In re Kandu: Defending DOMA—Deferential Washington Bankruptcy Court Deals Blow to Equal Protection and Due Process by Upholding Federal Ban on Recognition of Same-Sex Marriage

I. INTRODUCTION

Lee and Ann C. Kandu, two women and United States citizens, married each other in British Columbia, Canada, on August 11, 2003.[1] Seeking relief from their debts under Chapter 7 of the United States Bankruptcy Code (Code),[2] Lee filed a voluntary joint petition *pro se* in bankruptcy court.[3] Lee listed Ann as a joint debtor in the petition.[4] The court filed an order to show cause why the joint petition should not be dismissed for improper joint filing of unmarried individuals.[5] Lee filed a memorandum in support of the joint filing, in which she challenged the constitutionality of the definition of marriage contained in the Defense of Marriage Act (DOMA).[6] Prior to Lee's filing, Ann died.[7]

The United States Trustee (UST) then filed a motion for certification of issues to the Attorney General of Washington state.[8] The court granted the motion and certified the issue of the constitutionality of the state's marriage definition, contained in section 26.04.010 of the

1. *See In re* Kandu, 315 B.R. 123, 130 (Bankr. W.D. Wash. 2004).

2. Congress enacted the Bankruptcy Code when it passed the Bankruptcy Reform Act of 1978. *See* Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (2004).

3. *See In re Kandu*, 315 B.R. at 130.

4. *See id.* Section 302 of the Code provides that "a joint case under a chapter of this title is commenced by the filing . . . of a single petition . . . by any individual that may be a debtor . . . and such individual's *spouse*." 11 U.S.C. § 302(a) (2004) (emphasis added).

5. *See In re Kandu*, 315 B.R. at 130.

6. *See id.*

7. *See id.* The death of a debtor does not "abate" a Chapter 7 case. FED. R. BANKR. P. 1016. Instead, the case may be concluded as if the death had not occurred. *See id.*

8. *See In re Kandu*, 315 B.R. at 130.

Revised Code of Washington.[9] The UST subsequently filed a response to the show cause order asserting the constitutionality of DOMA, to which Lee filed a reply.[10] The United States Bankruptcy Court for the Western District of Washington *held* that the Kandus were not entitled to joint debtor status because DOMA constitutionally prohibits federal recognition of same-sex marriages. *In re* Kandu, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004).

II. BACKGROUND

An institution of vital social importance, civil marriage not only fulfills individuals' "yearnings for security, safe haven, and connection" but also bestows various enforceable legal rights and benefits not available to either unmarried or cohabiting same-sex couples.[11] One benefit available only to legally married spouses is the ability to petition a bankruptcy court for debt relief through a joint Chapter 7 case.[12] While the Code does not define the terms "marriage" or "spouse," DOMA provides that members of the same sex can neither be "married" nor "spouses" under federal law.[13] The Supreme Court has yet to decide whether DOMA is constitutional, but the Court's marriage, equal protection, and due process jurisprudence provide compelling constitutional reasons for DOMA's invalidation.

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9. *See id.* Chapter 26.04 defines a marriage contract as "a civil contract between a male and a female who have attained the age of eighteen years, and who are otherwise capable." WASH. REV. CODE § 26.04.010(1) (2004).

10. *See In re Kandu*, 315 B.R. at 130.

11. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003); *see* Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589, 593-95 (2004).

12. *See* Tisha Morris Federico, *The Impact of the Defense of Marriage Act on Section 302 of the Bankruptcy Code and the Resulting Renewed Interest in the Equitable Doctrine of Substantive Consolidation*, 103 COM. L.J. 82, 83-87 (1998). Chapter 7 of the Code provides individuals with a legal mechanism for the collection and conversion of that person's nonexempt property to cash and for the distribution of the cash to creditors. *See* 11 U.S.C. §§ 101(41), 109(a)-(b), 704(1), 726. A joint Chapter 7 case may be "commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor . . . and such individual's spouse." 11 U.S.C. § 302(a). Pursuant to the Federal Rules of Bankruptcy Procedure, a court may order joint administration of such a case. *See* FED. R. BANKR. P. 1015(b). Joint administration results in the combination of docketing, scheduling, fee payment, and other administrative matters for the purposes of efficiency and administrative ease. *See id.* advisory committee's notes. A joint case may be substantively consolidated, 11 U.S.C. § 302(b), with the result that "assets and liability [of both debtors will be] combined in a single pool to pay creditors." S. REP. NO. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818; H.R. REP. NO. 95-595, at 321 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6278.

