutiny on equal protection grounds for a classification based on sexual orientation. *See* Price-Cornelison v. Brooks, 524 F.3d 1103, 113–14 (10th Cir. 2008). The Tenth Circuit Court of Appeals cannot overrule its own precedent unless a case is heard *en banc*. *See* Kitchen v. Herbert, 755 F.3d 1193, 1233 (10th Cir. 2014) (Kelly, C.J., dissenting).

As the Supreme Court continually reminded in *United States v. Windsor*, marriage and domestic matters have traditionally been controlled and regulated by the states rather than the federal government.[168] Though the federal government has been known to use the status of marriage as a requirement for many federal benefits, regulation, or other legislation, until the passage of DOMA the federal government had never placed any defining restrictions on who could or could not be married for the purposes of federal law.[169] It has been mentioned in the opinions, concurrences, or dissents in all of the cases dealing with same-sex marriage that the state is the legitimate authority when it comes to defining marriage.[170]

If the state has the authority to control and regulate marriage under principles of federalism, it is through the democratic process at a state level that this is accomplished. One of the fundamental principles within American system of government is that through representation in state legislatures and, in some cases, through majority popular vote laws are enacted or repealed.[171]

Historically, state laws regarding marriage have done little to actually define marriage but have traditionally contained prohibitions against polygamy, incest, and placed age limitations on marriage.[172] It was not until 1973 that a state defined marriage as only between members of the opposite sex, when Maryland became the first state to pass a law defining marriage as between a man and a woman.[173] Prior to the Maryland law limiting marriage to opposite-sex couples, it was generally just assumed that marriage was restricted to opposite-sex couples.[174] However, this assumption changed as many states followed Maryland's example and passed laws, often amending

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[168] *See* discussion *supra* p. 6.
[169] *See* United States v. Windsor, 133 S. Ct. 2675, 2689–90 (2013).
[170] *See, e.g*., Kitchen, 755 F.3d at 1231 (Holmes, C.J., concurring) ("The Constitution is silent on the regulation of marriage; accordingly, that power is reserved to the States, albeit consistent with federal constitutional guarantees.").
[171] This refers to state constitutional amendments, *supra* note 9, and states that allow for legislative referendum or initiatives.
[172] *See* Cannizzaro *supra* note 30, at 168.
[173] Nancy Kubasek et al., *Amending the Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same–Sex Couples*, 19 AM. U. J. GENDER SOC. POL'Y & L. 959, 964 n. 32 (2011) (outlining every state which in 2011 had laws defining marriage and prohibiting the recognition of out of state same-sex marriages).
[174] *See* Baker v. Nelson, 191 N.W.2d 185, 185–86 (Minn. 1971) (holding that even though Minnesota law lacked a prohibition on same-sex marriage, marriage was subject to its "common usage" meaning automatically excluding same-sex marriage).

state constitutions, to define marriage and prohibit recognition of same-sex marriages performed elsewhere.[175]

The legitimacy of states using the democratic process to limit and define marriage is traditionally accepted under federalism and majoritarian principles.[176] One of the primary reasons for this legitimacy has been the idea that keeping family life from the reach of the federal government can preserve individual liberties.[177] A rationale for state control acting as a preservation of individual liberty is through a more localized government at the state level where, at least theoretically, a greater number of people will share the same interests and ideals. Under these conditions, the democratic process should result in laws affecting marriage and domestic affairs that reflect the desires and choices of those that live in that specific jurisdiction.

One additional point to consider here is the state constitutional amendments defining marriage that have arisen as a result of super-majoritarian processes. Not all state constitutions are as easily amended as others.[178] State constitutions can be classified as those that are easily amended, allowing for amendment by initiative or simple majority in the legislature followed by simple majority popular vote.[179] The next classification would be slightly more difficult and also the most common, allowing for amendment by two-thirds vote in the legislature followed by a simple majority popular vote.[180] The last classification would be the most difficult to amend state constitutions requiring a two-thirds vote in the legislature followed by a two-thirds majority popular vote.[181] When state constitutions can only be amended through super-majoritarian processes that are difficult to be achieved, the implication is that the resulting amendments are strongly desired by the population as a whole. However, the result is that minority groups are then left facing greater legal hurdles to gain a political voice because changing the amendment through the democratic process would not be possible even with the backing of a simple majority.[182]

