

The Track to Freedom: Canada's path to legal Same-sex marriage compared to The United States

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I. INTRODUCTION

In 2015 the United States Supreme Court released one of the most celebrated opinions of our time, *Obergefel v. Hodges*.¹ Because of this holding, same-sex couples can now enjoy the social and financial benefits of marriage.² The northern neighbors of the United States, Canada, legalized same-sex marriage more than ten years earlier by passing a national act.³ The two different paths these countries endured to legalize same-sex marriage resulted in different consequences.⁴ The path the United States endured to legalize same-sex marriage allowed for sexual orientation discrimination to continue, but in Canada the process employed to legalize same-sex marriage disallowed such discrimination.⁵ Though the two countries' governments vary, the two neighboring countries have similarities to validate the comparison.⁶

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¹ 135 S.Ct. 2584 (2015); see Ryan T. Beckwith, *Supreme Court Orders States to Recognize Same-Sex Marriage*, TIME (last updated June 26, 2015, 11:38 AM), <http://time.com/3937244/supreme-court-gay-marriage-decision/>.

² See *Obergefel*, 135 S.Ct. at 2607-08 (“[S]ame-sex couples may exercise the fundamental right to marry in all States . . . there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”).

³ Civil Marriage Act, S.C. 2005, c 33, art’s 2, 4 (Can.).

⁴ See Christy M. Glass & Nancy Kubasek, *The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn From their Northern Neighbor Regarding Same-Sex Marriage Rights*, 15 MICH. J. GENDER & L. 143, 144-47 (2008) (comparing the slow and difficult process of extending the right to marry to same-sex couples in the United States with the relatively quick and decisive move in Canada to extend that right to same-sex couples).

⁵ Ontario Human Rights Commission. *Policy on discrimination and harassment because of sexual orientation* (Online). Jan. 25, 2006. 3. Available: http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_discrimination_and_harassment_because_of_sexual_orientation.pdf [hereinafter OHRC, *Policy on discrimination and harassment*]; Donald R. Keller, *Business without bias: Avoid LGBT discrimination or pay the price*, 31 CENT. PENN BUS. J. 13, 13 (2015).

⁶ Glass & Kubasek, *supra* note 4, at 147-48.

This article proceeds in three sections. First, the background will describe the similarities and differences between the Canadian government and United States government for purpose of comparison.⁷ Then the background examines a brief history, which is broken into two parts (1) the United States path to legalize same-sex marriage and (2) Canada’s path to legalize same-sex marriage.⁸ This history will entail what arguments those that opposed such laws and opinions presented at the time of the decisions.⁹ This section also will present the differing legal issues that derive from legalizing same-sex marriage in both countries.¹⁰ Then the article advances the argument, comparing the two paths Canada and the United States employed to legalize same-sex marriage.¹¹ The argument will address which path resulted in the most benefits, as well as a comparison of the consequence both countries face.¹²

II. BACKGROUND

United States and Canada share intertwined colonial histories that established similar “legal traditions rooted in English common law.”¹³ Both countries “are subject to federal constitutions, which serve as the highest legal authority” to both nations.¹⁴ Both countries court systems employ a hierarchy where the higher courts are binding on the lower courts.¹⁵ The two important distinctions between the Canadian and American legal systems are (1) Canada Federal law governs criminal law and family law issues, where the United States delegates these issues to the states; and (2) Unlike the United States Most Canada provinces do not have their own state constitutions.¹⁶ Unlike the United States, Canada’s criminal and family laws are federally mandated throughout each province.¹⁷

A. THE UNITED STATES’ PATH TO LEGALIZING GAY MARRIAGE

⁷ See *infra* text accompanying notes 13-17.

⁸ See discussion *infra* Sections I.A., I.B.

⁹ See discussion *infra* Sections I.A., I.B.

¹⁰ See discussion *infra* Sections I.A., I.B.

¹¹ See discussion *infra* Sections II.A., II.B., II.C.

¹² See discussion *infra* Sections II.A., II.B., II.C.

¹³ Glass & Kubasek, *supra* note 4, at 148.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 148-50, 161.