13. *See* Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2004)).

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law . . . nor deny to any person within its jurisdiction the equal protection of the laws."[14] Engaging the Amendment's due process and equal protection guarantees, the Supreme Court, in *Loving v. Virginia*, struck down Virginia's interracial marriage ban and established marriage as a fundamental civil liberty protected from state infringement by the Due Process Clause.[15] State attempts to draw classifications as to who may marry must not constitute discrimination that is "arbitrary and invidious."[16] Accordingly, the Court held that state marriage statutes that did arbitrarily and invidiously discriminate were reviewable under the Equal Protection Clause and could not be upheld on the theory that the classification scheme applied equally to all who marry in violation of it.[17] Only legitimate legislative classifications "independent" of arbitrary and invidious discrimination may be upheld.[18]

In *Zablocki v. Redhail*, the Supreme Court applied *Loving*'s "strict" equal protection test and carved out a more precise constitutional balancing analysis for judicial scrutiny of marriage laws.[19] When states regulate marriage, courts must first determine the character of the legislative classification.[20] Marriage regulations must be "reasonable" and not "significantly interfere" with the decision or ability to enter into a marriage relationship.[21] When regulations do significantly interfere with that ability, courts may only uphold them upon a showing that the statute furthers "sufficiently important state interests" and is "closely tailored to effectuate *only* those interests."[22] Applying the test in *Turner v. Safley*, the Court held that regulations that conditioned prison inmates' entry into marriage upon pregnancy or child birth could not survive strict

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14. U.S. CONST. amend. XIV, § 1.

15. *See* 388 U.S. 1, 8-12 (1967). Previous Supreme Court holdings had grounded the marriage right in other constitutional provisions. *See* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

16. *Loving*, 388 U.S. at 10.

17. *See id.* at 10.

18. *Id.* at 11. "[T]he Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny, . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective . . . ." *Id.* (internal citations omitted).

19. *See* 434 U.S. 374, 383-88 (1978). While *Loving* dealt with racial impediments to marriage, the Court affirmed that the right to marry is fundamentally important to all persons. *See id.* at 384.

20. *See id.* at 383.

21. *Id.* at 386.

22. *Id.* at 388 (emphasis added).

judicial review.[23] The *Turner* Court affirmed that the ability to marry was so fundamental that even *prisoners*, who do lose *some* constitutional protections upon incarceration, had the right to do so.[24]

While the Court has yet to extend the fundamental marriage right specifically to persons of the same sex wishing to marry each other, recent holdings granting fundamental equal protection and due process guarantees to homosexuals, when viewed in the light of the Court's earlier marriage jurisprudence, provide a doctrinal framework through which same-sex marriage may be upheld under federal law.[25] When Colorado voters passed Amendment 2, a constitutional amendment prohibiting the state's legislature, executive, and judiciary from taking actions to prohibit discrimination based on sexual orientation, the Supreme Court, in *Romer v. Evans*, held that the amendment could not survive even the most deferential equal protection scrutiny.[26] The Court explained that the amendment singled out persons on the basis of a particular trait—sexual orientation—and denied those persons the ability to seek protection from discrimination.[27] "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[28] Amendment 2 was just such a declaration to gays and lesbians, and the Court struck it down.[29]

After reviewing past decisions conferring the Fourteenth Amendment's Due Process protection to intimate sexual and reproductive decisions, the Court, in *Lawrence v. Texas*, extended the clause to cover the choice of two individuals of the same sex to engage in private,

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23. *See* 482 U.S. 78, 94-98 (1987).

24. *See id.* at 95-98.

25. The Supreme Court has only summarily dealt with same-sex marriage. In *Baker v. Nelson*, the Minnesota Supreme Court distinguished *Loving* and upheld the state's denial of a marriage license to a same-sex couple. *See* 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972). The state high court concluded, without explanation, that a "commonsense and . . . constitutional" distinction existed between a marriage restriction based on sex and one based on race. *Id.* Baker appealed, invoking the Supreme Court's mandatory appellate jurisdiction, but the Court dismissed the appeal "for want of substantial federal question." Baker v. Nelson, 409 U.S. 810, 810 (1972) (Mem.). While summary affirmances and dismissals for lack of a substantial federal question bind lower federal courts, summary decisions have limited precedential effect. *See* Mandel v. Bradley, 432 U.S. 173, 176-77 (1977).