### *B. THE COUNTERMAJORITARIAN DIFFICULTY*

[175] *See* Kubasek et al. *supra* note 177, at 964 n. 32; *see also* Cannizzaro *supra* note 30, at 176–78.
[176] *See* Cannizzaro *supra* note 27, at 171–74 (explaining the federalism interests in retaining state control of marriage and domestic affairs as well as the traditional deference by the Supreme Court and other federal courts to state laws in these areas).
[177] *Id*. at 172.
[178] Morse *supra* note 11, at 969.
[179] *Id*. at 969–70, nn. 38, 39 (using California, Arizona, and Arkansas as examples).
[180] *Id*. at 969, n. 33 (using Kansas and Kentucky as examples); *see also id*. at 996.
[181] *Id*. at 969, n. 34 (using Florida and New Hampshire as examples). A variation on this is the few states that require a majority or supermajority vote in the legislature for two consecutive terms or a majority or supermajority vote by the public at more than one general election. *Id*. at 995.
[182] *Id*. at 969–970.

The counter-majoritarian difficulty arises in the issue of same-sex marriage through the tension between state constitutional amendments[183] and the federal courts that overturn them under the United States Constitution.[184] Judicial review of legislation by Congress and the states has a long history in the United States.[185] Through separation of powers and the creation of three branches of government, it can be argued that our federal government was intended to be counter-majoritarian in the judicial branch.[186] However, even shortly after the federal government was formed the public and elected officials began criticizing the judiciary for the counter-majoritarian nature of judicial review.[187]

The counter-majoritarian difficulty can crucially affect the legitimacy of the federal courts.[188] When the court strikes down legislation, it is often viewed as going against the will of the majority rather than supporting the democratic process.[189] Counter-majoritarian criticism is likely to arise when members of the public are dissatisfied with judicial decisions and it is less likely to be noticeable when there is a large amount of support or agreement with these decisions.[190] Wherever there is a great deal of countermajoritarian criticism, the public will often try to bypass the disliked judicial decision through the democratic process, which, in turn, affects the legitimacy of the court's decision.[191]

As applied to the issue of same-sex marriage, the countermajoritarian difficulty affecting the legitimacy of the courts can be

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[183] I address only state constitutional amendments here rather than statutes prohibiting same-sex marriage because statutes are generally passed only in state legislatures, occasionally subject to referendum vote, but arguably less a direct democratic process than state constitutional amendments.

[184] *See* Friedman, *supra* note 7, at 343–44 (describing the countermajoritarian difficulty with regard to criticism of judicial review).

[185] *See* Marbury v. Madison, 5 U.S. 137, 177–78 (1803) (providing the basis for judicial review).

[186] *See* Friedman, *supra* note 7, at 344–45. The way that the Supreme Court and lower federal court justices and judges are appointed for life and not subject to elections effectively insulating them from the democratic process supports this argument.

[187] *Id*. at 345.

[188] The issue of the legitimacy of the judicial branch is important because the judiciary lacks means of enforcing or carrying out its decisions on its own and must rely on the legislative and executive branches.

[189] *See* Friedman, *supra* note 7, at 347–48.

[190] *Id*. at 349–50.

[191] This is seen in movements to amend constitutions at the state level and occasionally the United States Constitution. Take for example the Dred Scott decision by the Supreme Court and later adoption of the Fourteenth Amendment.

illustrated at the state level through the example of Hawaii.[192] In the1993 case *Baehr v. Lewin,*[193] the Hawaii Supreme Court ruled that under Hawaii's constitution, a statute prohibiting same-sex marriage would be subject to strict scrutiny, and the court remanded the case for a determination under strict scrutiny.[194] When it became clear to the citizens of Hawaii that same-sex marriage would be legalized through the state court system, the people took action through the democratic process.[195] In 1998, the Hawaii Constitution was amended to state, "The legislature shall have the power to reserve marriage to opposite-sex couples."[196] This amendment was ratified by popular vote at the 1998 general election,[197] effectively keeping the Hawaii state courts from reaching a contrary decision.