¹⁷ *Id.*

In 1993 the Hawaii Supreme Court nearly invalidated the Hawaii's ban on same-sex marriage, which prompted congress to take protective action and define marriage.¹⁸ Therefore in 1996 congress passed the Defense of Marriage Act (DOMA), which federally defined marriage as, "only a legal union between one man and one woman as husband and wife."¹⁹ The DOMA act prompted litigation; and contrary to federal law some states went against the federal definition and granted same sex marriage licenses.²⁰ Then in 2013 in the case of *United States v. Windsor*, the Supreme Court invalidated the DOMA act because it barred the Federal Government from recognizing the legal same-sex marriage licenses granted in various states.²¹

Two years after the federal definition of marriage was invalidated the case of *Obergefel v. Hodges* was brought.²² Leading up to the decision in *Obergefel*, "[t]he Fourth, Seventh, Ninth, and Tenth Circuit Courts of Appeals had ruled that States could not ban same-sex marriage."²³ The Sixth Circuit was in direct conflict, which launched the *Obergefel* case.²⁴ The case of *Obergefel* was brought by 16 petitioners as a consolidation of cases from Michigan, Ohio, Tennessee, and Kentucky.²⁵ During this time these states defined marriage as a union only between one man and one woman.²⁶ These petitioners challenged the respondents for violating their Fourteenth Amendment rights on the grounds that the right to marry or right to have their marriage recognized within a state was denied.²⁷

¹⁸ See *Baehr v. Lweine*, 852 P. 2d 44, 68 (Haw. 1993) (explaining that the Hawaii Supreme Court held that Hawaii's law restricting marriage to opposite sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii constitution).

¹⁹ *Obergefel v. Hodges*, 135 S.Ct. 2584, 2597 (2015) (quoting The Defense of Marriage Act, 1 U.S.C. § 7 (2016)).

²⁰ *Id.*

²¹ See *United States v. Windsor*, 570 U.S 744, 816-17 (2013).

²² *Obergefell*, 135 S.Ct. 2584.

²³ Megan M. Walls, *Obergefel v. Hodges: Right Idea, Wrong Analysis*, 52 GONZ. L. REV. 133, 135 (2016/2017).

²⁴ See *Obergefell*, 135 S.Ct. 2584, 2590-91 (explaining that the Sixth circuit previously ruled marriage bans were constitutional in part because of *Baker v. Nelson*, a 1971 6th Circuit case where the Minnesota Supreme Court held the state ban on same sex marriage was not a violation of the constitution, *Baker* was expressly overruled by *Obergefel* when the Supreme Court's ruling made same sex marriage bans unconstitutional).

²⁵ See *Id.* at 2594 (explaining that the district courts for each of these 16 plaintiff's cases found in favor of the plaintiffs, but the Sixth District Court of Appeals reversed all these cases).

²⁶ See *Id.* at 2595.

²⁷ *Id.* at 2593.

The *Obergefel* court held that bans against same sex marriage were not valid because marriage is a fundamental right under substantive due process.²⁸ Under the due process clause of the fourteenth amendment, no state shall “deprive any person of life, liberty, or property, without due process of law.”²⁹ The due process clause serves as a guidepost to limit infringement from government onto fundamental rights of human beings.³⁰ The typical test to bring a claim under substantive due process is that the plaintiff must show (1) an asserted fundamental right or a fundamental liberty that is deeply rooted in this nation’s history and tradition implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed and (2) a careful description of the asserted fundamental liberty interest.³¹ However, the Supreme Court has also decided some fundamental rights cases without stating what standard or test the court was using to determine the constitutionality of the law.³² If upon review the right is determined to be fundamental, the government would need a constitutional justification to uphold the restricted legislation or law.³³

In *Obergefel*, the court did not cite a test to categorize marriage as a fundamental right.³⁴ Justice Kennedy justified this by stating “History and tradition guide and discipline this inquiry but do not set the outer boundaries, and the inquiry has not been reduced to any formula . . . The dynamic of the constitution system is that individuals need not await legislative action before

²⁸ See *Id.* at 2604-05, 2608 (explaining the constitutional principles employed by Justice Kennedy to write the opinion. Though he did not use the phrase “substantive due process,” he did cite to the due process clause from the 14th Amendment and presented arguments that marriage is a “fundamental” right. To support the opinion Justice Kennedy cited many cases that were decided based on the doctrine of “substantive due process.”).