26. *See* 517 U.S. 620, 631-33 (1996). Justice Kennedy concluded that the amendment was "born of animosity towards [sexual minorities]." *Id.* at 634. Desire to harm an unpopular political group cannot constitute a state interest legitimate enough to survive even deferential constitutional scrutiny. *See id.*

27. *See id.* at 633.

28. *Id.*

29. *See id.* at 635.

consensual sexual acts.[30] The Due Process Clause protects the ability of persons to make important personal choices concerning "*marriage*, procreation, contraception, family relationships, [and] child rearing."[31] The Constitution, the Court held, demands respect for personal dignity and autonomy in making these important personal decisions.[32]

The facts in *Lawrence*, however, did "not involve [the issue of] whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[33] The state courts and Congress have been left to grapple with the Court's jurisprudence and carve out the constitutional contours of a same-sex marriage right.

In *Baehr v. Lewin*, the Hawaii Supreme Court held that the state's constitutionally protected privacy right did not include a fundamental right to marry a person of the same sex.[34] The court remanded the case back to the trial court, however, so the plaintiffs could have an evidentiary hearing to determine whether the state's marriage statute could survive strict judicial scrutiny and was narrowly tailored to serve a compelling state interest.[35]

Concerned that Hawaii's courts would find that same-sex marriage was a fundamental right, Congress enacted DOMA.[36] The federal law has two provisions. First, the act makes an exception to the Constitution by providing that states and territories do not have to extend full faith and credit to valid same-sex marriages from other states.[37] Second, the act provides that the terms "marriage" and "spouse," when used in any federal law, refer only to opposite-sex relationships.[38] Congress enacted DOMA both to preserve the heterosexual definition of marriage and to advance the government's interest in defending traditional, Judeo-Christian moral norms.[39]

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30. *See* 539 U.S. 558, 563-79 (2003). The Court concluded that the nation's laws and traditions "show[ed] an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572.

31. *Id.* at 574 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (emphasis added)).

32. *See id.* Heterosexuals and homosexuals alike have the right to this autonomy. *See id.*

33. *Id.* at 578.

34. *See* 852 P.2d 44, 55-56 (Haw. 1993).

35. *See id.* at 57-58.

36. *See* H.R. REP. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

37. *See* Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738(C) (2000)).

38. *See id.* § 3(a) (codified at 1 U.S.C. § 7 (2004)) ("[T]he word 'marriage' means only a legal union between one man and one woman . . . and . . . 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

39. *See* H.R. REP. No. 104-664, at 9-11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916-20.

DOMA's enactment, however, appears not to have deterred state courts from utilizing federal and state constitutional law to uphold the right of persons to marry others of the same sex. The Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health*, held that the state could not deprive same-sex couples of their fundamental right to civil marriage.[40] Analyzing the state's marriage law under equal protection and due process principles, the high court held that the law's ban on same-sex marriage was not even rationally related to a legitimate state interest.[41] In *Anderson v. King County*, a Washington state superior court, employing strict judicial scrutiny, held that the state's prohibition of same-sex marriages "negatively impact[ed] the [same-sex couple] plaintiffs' *fundamental* right to marry."[42] Extending the Supreme Court's holdings in *Loving*, *Zablocki*, *Turner*, and *Lawrence* specifically to persons of the same sex wishing to marry, the court held that Washington could not constitutionally deny the plaintiffs "the autonomous right to have such a most important relation in their lives."[43] Most recently, the New York Supreme Court for the County of New York ruled the state's ban on same-sex marriage unconstitutional, comparing the law to the interracial marriage ban held unconstitutional in *Loving*.[44]

III. COURT'S DECISION

In the noted case, the Bankruptcy Court for the Western District of Washington deferred to Congress' intent in holding that federal bankruptcy courts may exclude same-sex couples, married or otherwise, from joint debtor recognition.[45] In the first published federal court opinion ever to address DOMA's constitutionality, the court upheld the ban on federal recognition of same-sex marriage.[46]

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40. *See* 798 N.E.2d 941, 966-69 (Mass. 2003).

41. *See id.* at 960-61.

42. Anderson v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *7 (Wash. Super. Ct. Aug. 4, 2004) (emphasis added).

43. *Id.*

44. *See* Hernandez v. Robles, No. 103434/2004, slip op. at 58-62 (N.Y. Sup. Ct. Feb. 4, 2005). The court noted that less than forty years ago the Supreme Court struck down anti-miscegenation statutes "adopted to prevent marriages between persons solely on the basis of rac[e] . . . because they infringed on the freedom to marry a person of one's choice. Similarly, this Court must so hold in the context of same-sex marriages." *Id.* at 58.