Though the United States Constitution would never be amended in this way to bar the federal courts from finding prohibitions on same-sex marriage unconstitutional due to a lack of political will, it is worth remembering that there is political recourse for public dissatisfaction stemming from the countermajoritarian difficulty.[198] Additionally, the perceived legitimacy of the judiciary is necessary for effective judicial rulings because the courts are dependent on the executive and legislative branches for enforcement mechanisms. Thus, the federal courts should show deference to the will of the majority as demonstrated in state constitutional amendments and not strike them down lightly as unconstitutional without giving full consideration to the arguments presented.

### *C. Same-sex Marriage and the Democratic Process*

There are enough advocates for same-sex marriage to gain legitimacy through the democratic process rather than through judicial

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[192] *See* Morse, *supra* note 11, at 999–1000.
[193] 852 P.2d 44 (Haw. 1993).
[194] *Id*. at 68.
[195] *See* Morse, *supra* note 11, at 1000.
[196] HAW. CONST. art. 1, § 23.
[197] *See* HAW. CONST. art. 1, § 23.
[198] The United States Constitution is widely known to be difficult to amend. As a little more than half the population now supports same-sex marriage, it would be extremely unlikely that enough support could be gathered to accomplish this especially since same-sex marriage is already allowed in thirty-four states. *See Marriage Gallup Historical Trends*, GALLUP.COM, http://www.gallup.com/poll/117328/marriage.aspx (last visited Nov. 17, 2014); *see also Marriage Center*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/campaigns/marriage-center (last visited Nov. 17, 2014).

decisions.[199] Because of this debate between using democracy versus the courts, it is worthwhile to measure the progress that same-sex marriage has made in the states through legislation.

As of 2014, twelve states and the District of Columbia had enacted legislation that allows same-sex couples to marry.[200] An additional three states—Oregon, Colorado, and New Jersey— allowed for civil unions or domestic partnerships through legislation.[201] In 2000, Vermont was the first state to allow relationship recognition through legislation in the form of civil unions, though this was in response to a 1999 Vermont Supreme Court decision holding that same-sex couples should be entitled to the same benefits and protection that marriage provides.[202] Prior to the Vermont legislation, Hawaii had granted the status of "reciprocal beneficiaries" to same-sex couples, though with few of the benefits provided in marriage and no relationship status was required to be a reciprocal beneficiary.[203]

This small number of states that have allowed same-sex marriage through legislation illustrates the limited success that same-sex couples have had in achieving marriage equality through the democratic process. Out of fifty states, only twelve have enacted legislation providing same-sex marriage, and at least one of those states was pushed to do so through a state court decision.[204] Many of these states also started with legislation providing only for civil unions or domestic partnerships, and did not allow same-sex marriage until the past three years.[205] This limited success emphasizes same-sex couples' minority status and a resulting lack of access to the political process.

### *D. THE CASE FOR SAME-SEX MARRIAGE*

[199] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2711 (2013) (Scalia, J., dissenting) ("We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.").

[200] *See* 50 STATE STATUTORY SURVEYS: FAMILY LAW: MARRIAGE: DEFENSE OF MARRIAGE STATUTES AND CONSTITUTIONAL PROVISIONS, Table 1 (Thomson Reuters June 2014).

[201] *Id*. Colorado and New Jersey now provide marriages to same-sex couples through judicial precedent. *See id*.

[202] Nancy Knauer, *Same-sex Marriage and Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 421, 425–46 n. 37 (2008).

[203] *Id*. at 426–27.

[204] *See* Knauer, *supra* note 207.

[205] *See* 50 STATE STATUTORY SURVEYS: FAMILY LAW: MARRIAGE: DEFENSE OF MARRIAGE STATUTES AND CONSTITUTIONAL PROVISIONS, *supra* note 186.

Since *Windsor* was decided, nearly every federal court presented with the issue has found state constitutional amendments and statutes prohibiting same-sex marriage unconstitutional under the United States Constitution.[206] Some federal courts have followed the Tenth Circuit Court of Appeals and found the state prohibitions to be unconstitutional when subject to strict scrutiny under a fundamental rights analysis.[207] Others have found the state prohibitions to be unconstitutional based on varying levels of scrutiny on equal protection grounds.[208] This section argues that, under fundamental rights or equal protection, state prohibitions on same-sex marriage are unconstitutional. On equal protection grounds, a suspect class is established for sexual orientation requiring the use of heightened scrutiny primarily through an analysis of the wording in footnote 4 of *United States v. Carolene Products Co.*,[209] which would become the basis for heightened scrutiny based on fundamental rights and equal protection.