²⁹ U.S. CONST. amend. XIV, § 1.

³⁰ *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992) (stating the due process clause protects against government actions regardless of the fairness of the procedures used to implement them.).

³¹ *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (some of the protected fundamental rights include: (1) the rights enumerated in the bill of rights; and (2) a list of rights that are not written into the constitution such as personal choices central to individual dignity and autonomy, including intimate choices that define personal identity beliefs, not assisted suicide).

³² See *Id.* at 722 (explaining there can be no doubt that the judicial value selection must be based on the majority’s decision to enforce some natural law rights against the acts of organized society).

³³ *Obergefell*, 135 S.Ct. 2584, 2597-98.

³⁴ See *Id.*

asserting a fundamental right.”³⁵ The court can make reasoned judgment and the people do not need to wait for legislature to decide when fundamental rights are asserted.³⁶ Justice Kennedy listed many wonderful reasons why gay marriage should be made a fundamental right but did so with very little analysis.³⁷

1. The Dissents against allowing the Court to Rule Gay marriage legal

The four Supreme Court justices; Scalia, Thomas, Roberts, and Alito, whom dissented do not necessarily believe same-sex marriage is morally wrong.³⁸ These four, rather, felt the Court should not have intervened on matters normally delegated to the states.³⁹ Before the court decided this case, eleven states took democratic action and made same-sex marriage legal.⁴⁰ Justice Scalia who supplied a concurring dissent stated, “Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at it’s best.”⁴¹ The dissents’ argument is that the Court should not allow the nine justices to decide matters that are ordinarily, without constitutional prescription, left to the states to decide.⁴² One reason being is that the nine Justice are not an adequate representation of the nation.⁴³

Justice Roberts presented a slippery slope argument of future issues that could result because of the majority opinion.⁴⁴ He simply stated that the majority opinion could be used the same way for a polygamist arguing that a marriage to a third wife should be legal.⁴⁵ Though the

³⁵ *Id.* at 2589, 2605.

³⁶ *Id.* at 2598.

³⁷ See Ilya Somin, *A great decision on same-sex Marriage - but based on dubious reasoning*, THE WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/?utm_term=.3fa36b63ff23.

³⁸ *Obergefell*, 135 S.Ct. 2584, 2602, 2612.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2627.

⁴² *Id.*

⁴³ *Id.* at 2629.

⁴⁴ *Id.* at 2621.

⁴⁵ See *Id.* at 2622 (explaining the similarities between same-sex marriage and polygamy, polygamy also involves committed couples and their children whom receive a stigma for their parent’s relationship not being accepted by the law).

United States has not legalized polygamy marriage, the prosecution of the crime bigamy/polygamy has relaxed in the United States since the *Obergefell* court decision.⁴⁶

2. *Current LGBT rights in the United States*

Each state varies on laws banning sexual orientation discrimination; federal law gives very little protection.⁴⁷ Only some states have prohibited businesses from discriminating against the LGBT community.⁴⁸ There are no United States federal statutes that protect LGBT individuals against housing and employment discrimination, however 22 states have enacted bans on employment and housing discrimination based on sexual orientation.⁴⁹ Since 2011 openly gay and lesbian individuals have been able to serve in the United States military.⁵⁰ The current guidance from the United States Food and Drug Administration is to defer from donating blood for 12 months from the most recent time a man had sex with another man.⁵¹

B. CANADA'S PATH TO LEGALIZING GAY MARRIAGE

In 1969, Canada decriminalized sodomy by passing a series of family reform laws.⁵² This was prompted by the Prime Minister Pierre Trudeau as an attempt to “bring the laws of the land

⁴⁶ See *Brown v. Buhman*, 822 F.3d 1151, 1171 (10th Cir. 2016) (explaining the current state of the law in regards to polygamy in the United States. The district court decided the law banning polygamy cohabitation was unlawful based on substantive due process. This lead Utah State law enforcement to decide they would not prosecute polygamy cases unless further criminal activity was involved).

