SAME SEX MARRIAGE:
EXAMINATION ISSUES, TITLE IMPLICATIONS, COMMON LAW PROPERTY ISSUES

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I. NATIONAL DECISIONS

The issue of same sex marriage was raised before the Hawaii Supreme Court in the case of Baehr v. Levin, in which the plaintiffs sought a determination that Hawaii Revised Statutes § 572-1 was unconstitutional to the extent it authorized refusal to issue a marriage license because the couple was of the same sex. On May 5, 1993, the Hawaii Supreme Court remanded the matter, with instructions that the law is presumed unconstitutional and this presumption may only be overcome by establishing, in accordance with a “strict scrutiny” standard, that the law furthers compelling state interests and is drawn to avoid unnecessary abridgement of the constitutional rights of applicants for a marriage license. The court concluded that:

In light of the interrelationship between the reasoning of the Brennan plurality and the Powell group in Frontiero, on the one hand, and the presence of article I, section 3 -- the Equal Rights Amendment -- in the Hawaii Constitution, on the other, it is time to resolve once and for all the question left dangling in Holdeman. Accordingly, we hold that sex is a “suspect category” for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that HRS § 572-1 is subject to the “strict scrutiny” test. It therefore follows, and we so hold, that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute’s sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples’ constitutional rights.1

It was generally believed that this Hawaii decision led to the Defense of Marriage Act (DOMA) in 1996.2

DOMA defined marriage for purposes of federal law and federal regulation as a marriage between one man and one woman. DOMA also provided that no state would be required to give full faith and credit to a same-sex marriage performed in another state.3

In 2001, the Netherlands became the first country to authorize same sex marriage.4 Over the last 14 years, an additional 19 countries have recognized same-sex marriage.5

Critically, the Massachusetts Supreme Court on November 18, 2003 ruled that state law, which barred an individual from civil marriage with another individual of the same sex, violated the Massachusetts Constitution. The court stated that “[w]e construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.”6 Though this decision may have precipitated enactment of prohibitions in many states, it also proved to be the forerunner for other state courts, such as California, Connecticut, and Iowa, to similarly rule. Although many states enacted prohibitions on same-sex marriage, others such as Delaware, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, and Vermont, enacted laws sanctioning same-sex marriage.7

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5 The Freedom to Marry Internationally, http://www.freedomtomarry.org/landscape/entry/c/international (Those countries authorizing same-sex marriage include Argentina, Belgium, Brazil, Britain, Canada, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United States, and Uruguay).
7 “Same-Sex Marriage and Estate Planning: Nope, It’s Not Over Yet!” by Patricia A. Cain, Webinar sponsored by Section of Real Property, Trust and Estate Law, American Bar Association, July 7, 2015.
In reaction to the domestic developments in other states concerning same-sex marriage, at least 31 states passed constitutional amendments prohibiting same-sex unions, while other states (such as Connecticut, Delaware, District of Columbia, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington) adopted same-sex marriage by new laws or by court decisions.\(^8\)

Texas was among those 31 states that adopted constitutional prohibitions on same-sex marriage. The Texas Constitution was amended in 2005 to approve new Article 1, Section 32, which stated:

\[\text{Marriage. (a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.}\]

The successful approach to achieve same-sex marriage was to litigate across the nation over the constitutionality of prohibitions on same-sex marriage. As part of this apparent strategy, Section 3 of DOMA, which defined marriage for purposes of federal law (and all of the rights and protections that may accrue because of marriage) as a marriage between a man and a woman, was ruled unconstitutional by the Supreme Court on June 26, 2013 in its Windsor decision. The majority (5-4) opinion was delivered by Justice Kennedy. The case concerned two women who were residents of New York and who were lawfully married in Ontario, Canada in 2007, and whose marriage is deemed valid by the State of New York (which recognized same-sex marriages performed in other jurisdictions and which also later amended its law to allow same-sex marriages). Edith Windsor and Thea Spyer then returned to New York City, where Ms. Spyer died in 2009 and left her estate to Edith Windsor. Ms. Windsor was refused her claimed estate tax exemption as a surviving spouse by the Internal Revenue Service, because of the definition of marriage under Section 3 of DOMA. The Supreme Court decision explained that:

\[\text{In 1996, as some States were beginning to consider the concept of same-sex marriage... and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). ... DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States... Section 3 is at issue here. It amends the Dictionary Act in Title 1, Section 7 of the United States Code to provide a federal definition of “marriage” and “spouse”... The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence... The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality”... The Act’s demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution’s Fifth Amendment... Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits. DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal... What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws... While the Fifth Amendment itself withdraws from the Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes the Fifth Amendment right all the more specific and all the better understood and preserved.}\]


Justice Roberts, in dissent, stated that:

[The Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising — and hardly enough to support a conclusion that the "principal purpose"... of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm.... But while I disagree with the result to which the majority’s analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation,"... may continue to utilize the traditional definition of marriage.]