### 1. Carolene Products Footnote 4

There are two portions of applicable text within *Carolene Products* footnote 4. The first of which became the basis for fundamental rights strict scrutiny, and the second, the basis for heightened scrutiny based on equal protection for a suspect class. The portion for fundamental rights reads, "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[210] This writing was prior to the advent of fundamental rights through substantive due process as evidenced by the phrase "a specific prohibition of the Constitution." The realm of fundamental rights has changed dramatically through Supreme Court precedent, which has found

[206] *See* discussion *supra* p. 9.
[207] *Supra* note 45 and accompanying text.
[208] *Supra* note 45 and accompanying text.
[209] 304 U.S. 144 (1938). *Carolene Products* was a case brought under the Commerce Clause involving a prohibition on shipments of filled milk. *Id.* at 145–46. Footnote 4 of *Carolene Products* was created to supplement the assertion by the Court that legislative findings and justification for legislation was to be presumed by the judiciary upon review and to acknowledge that there would be situations that this presumption would not be made. "Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *Id.* at 152.
[210] *Id.* at 152 n.4.

fundamental rights such as privacy and marriage that are not explicitly stated in the Constitution.[211]

The portion of footnote four that is applicable to the determination of a suspect class for equal protection reads, "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[212] The wording here became the basis for the three traditional levels of scrutiny for equal protection analysis, with the Supreme Court finding strict scrutiny applicable for classifications based on race or national origin and intermediate scrutiny applicable for classifications based on gender.[213] Later, the Supreme Court expanded rational basis scrutiny to include animus doctrine, focusing on government action that differentiated between classes that the Court had not found to be suspect or quasi-suspect.[214]

### 1. Fundamental Rights Analysis

The Supreme Court, as noted above, has expanded on the original strict scrutiny for fundamental rights explicitly stated in the Constitution to include fundamental rights under substantive due process that can be inferred from the Constitution without being directly stated.[215] As the Tenth Circuit Court of Appeals noted in *Kitchen*, there are number of cases in which the Supreme Court has already found a fundamental right to marriage.[216] The

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[211] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing marriage as "one of the vital personal rights essential to the orderly pursuit of happiness by free men."); Griswold v. Connecticut, 381 U.S. 379, 485 (1965) (finding a right to privacy through "several constitutional guarantees.").

[212] *Carolene Products*, 304 U.S. at 152 n.4.

[213] *See, e.g.*, Bolling v. Sharp, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[214] *See* Romer v. Evans, 517 U.S. 620, 624 (1996) (analyzing a classification based on sexual orientation); Cleburne v. Cleburne Living Ctr., 473 U.S. 472, 436–37 (1985) (analyzing a classification based on mental disability); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 530 (1973) (analyzing a classification based household members who are unrelated to each other); *see also* discussion *supra* pp. 22–23.

[215] *See* sources *supra* note 211.

[216] *See* discussion *supra* pp. 15–16.

Tenth Circuit did not perform its own fundamental rights analysis to determine whether marriage or even same-sex marriage was a fundamental right because Supreme Court precedent did not require this analysis.[217] For example, in *Zablocki v. Redhail*, the Court did not perform an analysis of whether the right to marriage for those who failed to pay child support was deeply rooted in our history and tradition, but relied on *Loving v. Virginia* in which the Court had already found that marriage was a fundamental right.[218]

Additionally, in *Zablocki*, the Court provided further guidance for evaluating restrictions on the fundamental right to marry, stating, "reasonable regulations that do not *significantly interfere with decisions to enter into the marital relationship* may legitimately be imposed."[219] This Supreme Court guidance provides support for the Tenth Circuit Court of Appeals' decisions in *Kitchen* and *Bishop*, which held that the fundamental right to marriage includes the right for same-sex couples to marry, because prohibitions on same-sex marriage—like prohibitions on marriage for those who fail to pay child support—create a regulatory bar that significantly interferes with personal decisions to enter into a marital relationship.[220]