⁴⁷ See Alan Feuer, Justice Department Says Rights Law Doesn't Protect Gays, N.Y. Times (July 27, 2017), <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>.

⁴⁸ Keller, *supra* note 5, at 13.

⁴⁹ Housing for LGBTQ People: What You Need to Know About Property Ownership and Discrimination, Human Rights Campaign (last visited Mar. 16, 2018), <http://www.hrc.org/resources/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and>.

⁵⁰ See Charles Keyes, *In 60 days, gays will be allowed to serve openly in the military*, CNN (July 22, 2011, 9:48 PM), <http://www.cnn.com/2011/POLITICS/07/22/dadt.repeal/index.html>.

⁵¹ *Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products - Questions and Answers*, FDA (last updated Feb. 5, 2018),

<https://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/QuestionsaboutBlood/ucm108186.htm> [hereinafter FDA, *Revised Recommendations*].

⁵² Glass & Kubasek, *supra* note 4, at 161-62.

up to contemporary society.”⁵³ Because most of the Canadian provinces lacked their own separate constitutions, Canada Province courts lacked the ability to protect minority rights.⁵⁴ In 1982 to assist minority groups, parliament passed the Canadian Charter of Rights and Freedoms (the “Charter”).⁵⁵ The Charter discussed equality guarantees.⁵⁶ Same-sex marriage litigation started soon after the release of the Charter to determine if gays and lesbians were protected by this phrasing from the Charter, “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁵⁷

First, the courts had to decide if the language from Section 15 of the Charter designated same-sex couples as a protected class.⁵⁸ Not until 1995, in the case of *Egan v. Canada*, did the Canada Supreme Court hold that sexual orientation was a characteristic that falls within the protection of section 15 of the Charter.⁵⁹ At nearly the same time of *Egan v. Canada*, litigation

⁵³ *Timeline: Same-sex rights in Canada*, CBCNEWS (Jan. 12, 2012, 4:47 PM), <http://www.cbc.ca/news/canada/timeline-same-sex-rights-in-canada-1.1147516> (discussing the amendments, Trudeau says: "It's certainly the most extensive revision of the Criminal Code since the 1950s and, in terms of the subject matter it deals with, I feel that it has knocked down a lot of totems and overridden a lot of taboos and I feel that in that sense it is new. It's bringing the laws of the land up to contemporary society I think. Take this thing on homosexuality. I think the view we take here is that there's no place for the state in the bedrooms of the nation. I think that what's done in private between adults doesn't concern the Criminal Code. When it becomes public this is a different matter, or when it relates to minors this is a different matter.").

⁵⁴ Glass & Kubasek, *supra* note 4, at 161-62.

⁵⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11, § 15(1) (U.K.).

⁵⁶ *Id.*

⁵⁷ *See Andrews v. Ontario (Minister of Health)* (1988), 64 O.R. 2d 258, para. 15 (Can. Ont. Sup. Ct. J.).

⁵⁸ *See Id.* at para.'s 14-23; *See also Andrews v. Law Soc'y of British Columbia*, [1989] 1 S.R.C. 143 (Can.) (demonstrating that early cases brought arguments that sexual orientation is protected by Section 15 of the Charter, these early cases paved the way for the supreme court to decide the Charter included sexual orientation as a protected class.)

⁵⁹ *Egan v. Canada*, [1995] 2 S.C.R. 513, 514, 528 (Can.) (though the court held that marriage is still between a man and a woman it recognized that, “[s]exual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of [section] fifteen protection as being analogous to the enumerated grounds.”).

was being heard on laws about common law marriage status, which involved same-sex couples.⁶⁰ This eventually led to the Supreme Court of Canada to overturn previous law that blocked same-sex common law couples from reaping common law marriage benefits.⁶¹ Up until this point, marriage was still not legal between same-sex couples.⁶²