The issue of whether same-sex marriage is constitutionally protected was raised in many federal district courts, which generally held in favor of same-sex marriage. The 4th, 7th, 9th, and 10th Circuit Courts thereafter ruled in favor of same-sex marriage and held prohibitions of same-sex marriage unconstitutional. Writ of certiorari was denied by the Supreme Court in each case.

The Supreme Court then proceeded to address by its *Obergefell* decision on June 26, 2015 (exactly two years after the *Windsor* decision) the question posed by Justice Roberts in *Windsor*, and as its reasoning had suggested it would. The Supreme Court ruled that same-sex marriage was a fundamental right under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment, and that laws excluding same-sex couples from civil marriage on the same terms as heterosexual couples in Michigan, Kentucky, Ohio, and Tennessee (and any other states) were unconstitutional to that extent. One of the plaintiffs was James Obergefell, a resident of Ohio, where same-sex marriage was not allowed. James Obergefell and John Arthur traveled in 2013 to Maryland, where same-sex marriage was lawful, and married at the airport. They returned to Ohio, and Arthur, who had amyotrophic lateral sclerosis, or ALS, died three months later, but Ohio refused to permit Obergefell to be listed as surviving spouse on the death certificate. April DeBoer and Jayne Rowe were co-plaintiffs from Michigan who had a commitment ceremony in 2007, but because Michigan permitted only opposite-sex couples or single persons to adopt, each adopted child of their family could have only one woman as a legal parent. Army Reserve Sergeant First Class Ijpe DeKoe and partner Thomas Kostura were married in New York in 2011, one week before DeKoe began deployment in Afghanistan, but their marriage was not recognized in Tennessee.

Justice Kennedy again delivered the opinion for the Supreme Court (in a 5-4 decision) in *Obergefell*. The Supreme Court held that:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.... [S]ame-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.... A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.... A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.... Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.... If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.... The right to marry is fundamental as a

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matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. The State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have so long revered. As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, it this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold — and it now does hold — that 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. No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.  

Justice Roberts, in dissent, responded that:  

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex. But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the constitution authorized courts to exercise “neither force nor will but merely judgment” .... Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening.  

Justice Scalia in his dissent stated that:  

The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. But what really astounds is the hubris reflected in today’s judicial Putsch.  

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The five Justices who compose today’s majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment’s ratification and Massachusetts’ permitting of same-sex marriage in 2003.... The opinion is couched in a style that is as pretentious as its content is egotistic.... The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.... Of course the opinion’s showy profundities are often profoundly incoherent. "The nature of marriage is that through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie....)\textsuperscript{16}

Justice Thomas replied that:

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples.... The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause and even if it did, the government would be incapable of bestowing dignity.\textsuperscript{17}

The Obergefell case manifests several principles, which include:

(1) Prohibitions on same-sex marriage are unconstitutional, which means that those prohibitions were never valid and that the opinion is retroactive;

(2) A same-sex marriage that was valid prior to June 26, 2015 in any state, either because of state law or decision, or because of federal court ruling, is valid for all purposes wherever the couple has traveled or moved and entitled to full recognition in any other state, regardless of whether the other state’s law or policy prohibited same-sex marriage; and

(3) Any property rights accruing to a married couple or the survivor of a marriage will accrue to a same-sex married couple and the survivor of that marriage in the same manner as applicable to a married heterosexual couple.

Retroactivity, which is a feature in a ruling of unconstitutionality, was essential to the outcome of Obergefell and the recognition of Obergefell’s right to a death certificate reflecting their relationship. If Obergefell is retroactive, then it follows that (1) a marriage lawfully performed in another state was entitled to recognition when the couple moved to Texas and acquired property; and (2) a same-sex couple could have a common law marriage in Texas or elsewhere where common law marriage is recognized that predated Obergefell.