### 2. Equal Protection Analysis and Appropriate Level of Scrutiny

The question of whether equal protection analysis applies is an easy one compared with the question of what level of scrutiny should be applied to sexual orientation. It is fairly clear that state constitutional amendments and statutes defining and limiting marriage to opposite-sex couples create a classification based on sexual orientation.[221] However, the determination of what level of scrutiny applies is difficult because the Supreme Court has not determined that sexual orientation is either a suspect or quasi-suspect class, though there is some basis for the use of animus doctrine in prior Supreme Court precedents on sexual orientation.[222] The conflicting federal district court and court of appeals opinions on the correct level of scrutiny for sexual

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[217] *See* discussion *supra* pp. 15–16.
[218] 434 U.S. 374, 383 (1978).
[219] *Id*. at 386 (emphasis added).
[220] *See* discussion *supra* pp. 15–16.
[221] It has also been argued that prohibitions on same-sex marriage are a classification based on gender. I focus only on sexual orientation for the purposes of this comment primarily because I agree with Circuit Judge Kelly that all same-sex couples no matter their gender are equally denied marriage. *See* discussion *supra* p. 21, note 150. Additionally, prohibitions on same-sex marriage do not create a facial classification on gender lines but a facial classification for sexual orientation.
[222] *See* Bishop v. Smith, 760 F.3d 1070, 1101–03 (10th Cir. 2014) (Holmes, C.J., concurring) (evaluating *Romer v. Evans* and *United States v. Windsor* as animus cases dealing with sexual orientation).

orientation in equal protection cases do not provide much clarification on this question.[223]

As there is no clear precedent to determine the use of heightened scrutiny for classifications based on sexual orientation, it is useful to look to *Carolene Products* footnote 4 for guidance.[224] The applicable wording of footnote 4 can be broken into four requirements: (1) "prejudice," (2) "discrete and insular," (3) "minorities," and (4) a tendency to "curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[225] When these requirements are met, heightened scrutiny is triggered, and the appropriate level of scrutiny can be determined by comparison with other classifications that the Supreme Court has termed suspect or quasi-suspect.[226]

The first requirement is "prejudice", which can be established through a history of discrimination towards a specific group.[227] Discrimination towards gays and lesbians used to be quite widespread, though less prevalent today, as illustrated by the former military policy of "Don't ask, don't tell," and the criminalization of consensual intimate behavior between members of the same sex.[228] Additionally, there are only a few states that protect against employment discrimination based on sexual orientation and no federal protections from this type of discrimination.[229] Further, even though a great deal of progress has been made in ending sexual orientation discrimination, there is still work to be done in this area and a continued basis for heightened scrutiny because the Supreme Court has

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[223] *See* sources *supra* note 45 and accompanying text; *see also* Whitewood v. Wolf, 992 F. Supp. 2d 410, 430 (M.D. Pa. 2014) (determining that sexual orientation is a quasi-suspect class requiring the use of intermediate scrutiny).
[224] *See* discussion *supra* pp. 31–32.
[225] *See* discussion *supra* Part 31–32.
[226] *See Whitewood*, 992 F. Supp. 2d at 430 ("We agree with the Second Circuit, and the district court cases that followed it, that the class is quasi-suspect—as opposed to suspect—'based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect.'") (quoting Windsor v. United States, 699 F.3d 169, 185 (2nd Cir. 2012).
[227] *See* Baskin v. Bogan, 766 F.3d 648, 655 ("Does the challenged practice involve discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them?").
[228] *See* Bowers v. Hardwick, 478 U.S. 186, 192 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).
[229] *See* Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 LAW & SEXUALITY 61, 77 (2011) (describing the necessity for the Employment Non-Discrimination Act and attempts to get the act to pass Congress).

continued to apply heightened scrutiny for gender classifications despite improvements in gender discrimination.[230]

The second requirement, "discrete and insular", deals with the immutability of the characteristics of the group being classified.[231] Immutability deals with characteristics that cannot be changed or "ought not be compelled to change because it is fundamental to [a person's] identity."[232] Much has been argued and written about the immutability of sexual orientation and it has been accepted in many federal courts that sexual orientation is an immutable characteristic.[233] For example, Circuit Judge Posner for the Seventh Circuit Court of Appeals stated, "And there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice. Wisely, neither Indiana nor Wisconsin argues otherwise."[234] Whether in-born or fundamental to a person's identity, sexual orientation is a characteristic that a person either cannot or should not be compelled to change and is thus immutable.