In 2000 in the case of *Halpern v. Canada*, seven Ontario same sex couples challenged Ontario bans against same sex marriage.⁶³ The Court held that although common law defined marriage as the union between opposite sexes, no statutory impediment to same-sex marriage existed.⁶⁴ The court ordered the definition of marriage to be immediately changed.⁶⁵ The Ontario gay-marriages were the first besides the Netherlands in 2001 to be legally recognized in the world.⁶⁶

The province litigation prompted parliament to take action and stop the fight, soon after the Ontario decision, Parliament began drafting the Civil Marriage Act.⁶⁷ Prime Minister Jean Chretien announced legislation to make same-sex marriages legal.⁶⁸ The two main points of the Act were, first, marriage defined “for civil purposes, is the lawful union of two persons to the exclusion of all others.”⁶⁹ Second, the Act protects the freedom of religion, and does not require all officials of religious groups to perform same-sex ceremonies.⁷⁰ The Act was introduced February 2005 and Parliament voted on the Act June 2005.⁷¹ The Act was passed by a 158-133

⁶⁰ See generally *Miron v. Trudel*, [1995] 2 S.C.R. 418 (Can.) (this case established that discriminating against people based on their marital status violated the Charter, because of this decision same-sex-couples sued for employment and other issues and eventually overturned the family law act of 1990 where the act did not mention homosexual common law couples in the provision).

⁶¹ Glass & Kubasek, *supra* note 4, at 166.

⁶² See *Halpern v. Canada* (2003), 65 O.R. 3d 161, para. 65, 150, 154 (Can. Ont. C.A.).

⁶³ *Halpern v. Canada* (2003), 65 O.R. 3d 161 (Can. Ont. C.A.).

⁶⁴ *Id.* at para. 16, 27.

⁶⁵ Glass & Kubasek, *supra* note 4, at 167; *Halpern v. Canada* (2003), 65 O.R. 3d 161, para. 144 (Can. Ont. C.A.).

⁶⁶ Glass & Kubasek, *supra* note 4, at 167.

⁶⁷ *Id.* at 168.

⁶⁸ CBCNEWS, *supra* note 53.

⁶⁹ Civil Marriage Act, S.C. 2005, c 33, art 2 (Can.).

⁷⁰ Civil Marriage Act, S.C. 2005, c 33, Preamble (Can.).

⁷¹ *Id.*

vote.⁷² In 2006, the conservatives motioned to overturn the legislation, but the revote favored the Act 175-123, demonstrating Canadian society's acceptance of same sex marriage.⁷³ However, some argued that freedom of speech was taken away by the Parliament's Act to legalize gay marriage.⁷⁴

C. CURRENT LGBT RIGHTS/PROTECTIONS AND RELATED ISSUES IN CANADA

Any discrimination, including harassment, based on real or perceived sexual orientation is prohibited throughout Canada in private and public sector employment, housing, public services, and publicity.⁷⁵ Examples of services include insurance, government programs, hotels and schools open to the public.⁷⁶ The Canadian criminal codes give protection for harassment against members of a protected class making it easier to convict based on the harassment.⁷⁷ Furthermore, LGBT Canadians have been allowed to serve in the military since 1992.⁷⁸ Some discrimination in Canada still exists, however, as anal sex is still not legal until you are 18 as other sexual acts are legal after 16, and sexually active gay men may not be allowed to donate blood.⁷⁹

⁷² CBCNEWS, *supra* note 53.

⁷³ *Id.*

⁷⁴ Bradley Miller, *Same-Sex Marriage Ten Years On: Lessons from Canada*, THE WITHERSPOON INST. (Nov. 5, 2012), <http://www.thepublicdiscourse.com/2012/11/6758/>.

⁷⁵ See OHRC, *Policy on discrimination and harassment*, *supra* note 5 (explaining the policy on discrimination and harassment because of sexual orientation).

⁷⁶ *Id.*

⁷⁷ *Id.* at 14.

⁷⁸ John Ibbitson, *How Michelle Douglas broke down the Canadian military's LGBT walls*, THE GLOBE AND MAIL (Oct. 23, 2017), <https://www.theglobeandmail.com/news/politics/interrogation-dismissal-and-now-an-apology-to-michelle-douglas/article36700166/>.