45. *See In re* Kandu, 315 B.R. 123, 131-48 (Bankr. W.D. Wash. 2004).

46. *See id.* Judge Synder noted that he was "unaware of any published opinion by a federal court addressing [DOMA's] constitutionality." *Id.* at 131. While the noted case is the first to address DOMA's constitutionality on the merits, a handful of federal decisions have made mention of the act. *See* United States v. Reid, 206 F. Supp. 2d 132, 139 (D. Mass. 2002); United States v. Costigan, No. CRIM. 00-9-B-H, 2000 WL 898455, at *4 (D. Me. Jun. 16, 2000); Miller v. Vesta, Inc., 946 F. Supp. 697, 711 (E.D. Wis. 1996).

After reviewing DOMA's legislative history, the court concluded that since Congress intended for DOMA to apply only to the interpretation of federal law, its marriage definition did not impinge upon the power of the states to determine which persons may marry, in violation of the Tenth Amendment.[47] The Tenth Amendment is not implicated, the court held, because DOMA does not force the states to accept a particular definition of marriage.[48] Distinguishing the noted case from past Supreme Court precedent, the court also determined that a federal marriage definition did not preempt Washington state's marriage law because the state definition mirrored the federal one.[49]

The court then declined the opportunity to recognize the Kandus' valid Canadian marriage as valid under federal law.[50] It found that DOMA's decree that marriage is the union between one man and one woman evidenced an American marriage policy that is directly in conflict with the marriage policy of British Columbia.[51] "[I]n the event of a conflict of laws between nations, a court must prefer the laws of its own nation."[52] Furthermore, since DOMA's language is clear, a court's first concern should be enforcing the law according to its terms.[53]

Next, Ms. Kandu advanced the novel argument that a court's application of DOMA to federal bankruptcy law would result in an unconstitutional seizure of her property interest in federal bankruptcy benefits in violation of the Fourth Amendment.[54] The court disagreed, noting that when a debtor merely wishes or desires the benefits at issue, a property interest cannot be found.[55] Instead, the court determined that Ms. Kandu must have "a legitimate claim of entitlement" to those benefits.[56] Since she was unable to show such a present possessory interest in the joint filing, the court concluded that the Fourth Amendment's prohibition on unlawful seizures remained unviolated.[57]

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47. *See In re Kandu*, 315 B.R. at 131-32. "The primary question raised by the [d]ebtor as it concerns the Tenth Amendment is whether DOMA oversteps the boundary between federal and state authority. The [c]ourt concludes that . . . it does not." *Id.* at 132.

48. *See id.*

49. *See id.* at 132-33. The state and federal definitions remain identical "notwithstanding recent developments." *Id.* at 133 & n.2 (citing Anderson v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *1, *7-*11 (Wash. Super. Ct. Aug. 4, 2004)).

50. *See id.* at 133-34.

51. *See id.*

52. *Id.* at 133 (citing Hilton v. Guyot, 159 U.S. 113, 165 (1895)).

53. *See id.* at 134.

54. *See id.* at 134-35.

55. *See id.* at 135.

56. *Id.* (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (internal quotations omitted)).

57. *See id.* at 138.

Since the Supreme Court decided *Baker v. Nelson*, none of the Court's own decisions nor decisions from the Ninth Circuit have addressed the constitutionality of state prohibitions on same-sex marriage.[58] In order for summarily decided cases to act as binding precedent, a court must determine that the jurisdictional questions presented in both the earlier and present case are the same in that the earlier case's judgment depended upon a decision on those particular constitutional grounds.[59] In light of differences between DOMA and the statute at issue in *Baker* and the constitutional analysis of same-sex conduct as articulated in *Lawrence*, the court held that *Baker* was not dispositive of Ms. Kandu's Fifth Amendment challenge to the federal same-sex marriage prohibition.[60]

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law."[61] Like its Fourteenth Amendment counterpart, the Fifth Amendment's Due Process clause provides "heightened protection against government interference with certain fundamental rights and liberty interests."[62] Where fundamental rights are present, judicial scrutiny of government actions infringing on that right must be strict.[63] The court determined that past Supreme Court decisions upholding the fundamental right to marry under the Fourteenth Amendment's Due Process Clause and state court decisions recognizing same-sex marriages as a matter of state due process did not explicitly or implicitly create a fundamental right to marry someone of the same sex.[64] Rejecting Ms. Kandu's argument that language in *Lawrence* could be read to recognize same-sex marriage as a fundamental liberty protected by the due process clause, the court concluded that the less demanding standard of rational basis review was the more "appropriate level of scrutiny to apply for purposes of a due process analysis."[65] Before proceeding with its rational basis scrutiny, the

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58. *See id.* For a discussion of the *Baker* holding, see discussion *supra* note 24.