The third requirement of minority status is quite clear, as it has been estimated that gays and lesbians make up about 1.6% of the population.[235] Additionally, gays and lesbians continue to have minority status in government and legislative decision-making.[236] The minority status of sexual orientation can be further emphasized by the ease with which a majority of states was able to amend their state constitutions to prohibit marriage to same-sex couples.[237]

The final requirement, laid out above, involves separation from the political process. Same-sex couples have made a great deal of progress in the federal court system, particularly since the Supreme Court decided *Windsor*.[238] However, as noted earlier, same-sex marriage has been relatively unsuccessful when attempts have been made to change laws prohibiting same-sex marriage through the democratic process.[239] Because of this lack of power to change existing laws through legislative channels and being subject to prejudice based on an immutable characteristic, it can be seen that

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[230] *See Whitewood*, 992 F. Supp 2d at 428 (citing Frontiero v. Richardson, 411 U.S. 677, 685–86 (1973)).
[231] *See* Brief of Constitutional Law Scholars Ash Bhagwat et al. as Amici Curiae in Support of Plaintiffs-Appellees at 24, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).
[232] *See id.*
[233] *See* Baskin v. Bogan, 766 F.3d 648, 657.
[234] *Id.*
[235] Eugene Volokh, *What percentage of the U.S. population is gay, lesbian or bisexual?,* WASH. POST, July 15, 2014.
[236] *See* Brief of Constitutional Law Scholars Ash Bhagwat et al. as Amici Curiae in Support of Plaintiffs-Appellees at 21–22, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).
[237] *See* discussion *supra* pp. 5, 25–26.
[238] *See* discussion *supra* p. 9.
[239] *See* discussion *supra* pp. 29–30.

there is "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[240]

As the four requirements of *Carolene Products* footnote 4 are met in this case, some level of heightened scrutiny should apply. Also, because the levels of discrimination and political power evident in sexual orientation classification most closely resemble gender classifications, it is persuasive that sexual orientation classifications be subject to intermediate scrutiny rather than strict scrutiny.[241] However, an additional consideration is the Supreme Court's rationale in classifying gender as a quasi-suspect classification. The Supreme Court has determined that there could be some necessity for creating laws that draw lines between male and female based on "inherent differences."[242] There appear to be no significant differences between straight, gay, or lesbian that would fit this rationale of inherent or physical differences.[243] Therefore, one is left with the question of whether without this rationale for the use of intermediate scrutiny would strict scrutiny more aptly apply for sexual orientation classifications.

Under this analysis, animus doctrine becomes a lesser concern as the Supreme Court generally uses animus in cases that do not involve a suspect or quasi-suspect class.[244] Additionally, the cases in which the Supreme Court has used animus doctrine when dealing with sexual orientation classifications are distinguishable based on the laws at issue that deprived individuals of pre-existing privileges or were unusual deviations.[245] Circuit Judge Holmes in the *Bishop* concurrence analyzed *Romer* and *Windsor* for their applicability to the issue of Oklahoma prohibitions on same-sex marriage and noted that there had never been a pre-existing right to same-sex marriage in the state and that Oklahoma's creation of the prohibition was an unusual deviation from traditional state authority.[246]

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[240] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
[241] *See* Whitewood v. Wolf, 992 F. Supp. 2d 410, 430 (M.D. Pa. 2014).
[242] United States v. Virginia, 518 U.S. 515, 533 (1996) ("The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring.") (citations omitted).
[243] In fact, one is left with the question of whether there is ever a rationale for sexual orientation to be a reasonable classification in law.
[244] *See* discussion *supra* p. 9. *But see* Pollvogt, *supra* note 42 at 900 (arguing that animus doctrine has been used by the Supreme Court in heightened scrutiny cases).
[245] *See* discussion *supra* p. 23.
[246] *See* discussion *supra* p. 23.

Under a fundamental rights analysis, the Tenth Circuit was correct in determining that the fundamental right to marriage included the right of same-sex marriage. Also, an examination of the basis for heightened scrutiny as laid out in footnote 4 of *Carolene Products* demonstrates that heightened scrutiny is required for classification based on sexual orientation.