⁷⁹ *Lesbian, Gay, Bisexual and Transgender Rights in Canada*, HISTORICA CANADA (last visited Mar. 16, 2018), <http://www.thecanadianencyclopedia.ca/en/article/lesbian-gay-bisexual-and-transgender-rights-in-canada/>.

Many in Canada argued that legalizing gay marriage would lead to legal polygamy in Canada.⁸⁰ However almost 15 years after gay marriage was made legal, Canada prosecuted a known polygamist for the crime of bigamy/polygamy.⁸¹

III. ARGUMENT

The United States could benefit from following some of the actions taken by Canada to address the LGBT community rights.⁸² One reason is because the legal process employed by Canada to legalize same-sex marriage was more democratic and less murky than the United States judicial method.⁸³ The United States could better address the sexual orientation discrimination that still permeates much of the United States by following Canada's example; namely, by passing a charter to stop the discrimination.⁸⁴ Also, in comparing both countries' slippery slope arguments, the adoption of same-sex marriage in Canada resulted in stronger criminalization of polygamy compared to the United States.⁸⁵

A. COMPARISON OF THE LEGAL PATHS TO SAME-SEX MARRIAGE

⁸⁰ Neil Addison, *Polygamy in Canada: a case of double standards*, THE GUARDIAN (Nov. 30, 2011), <https://www.theguardian.com/commentisfree/belief/2011/nov/30/heterosexuality-canada-law-monogamy-polygamy>.

⁸¹ *Two Canadian men found guilty of polygamy in first test of 127-year-old law*, THE TELEGRAPH (July 25, 2017, 8:53 AM), <http://www.telegraph.co.uk/news/2017/07/25/two-canadian-men-found-guilty-polygamy-first-test-127-year-old/> (for the first time in 127 years a polygamy law was challenged in court, where the polygamist group argued religious protections; both the polygamist on trial were convicted).

⁸² See Glass & Kubasek, *supra* note 4, at 197-204; See also Miller, *supra* note 74 (explaining the benefits of Canada's same-sex marriage laws).

⁸³ Compare Civil Marriage Act, S.C. 2005, c 33, art 2 & 4 (Can.) (legalizing same-sex marriage in Canada; this was a result of the democratic process used to elect the officials that voted on the Act), with *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607-08 (2015) (legalizing same-sex marriage, thereby circumventing the democratic process).

⁸⁴ See generally Keller, *supra* note 5, at 13 (discussing the lack of state anti-discrimination laws in the United States, specifically in the realm of public accommodations).

⁸⁵ See generally *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016) (a case discussing the prosecution of polygamy in Utah, a state with many cases of polygamy, and Utah's current stance on the practice); THE TELEGRAPH, *supra* note 81 (discussing the prosecution of a polygamy law that had not been challenged for 127 years).

Both America and Canada arrived at their desired outcome to legalize same-sex marriage, but Canada's path resulted from application of the democratic process.⁸⁶ Canada's parliament passed the law legalizing gay marriage; 158 of the 291 elected members of parliament who voted were in favor of the change.⁸⁷ Though some citizens felt the act took away freedom of speech in Canada, the act was passed by those elected by the people.⁸⁸ Compared to the Supreme Court in the United States, where 9 unelected men and women with different pasts, many from New York, made a decision about marriage ordinarily delegated to the individual states to decide.⁸⁹ Only 5 of those 9 justices accepted that gay marriage should be legal and therefore the entire country was forced to adopt their decision.⁹⁰

The legal backing behind the actual change of marriage law is clear in Canada.⁹¹ Canada parliament created an act to bind all providences to allow gay marriage, this was done because the government recognized the need and wanted to stop the fighting.⁹² The argument that Section 15 of the Canadian Charter of Rights and Freedoms entailed protection for the LGBT community appears to be stronger in comparison to the substantive due process argument employed by Justice Kennedy in *Obergefel*.⁹³ The legal analysis employed by the Supreme Court did not cite a legal test when deciding the case, rather justice Kennedy elegantly explained how times change so now gay marriage is a fundamental right.⁹⁴

⁸⁶ Compare Civil Marriage Act, S.C. 2005, c 33 (Can.) (legalizing same-sex marriage through the democratic process), with *Obergefel*, 135 S.Ct. at 2607-08 (legalizing same-sex marriage through the judiciary).