Critical dates because of the Obergefell decision:

1. November 18, 2003 or any other date thereafter when same sex marriage became legal in state of marriage (state of celebration), regardless of whether it was state of domicile of the spouses.
2. June 26, 2015 (the date of the Obergefell decision).
3. Any date whether before or after June 26, 2015 when the couple began a common law marriage as allowed in Texas or another state.
4. State or federal time limitation periods of relevance for bringing actions or asserting rights. Limitation periods may apply and may prevent parties from asserting rights relating to a same-sex marriage: e.g. IRS Notice 2014-19.\textsuperscript{18}

This IRS Notice 2014-19 concluded that for Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals who have a registered domestic partnership, civil union (which was adopted in states such as Colorado, Hawaii, Illinois, Nevada, New Jersey, Oregon, Wisconsin), or similar relationship under state law that is not denominated as a marriage.

\textsuperscript{17} Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609, 668-669, 83 U.S.L.W. 4592 (U.S. 2015).
\textsuperscript{18} Application of the Windsor Decision and Rev. Rul. 2013-17 to Qualified Retirement Plans, IRS Notice 2014-19; See also Rev. Rul. 2013-17.
II. **RECENT TEXAS DEVELOPMENTS**

The Texas Supreme Court rejected the State’s attempt to intervene in a divorce proceeding of Angelique Naylor and Sabina Daly, a same sex couple who were lawfully married in Massachusetts in 2004 and who later filed for divorce in Travis County. The State lacked standing to appeal the final judgment.\(^9\)

Brooke Powell and Cori Jo Long, who were both females, sought divorce in Texas from their marriage performed in 2010 in New Hampshire. The Texas trial court denied relief and dismissed the case for want of jurisdiction. Because of *Obergefell*, the Court of Appeals reversed the trial court judgment, and remanded the case to the trial court.\(^{20}\)

The Fifth Circuit affirmed a preliminary injunction that enjoins the State of Texas from enforcing “‘Article I, Section 32 of the Texas Constitution, and any related provisions of the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage.’”\(^{21}\)

In a suit brought to enjoin Mayor Parker and the City of Houston from providing employee benefits to same-sex spouses of employees who were lawfully married in another state, the appellees cited the Texas Constitution, Article I, Section 32, and Texas Family Code Section 6.204, which banned recognition of same-sex marriage, declared same-sex marriage void as violating public policy, and prohibited political subdivisions such as the City of Houston from applying same-sex marriages conducted in other states. The trial court granted a temporary injunction, but in light of *Obergefell*, the Court of Appeals reversed the temporary injunction and remanded the case for proceedings consistent with *Obergefell* and *De Leon*.\(^{22}\)

Gender identity issues regarding a spouse, such as presented *In the Estate of Araguz*, should no longer be relevant for purposes of a valid marriage.\(^{23}\)

There had been some doubt in the past as to whether a same-sex couple (as opposed to one individual) could adopt a child, although such adoption would not be void.\(^{24}\) That issue should no longer be relevant to subsequent adoptions. Texas Health and Safety Code Section 192.008 requires that the “supplementary birth certificate of an adopted child must be in the names of the adoptive parents, one of whom must be a female, named as the mother, and the other of whom must be a male, named as the father. This subsection does not prohibit a single individual, male or female, from adopting a child.” Like many other sections of Texas law, this provision should recognize same-sex spouses.

In Texas, the Attorney General has opined that a government agency may not substantially burden a person’s free exercise of religion unless the government agency demonstrates that the burden is in furtherance of a compelling government interest and is the least restrictive means to further that interest.\(^{25}\)

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\(^{21}\) De Leon v. Abbott, 791 F.3d 619, 625 (5th Cir. Tex. 2015).


\(^{23}\) *In re Estate of Araguz*, 443 S.W.3d 233 (Tex. App.—Corpus Christi 2014, pet. denied) (raising the validity of a marriage of the decedent husband and the wife who was born a male and had a sex change during their marriage; the court holds that Texas law recognizes that a person who has a sex change may marry a person of the opposite sex); Tex. Fam. Code. § 2.005(b)(8) (which provides that in application for a marriage license may include “an original or certified copy of a court order relating to the applicant’s name change or sex change”); Littleton v. Prange, 9 S.W.3d 223 (Tex. App.—San Antonio 1999, pet. denied) (plaintiff was a transsexual born as a male who had a sex change operation and married a man, and filed a medical malpractice case against the doctor of the deceased husband as the surviving spouse, but the marriage was held to be invalid and the suit could not be brought).


\(^{25}\) TEX. CV. PRAC. & REM. CODE § 110.003 (Texas Religious Freedom Restoration Act).
III. RETROACTIVE APPLICATION OF STATE LAWS

In Obergefell, the Supreme Court stated that "...[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples...."