### *E. The Court as Proper Venue for the Resolution of the Same-Sex Marriage Debate*

The courts are the proper setting for same-sex marriage to gain legitimacy for many of the reasons discussed previously in this Comment. It has been previously discussed that concerns for the legitimacy of the courts and the countermajoritarian difficulty necessitate a deference to state constitutional amendments as being representative of the will of the people, particularly those which stem from supermajoritarian processes.[247] However, judicial review has been crucial to many protections of minorities through fundamental rights and equal protection.[248]

This balancing of the interests of democracy and the protection of minorities has played out numerous times throughout American history in civil rights issues.[249] Here, as applied to same-sex marriage, because there is a fundamental right to marriage that includes the right of same-sex couples to marry, combined with a need for heightened scrutiny under equal protection analysis and a relative lack of progress in achieving marriage equality through the democratic process,[250] the protection of a minority outweighs the interests in preserving the will of the majority. As the Tenth Circuit Court of Appeals stated in *Kitchen*, "We may not deny them relief based on a mere preference that their arguments be settled elsewhere. Nor may we defer to majority will in dealing with matters so central to personal autonomy. The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box."[251]

## Conclusion

[247] *See* discussion *supra* pp. 26–27.
[248] *See* discussion *supra* p. 30.
[249] For example, in racial civil rights, the Supreme Court's decision in *Dred Scott*, the later outlawing of slavery through legislative processes, and then the necessity of the Court to end many instances of continuing racial discrimination through judicial decisions.
[250] *See* discussion *supra* pp. 29–30.
[251] *Kitchen,* 755 F.3d at 1228.

The Tenth Circuit Court of Appeals made a pivotal decision that the fundamental right to marriage includes the right of same-sex couples to marry in the cases of *Kitchen v. Herbert* and *Bishop v. Smith*. The determination that a fundamental right was at issue required the use of strict scrutiny, which the Utah and Oklahoma state constitutional amendments could not withstand. The Tenth Circuit Court of Appeals was correct in this fundamental rights determination. However, these decisions raised issues on the appropriate level of deference to the democratic process and concerns for the countermajoritarian difficulty.

State constitutional amendments are strongly representative of the will of the majority because of the requirements that they be put to popular vote and the supermajoritarian processes to which they are often subject. This brings into question the perceived legitimacy of the courts when state constitutional amendments are struck down as unconstitutional. A state's arguments regarding federalism and state regulation of marriage should not be lightly disregarded. However, though these interests and concerns are important to consider in judicial review, judicial review is crucial to the protection of minorities under certain circumstances.

Judicial review, including the use of heightened scrutiny, has been established as a mechanism by which the rights of minority groups can be protected. Looking to the early basis for the use of heightened scrutiny laid out in *Carolene Products* footnote 4 combined with later Supreme Court precedents, the issue of same-sex marriage requires the use of heightened scrutiny through both fundamental rights analysis and equal protection analysis.

Under a fundamental rights analysis, marriage has had a long history in Supreme Court cases as being a fundamental right. This fundamental right is one that has been deprived to same-sex couples triggering the use of strict scrutiny in evaluation of laws that prohibit same-sex marriage. Under equal protection analysis, the classification of sexual orientation has resulted in conflicting opinions on the required level of scrutiny. However, a return to the actual wording of *Carolene Products* footnote 4 provides requirements that are met for the use of heightened scrutiny for a sexual orientation classification. Further, an examination of the rationale behind the Supreme Court's development of intermediate scrutiny brings into question whether strict scrutiny might be called for in classifications based on sexual orientation.

In conclusion, when the interests of the democratic process and concern for the countermajoritarian difficulty are balanced with the

protection of same-sex couples' fundamental right to marry and equal protection of the laws under heightened scrutiny, it is the protection of rights and protection of minorities that must weigh more heavily. As a result, the courts have an important role in ensuring that marriage equality is gained for same-sex couples. Justice Scalia ended his dissent in *Windsor* by stating his fear that the Court was robbing people of a fair fight through democracy. But this is an incorrect way to view an issue that so closely affects an individual's personal life and decisions. No one should have to struggle and fight against the majority for access to a fundamental right or for laws that do not draw classifying lines arbitrarily.