⁸⁷ Civil Marriage Act, S.C. 2005, c 33, art 2 (Can.); CBCNEWS, *supra* note 53.

⁸⁸ See Miller, *supra* note 74 (discussing the impact that legalizing same-sex marriage has had on freedom of expression in Canada).

⁸⁹ *Obergefel*, 135 S.Ct. at 2612 (Roberts, C.J., dissenting); see generally Geneva Sands, *Meet the 9 sitting Supreme Court Justices*, ABC NEWS (May 29, 2017, 8:06 AM), <http://abcnews.go.com/Politics/meet-sitting-supreme-court-justices/story?id=37229761> (discussing biographical information of recent Supreme Court Justices).

⁹⁰ *Obergefel*, 135 S.Ct. at 2612 (Roberts, C.J., dissenting).

⁹¹ See Glass & Kubasek, *supra* note 4, at 166-67.

⁹² *Id.*

⁹³ See *Id.*; *Obergefel*, 135 S.Ct. at 2604-05 (citing the Due Process Clause of the 14th Amendment and arguing that marriage is a fundamental right); See generally Miller, *supra* note 74 (explaining the impact of Canada's same-sex marriage laws).

⁹⁴ See *Obergefel*, 135 S.Ct at 2596-97, 2604-05 (explaining that same-sex marriage is a fundamental right).

B. COMPARING CONTINUED LGBT DISCRIMINATION IN BOTH NATIONS

The United States would benefit from following Canada and enacting federal law to protect the LGBT Community from discrimination.⁹⁵ Parliament in Canada enacted Section 15 of the Charter, and as a result all providences cannot discriminate on the basis of sexual orientation for employment, services, and public accommodation or housing.⁹⁶ Though some states in America took the initiative to enact their own laws and ban sexual orientation discrimination, most of the states have not provided such protection.⁹⁷ In Canada, no company, renter, or business may turn someone away based on their sexual orientation; though this may diminish freedom of speech in Canada, it results in more peace.⁹⁸

In the United States, LGBT rights are constantly in dispute because each state varies on the subject matter.⁹⁹ Currently, the United States Supreme Court is deciding whether a cake decorator has the constitutional right to withhold his services from same-sex couples.¹⁰⁰ These disputes do not happen in Canada but Canada has traded a degree of free speech for the fair treatment of same-sex couples.¹⁰¹ Canada in fact will fine or penalize any business that refuses to serve same-sex couples for marriage services.¹⁰² The United States obviously wants to protect freedom of speech but depending on the Supreme Court's upcoming decision the result could be similar to a federal law prohibiting sexual orientation discrimination everywhere.¹⁰³

⁹⁵ See generally Glass & Kubasek, *supra* note 4, at 167 (discussing the legal landscape in Canada leading up to the passage of the Civil Marriage Act).

⁹⁶ OHRC, *Policy on discrimination and harassment*, *supra* note 5, at 24-26.

⁹⁷ Keller, *supra* note 5, at 13.

⁹⁸ See OHRC, *Policy on discrimination and harassment*, *supra* note 5, at 24-26; Miller, *supra* note 74.

⁹⁹ See Keller, *supra* note 5, at 13 (discussing varying legal protections against discrimination based on sexual orientation in public accommodations at both the state and local levels).

¹⁰⁰ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. denied*, *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Com'n*, No. 15SC738, 2016 WL 1645027 (Colo. 2016), *cert. granted*, 137 S.Ct. 2290 (2017).

¹⁰¹ See Miller, *supra* note 74.

¹⁰² See Jennifer Graham, *Same-sex nuptials can't be refused on religious grounds, Saskatchewan court rules*, THE GLOBE AND MAIL (Mar. 26, 2017), <https://www.theglobeandmail.com/news/national/same-sex-nuptials-cant-be-refused-on-religious-grounds-saskatchewan-court-rules/article561234/>.