While there may be different views on the extent of retroactivity of a decision holding statutes unconstitutional, the principal appears to be that the result of the holding is as if the statutes never existed:

An unconstitutional statute is void from its inception. The Act of the Legislature under which relator was arrested for violating same, if unconstitutional at the time of its passage, would not be rendered constitutional by some subsequent Act of the Legislature repealing the occupation tax upon merchants, and such repeal would not impart validity to the prior unconstitutional Act. Cooley’s Constitutional Limitations, 7th ed., p. 259; Norton v. Shelby County, 118 U.S. 425; Boales v. Ferguson, 76 N.W. 18; Finders v. Bodle, 78 N.W. 480; Seneca Min. Co. v. Secretary of State, 47 N.W. 25; State v. Tufly, 19 Am. St. Rep. 374.

Mr. Cooley, in his work on Constitutional Limitations, uses this language: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights can not be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."

In the case of Norton v. Shelby County, 118 U.S. 25, supra, Justice Field, of the Supreme Court of the United States, says in regard to unconstitutional statute: "It confers no rights; it embodies no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it never had been passed."

In the case of Boales v. Ferguson, 76 N.W. 18, supra, the court uses this language: "The Baker law was enacted in violation of the Constitution; it was never enforced, and the decision of this court, in Trumble v. Trumble, was a mere judicial declaration of a pre-existing fact; the court did not annul the statute, for it was already lifeless. It had been fatally smitten by the Constitution at its birth."

In the case of Seneca Min. Co. v. Secretary of State, 47 N.W. 25, supra, in passing on this question, the court said: "If the law-making power is prohibited from enacting a law, and in disregard of such prohibition it goes through the forms of enacting a law, such enactment is of no more force or validity than a piece of blank paper, and is utterly void, and powers subsequently conferred upon the Legislature by an amendment to the Constitution do not have a retroactive effect and give validity to such void law."

In the case of State v. Tufly, 19 Am. St. Rep. 374, supra, it was said: "An Act of the Legislature which is not authorized by the State Constitution at the time of its passage is absolutely null and void; it is a misnomer to call such an Act a law; it has no binding authority, no validity, no existence; it is as if it had never been enacted, and is to be regarded as never having been possessed of any legal force or effect. The Act being void, no subsequent adoption of an amendment of the Constitution authorizing the Legislature to provide for such investment would have the effect to infuse life into a thing that never had any existence."

Courts may choose either of two alternatives in ruling that a statute is unconstitutional:

They may follow strictly the view that an unconstitutional statute is void ab initio and refuse to recognize the validity of any acts done in reliance on the statute. This sometimes leads to so-called strong decisions, decisions contrary to sense and injustice. Or they may choose to modify the general rule which they may have previously enunciated, or refuse to apply it to a particular situation. There are two views that are discernible in the foregoing cases. One view is that just mentioned, that the statute is as though never passed. The other is that the statute is as though passed, is to be relied upon, and to be regarded as law until the statute is declared unconstitutional.

It is apparent that the ruling in Obergefell was retroactive.

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Examples of state laws that should be applied retroactively to spouses in a same-sex marriage include:
Separate and Community Property, as defined and established by Article 16, Section 15 of the TEXAS CONSTITUTION (including agreements to partition or exchange, agreements that income from separate property shall be separate property, survivorship agreements relating to community property, and agreements that separate property shall be the spouses’ community property).

Homestead and requirements of or protection accorded a spouse and a family, as set forth in Article 16, Section 50 of the TEXAS CONSTITUTION. A “family” would now include same-sex spouses.

Protection from partition during the lifetime of a surviving husband or wife in Article 16, Section 52 of the TEXAS CONSTITUTION now extends to the survivor of a same-sex marriage.28

Rural homestead of a family, not to exceed 200 acres, would now include same-sex spouses. TEX. PROP. CODE § 41.002.

Separate and community property, applicable rules, and management and control. TEX. FAM. CODE §§ 3.001-3.104 (including the protection afforded third parties in reliance on the sole management, control, and disposition by one spouse if held in that spouse’s name, pursuant to Section 3.104).

Presumption of community property. TEX. FAM. CODE § 3.003 (proposed possessed during or on dissolution of marriage is presumed community property).