59. *See id.* at 136-37 (construing Mandel v. Bradley, 432 U.S. 173, 180 (1977) (Brennan, J., concurring)).

60. *See id.* at 137. *But see* Wilson v. Ake, No. 8:04-CV-1680-T-30TBM, 2005 WL 281272, at *3-4 (M.D. Fla. Jan. 19, 2005).

61. U.S. CONST. amend. V.

62. *In re Kandu*, 315 B.R. at 138 (quoting Washington v. Glucksburg, 521 U.S. 702, 720 (1997) (internal citations omitted)).

63. *See id.*

64. *See id.* at 138-39.

65. *Id.* at 141. In a footnote, the court responded to the UST's alternative argument that DOMA neither directly nor substantially interfered with the ability of a person to marry another person of the same sex. *See id.* at 141 n.6. The court agreed, concluding that "DOMA does not forbid a same-sex couple from being married under the law of a state or a foreign jurisdiction"

court reviewed DOMA under the Fifth Amendment's "equal protection component" of the Due Process Clause.[66] The court rejected the argument that DOMA, like the antimiscegenation statutes held invalid in *Loving*, could not survive equal protection analysis on the theory that it bars both women and men equally from federal recognition of their same-sex marriage.[67] The court also rejected the argument that *Lawrence*'s dignity-centered approach changed the classification of homosexuals, for purposes of equal protection analysis, from a non suspect to a suspect class.[68] Therefore, since DOMA neither burdened a right that was fundamental nor targeted a class that was suspect, the court applied its most deferential "rational basis review" to uphold the law.[69]

IV. ANALYSIS

The noted case's congressionally deferential approach is predictable in light of the court's limited and deferential role within the federal judiciary. As creatures of statute, bankruptcy courts depend not only upon Congress's enactment of a statute authorizing their existence, but the choice of the district court to refer "all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11" to the bankruptcy judges in the district.[70] The court's purpose is similarly limited to that of "hear[ing] and determin[ing] all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11."[71] The final judgments and orders of bankruptcy judges are subject to review by the district court in the district in which the bankruptcy judge serves.[72] Furthermore, bankruptcy court decisions have limited precedential value.[73] Given the court's deferential position, it is not surprising that the court declined Ms. Kandu's

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but "simply addresses how couples who are married will be treated for federal [benefits] purposes." *Id.*

66. *See id.* at 142 (quoting High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 570 (9th Cir. 1990) (internal citations omitted)). The Supreme Court's equal protection approach under the Fifth Amendment "has always been precisely the same as . . . equal protection claims under the Fourteenth Amendment." *Id.* (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)).

67. *See id.* at 142-43.

68. *See id.* at 143.

69. *See id.* at 144-45.

70. *See* 28 U.S.C. § 157(a) (2000).

71. *See id.* § 157(b)(1).

72. *See id.*; *id.* § 158. Ms. Kandu has appealed her ruling to the district court and hopes to see her marriage recognized. *See* E-mail Interview with Lee Kandu, *pro se* petitioner in the noted case (on file with author) (Nov. 7, 2004).

73. *See In re* Penn. Cent. Transp. Co., 335 F. Supp. 832, 835 (E.D. Pa. 1971); *In re* Davis, 134 B.R. 34, 37 (Bankr. W.D. Okla. 1991).

invitation to declare DOMA unconstitutional and overturned the federal government's ban on recognition of same-sex marriage. Judge Synder echoed that sentiment when he noted that his bankruptcy court was a court of limited jurisdiction that must exercise great care before bestowing new fundamental rights "based on what the Supreme Court *might* in the future decide."[74]