¹⁰³ See generally Douglas Laycock, *The First Amendment in Contemporary Society*, 41 HARV. J.L. & PUB. POL'Y 49 (discussing the *Masterpiece Cakeshop* litigation, as well as the balance of

C. COMPARISON OF BOTH COUNTRIES' SLIPPERY SLOPE ARGUMENT, POLYGAMY

Before the United States and Canada legalized same-sex marriage, many opposed the decision and argued that legal polygamy would result from allowing same sex marriage.¹⁰⁴ Canada has allowed same-sex marriage for ten years longer than the United States, but Canada is stricter to prosecute the crime of polygamy.¹⁰⁵ In 2017, Canada prosecuted a man for cohabitation polygamy.¹⁰⁶ Though the United States does not allow polygamy marriage, some states have decided not to prosecute polygamy cohabitation.¹⁰⁷ The Utah Attorney General's current policy for polygamy is to not prosecute unless polygamy is coupled with another crime such as child abuse or incest.¹⁰⁸ Also, in a high profile case, a Utah District Court invalidated the current polygamy statute for failing to survive rational basis review under substantive due process.¹⁰⁹ Though the appellate court overturned the state court ruling, the murkiness of the substantive due process may lead to unclear application of *Obergefel* in the future.¹¹⁰

IV. CONCLUSION

hardships between religious objectors and same-sex couples, and how the balance could tip to only protect same-sex couples).

¹⁰⁴ See *Obergefel v. Hodges*, 135 S.Ct. 2584, 2621-22 (2015) (Roberts, C.J., dissenting) (citing Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, NEWSWEEK (July 28, 2009, 8:00 PM), <http://www.newsweek.com/polyamory-next-sexual-revolution-82053>, David K. Li, *Married Lesbian "Throuple" Expecting First Child*, N.Y. POST (Apr. 23, 2014), <https://nypost.com/2014/04/23/married-lesbian-threesome-expecting-first-child/>, Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977 (2015)); Addison, *supra* note 80.

¹⁰⁵ Compare THE TELEGRAPH, *supra* note 81 (discussing the prosecution of two Canadian men for violating a polygamy law that is 127 years old), with *Brown v. Buhman*, 822 F.3d 1151, 1155 (10th Cir. 2016) (discussing the Utah County Attorney's policy of prosecuting bigamy only in narrow circumstances).

¹⁰⁶ THE TELEGRAPH, *supra* note 81.

¹⁰⁷ See *Brown*, 822 F.3d at 1171-72 (explaining that the Browns "face no credible threat of prosecution from the Utah County Attorney").

¹⁰⁸ *Id.* at 1157.

¹⁰⁹ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1225 (D. Utah 2013).

¹¹⁰ See *Obergefel*, 135 S.Ct. at 2621-22 (Roberts, C.J., dissenting) (explaining that the majority's holding may be used to argue for polygamy because of the unclear nature of the decision).

Gay marriage is legal in North America, benefitting many people both in Canada and the United States.¹¹¹ The paths that the two nations endured to make same-sex marriage legal are distinguishable.¹¹² Canada employed a more democratic approach compared to the United States, where the Supreme Court made the ultimate decision.¹¹³

Of these two approaches to the legal issue of same-sex marriage, Canada's resulted in less discrimination based on sexual orientation. The United States' approach has not yet infringed upon those who deny their business services to same-sex couples because of their religious beliefs. The two paths resulted in separate and distinct consequences. As another result polygamy is being argued and prosecuted completely different in both nations. The United States would still benefit from following Canada's example by enacting a federal law to protect minority classes such as sexual orientation in order to stop discrimination throughout each state.

¹¹¹ See generally *Obergefel*, 135 S.Ct. 2584 (legalizing gay marriage by judicial decision); Civil Marriage Act, S.C. 2005, c 33, art's 2, 4 (Can.) (legalizing gay marriage by an act of Parliament).

¹¹² Compare Civil Marriage Act, S.C. 2005, c 33 (Can.) (legalizing same-sex marriage through the democratic process), with *Obergefel*, 135 S.Ct. at 2597 (legalizing same-sex marriage through the judiciary).

¹¹³ Compare Civil Marriage Act, S.C. 2005, c 33, art 2 (Can.), with *Obergefel*, 135 S.Ct. at 2597.