Court orders for management of community or homestead by one spouse in certain cases. TEX. FAM. CODE §§ 3.301 (Missing, Abandoned, or Separated Spouse), 3.302 (Spouse Missing on Public Service), 5.001 (Sale, Conveyance, or Encumbrance of Homestead, requiring joinder of spouses), 5.002 (Sale of Separate Homestead After Spouse Judicially Declared Incapacitated), 5.003 (Sale of Community Homestead After Spouse Judicially Declared Incapacitated), 5.101 (Sale of Separate Homestead Under Unusual Circumstances, such as disappeared, permanently abandoned, reported to be prisoner of war or missing on public service), and 5.102 (Sale of Community Homestead Under Unusual Circumstances).

Estate of Intestate Not Leaving Spouse (if Intestate Succession). TEX. ESTATES CODE § 201.001 (where references to father and mother, and paternal and maternal kindred).

Separate Estate of an Intestate (if Intestate Succession). TEX. ESTATES CODE § 201.002 (references to surviving spouse and children).

Community Estate of an Intestate. TEX. ESTATES CODE § 201.003 (all to surviving spouse who is parent of all of decedent’s children; “child” includes an adopted child under TEX. ESTATES CODE § 22.004).

Effect of Divorce or Annulment on Provisions in Will or Irrevocable Trust in favor of former spouse. TEX. ESTATES CODE § 123.001.

Effect of Divorce or Annulment on Durable Power of Attorney. TEX. ESTATES CODE § 751.053.

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28 NCBN Tex. Nat'l Bank v. Carpenter, 849 S.W.2d 875 (Tex. App.—Fort Worth 1993, no pet.) (In the instant case, the parties agree that the Carpenters reside on part of the property they are claiming as their rural homestead. The dispute between NCBN and the Carpenters centers solely on whether the Carpenters used the 172.93 acres as a home. The Carpenters claim they have continually used this tract of land for agricultural purposes and to support their family and that NCBN had knowledge of this use through Bedwell, NCBN's senior loan officer. Conversely, NCBN asserts the Carpenters' sons, and not the Carpenters, were in actual use of the property when the loans were made. In order for either a family business or residence homestead to exist, a family must exist. The requirement of family is met whenever there is a group of people who have a social status as a family—that is, a group living together subject to one domestic government. There must be a legal or moral responsibility on the head of the family for the rest of the members of the family, and a corresponding dependence of the others upon the head of the family. Henry S. Miller Co. v. Shoaf, 434 S.W.2d 243, 244 (Tex. Civ. App.—Eastland 1968, writ ref’d n.r.e.). See also Roco v. Green, 50 Tex. 483, 490 (1878); Central Life Assurance Soc. v. Gray, 32 S.W.2d 259, 260 (Tex. Civ. App.—Waco 1930, writ ref’d). A moral obligation for support and care exists where there is a necessity for such care and support, although that necessity need not be absolute. Henry S. Miller Co. v. Shoaf, 434 S.W.2d 243, 245 (Tex. Civ. App.—Eastland 1968, writ ref’d n.r.e.). In addition to the situation involving a husband, wife, and minor children, Texas courts have found that a family exists for homestead exemption purposes in the following circumstances: (1) a divorcée and her mother constitute a family, if the divorcée has a moral obligation to support and care for her mother, Henry S. Miller Co. v. Shoaf, 434 S.W.2d 243, 246 (Tex. Civ. App.—Eastland 1968, writ ref’d n.r.e.); (2) a brother and sister constitute a family when the brother has a moral obligation to support and care for his sister, Central Life Assurance Soc. v. Gray, 32 S.W.2d 259, 260-261 (Tex. Civ. App.—Waco 1930, writ ref’d); (3) a father and minor son constitute a family—whether or not the father has custody of the child—because the father has a legal and moral obligation to support the child, White v. Edzards, 399 S.W.2d 935, 937 (Tex. Civ. App.—Texarkana 1966, writ ref’d n.r.e.). In each of these instances, the court allowed the head of the family to claim a homestead exemption under Article 16, Section 50 of the TEXAS CONSTITUTION.)
IV. COMMON LAW MARRIAGE

Common law marriage, although a dying legal doctrine, is recognized in at least nine states (such as Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas, and Utah, and in the District of Columbia) and was previously recognized in additional jurisdictions (such as Georgia, Idaho, Ohio, Oklahoma, and Pennsylvania) for which prior common law marriages remain valid. In some states where common law marriage was abolished, courts have recognized common law marriage of persons who spent time in a state recognizing common law marriage. Some jurisdictions have recognized recovery in a divorce or probate because of long term cohabitation and an agreement to be married.29 There are differing views as to whether a temporary visit to a state recognizing common law marriage will result in a marriage recognized in the domicile of the couple.30

In Texas, a common law or informal marriage can be proved by a declaration of marriage in the form allowed by Texas law or by agreement of the spouses to be married, if after the agreement the spouses live together in Texas as spouses and there represent to others that they are married.31 Although Texas law recognizes an informal marriage only of “a man and a woman,” this limitation is overridden by the Obergefell decision.