Since the noted case holds conclusively that DOMA bars anyone other than opposite-sex married couples from attaining joint debtor status under § 302 of the Code, the equitable doctrine of substantive consolidation may provide same-sex couples with an alternative means for seeking relief comparable to that obtainable under § 302.[75] Under this doctrine debtors could file separate petitions and then ask the court to consolidate the cases "under equitable principles."[76] In creating the Bankruptcy Reform Act, however, Congress noted that § 302(a)'s single petition provision was in fact a provision that benefited married couples, who often are "jointly liable on their debts."[77] The ability to *file* a joint case serves to "facilitate consolidation of [the couple's] estates," reduce the bankruptcy filing fee, and the overall cost of administration.[78] Even the alternative approach of substantive consolidation does not cure the illness that DOMA inflicts upon the Code, since married persons of the same sex are still denied the benefit of filing jointly. A finding that DOMA is unconstitutional, however, is the only medicine that will enable all married persons to avail themselves of the bankruptcy benefit Congress has given them under § 302.

The court's shortcomings, however, go beyond its failure to extend bankruptcy benefits to same-sex couples; they strike at the very heart of the Supreme Court's understanding of marriage, equal protection and due process. "The freedom to marry has long been recognized as one of the vital personal rights essential the orderly pursuit of happiness by free [persons] . . . ."[79] The marriage right is infused within our constitutional system—it is a right even older than the Bill of Rights itself.[80] Such a "fundamental" right, recognized as such by the Court in *Loving* and *Zablocki*, is no less deserving of the strictest judicial scrutiny when invoked by a person wishing to marry someone of the same sex than when invoked by a person wishing to marry someone of the opposite sex

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74. *In re Kandu*, 315 B.R. at 141.
75. *See* Federico, *supra* note 12, at 91-97.
76. *Id.* at 91.
77. *See* S. REP. NO. 95-989, at 32 (1978).
78. *Id.*
79. Loving v. Virginia, 388 U.S. 1, 12 (1967).
80. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

because the Court's holdings bestowed upon individuals the right to select a marriage partner of one's own choosing.[81]

In failing to give federal protection to same-sex marriages, the court in the noted case also gives short shrift to the *Lawrence* court's dignity-centered approach to due process analysis.[82] The *Lawrence* majority realized that sexuality does not exist in a void, but finds "overt expression" in conduct, sometimes intimate conduct, with another person.[83] This protected intimate conduct, the court held, is part of the personal bond that same-sex persons may form with each other.[84] Yet, ironically, by not extending *Lawrence*'s holding to cover same-sex marriage, the court in the noted case has privileged raw sexual expression outside the bonds of marriage over the intimate and important relational bonds in which that expression finds purpose.[85] In light of the court's acceptance of the legislative history underlying DOMA, this privileging appears misplaced.[86]

Furthermore, if the Constitution's equal protection guarantees truly do not tolerate "classes among citizens," then the court's ruling simply cannot stand.[87] *Zablocki* stands for the proposition that the right to marry is fundamental to *all* individuals.[88] If marriage prohibitions may constitutionally prohibit homosexuals, all of whom have a fundamental right to marry, from marrying each other, then either the right to marry is not as fundamental as the Supreme Court claims it is or the right is only fundamental for a certain class of citizens, heterosexuals.[89] While the court's constitutional classism currently remains law, as Lee Kandu eloquently points out, the fight for marriage equality wages on,

> While Ann was on her deathbed she said, 'Don't let them say we aren't married,' then she told me she loved me and she would love me forever and ever. Then she closed her eyes for the last time before she died in her sleep. I will stand up and speak out for the recognition of my marriage until the day I die. I will not tolerate anyone saying my marriage is less than a

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81. *See* Zablocki v. Redhail, 434 U.S. 374, 386-88 (1978); *Loving*, 388 U.S. at 12 (holding that persons may select a marriage partner across racial lines if they so *choose*).

82. *See* Lawrence v. Texas, 539 U.S. 558, 574-75 (2003).

83. *Id.* at 567.

84. *See id.*

85. *See In re* Kandu, 315 B.R. 123, 139 (Bankr. W.D. Wash. 2004).

86. *See* H.R. REP. No. 104-664, at 9-11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916-20.

87. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

88. *See* 434 U.S. 374, 384 (1978).

89. This line of trait-based reasoning was prohibited by the Court in *Romer v. Evans*, 517 U.S. 620, 631-33 (1996).

heterosexual marriage. If I give up on marriage equality I would dishonor Ann's memory.[90]

Theresa Rose Goulde[*]

90. E-mail Interview with Lee Kandu, *supra* note 72.

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