If Obergefell is retroactive, then it follows that (1) a marriage lawfully performed in another state was entitled to recognition when the couple moved to Texas and acquired property; and (2) a same-sex couple could have a common law marriage in Texas or elsewhere where common law marriage is recognized that predated Obergefell. A series of cases across the United States have dealt with the issue of common law marriages preceding legality of same-sex ceremonial marriages in the particular state. In Texas, for example, two recent cases have been reported:

(1) Common law marriage of Sonemaly Phrasavath and Stella Powell:

Less than a week after plaintiffs in the federal lawsuit challenging Texas’ ban on marriage equality asked the Fifth Circuit Court of Appeals to lift the stay on U.S. District Judge Orlando Garcia’s February 2013 ruling striking down the marriage ban, Travis County Probate Judge Guy Herman ruled today (Tuesday, Feb. 17) that the Texas ban is unconstitutional. … Herman’s ruling came as part of an estate fight in which Austin resident Sonemaly Phrasavath is seeking to have her eight-year relationship to Stella Powell designated as a common-law marriage. Powell died last summer of colon cancer…. The lawyer for Powell’s siblings, who opposed Phrasavath’s claim, said they have made no decision on whether to appeal Herman’s ruling. Herman ruled after an hour-long hearing in which Phrasavath challenged the constitutionality of Texas ban on marriage equality as a first step toward establishing her relationship as a common-law marriage. Phrasavath and Powell had lived together since Phrasavath proposed in 2007. The two were joined in 2008 in a ceremony performed by a Zen priest in Driftwood southwest of Austin. The ceremony was, of course, not legally recognized. Powell died without a valid will in June, eight months after she was diagnosed with colon cancer.32

In most cases where the court is attempting to determine if a common-law marriage exists, the key legal inquiry is whether the couple had held themselves out to the public as married. With many gay couples having wedding celebrations even before their states legally recognized them, and calling each other “husband and husband” or “wife and wife,” that certainly seems likely to meet the standard to establish a common-law marriage. That was the reasoning used by Travis County Probate Judge Guy Herman earlier this week, finding that two Austin women were in a common-law marriage. As the Austin American-Statesman reported, Stella Powell and Sonemaly Phrasavath began dating in 2006. In 2008, they had a wedding ceremony performed by a Zen Buddhist priest even though Texas did not recognize gay marriage at that time. Powell and Phrasavath also “lived openly as spouses in a Northwest Austin home,” according to the Statesman, until Powell passed away from cancer in 2014. … Judge Herman… did not treat Obergefell as a time barrier, ruling that there had in fact been a valid common-law marriage between the two women. Accordingly, Phrasavath was entitled to

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30 Temporary visits in states permitting common-law marriages, 52 Am Jur 2d Marriage § 73.
31 TEX. FAM. CODE § 2.401.
inheri part of Powell’s estate under the Texas law allowing a spouse to automatically inherit where there is no valid will. Phrasavath’s attorney, Brian Thompson, told the Statesman that their goal for the case was to have his client and Powell “treated like any other couple” under the law. “And now we know that other same-sex couples are going to be treated equally, not just in Travis County but now I think we have precedent for the state of Texas.”

(2) Common law marriage of Jim Fritsch and Bill Parker:

Two Fort Worth men wanted their 23-year relationship to be legally recognized. On first try, they couldn’t get an accurate common law declaration. Second time was the charm; they can move forward with naming beneficiaries. Jim Fritsch wanted to make sure — no matter what — that his partner of more than two decades would receive his retirement benefits if anything were to happen to him. So, Fritsch, 62, and Bill Parker, 57, headed to the Arlington Sub-Courthouse last week to file a declaration of common law marriage dating back to 1992, when the two Fort Worth men began living together as a married couple. They were told they could get the declaration of marriage, but they couldn’t put the date of their union before June 26, 2015, the day the Supreme Court swept away bans on same-sex marriage. So they left. “I know what the Supreme Court ruled on,” Parker said. “I wasn’t going to stand there and take it.” Getting an accurate common law marriage declaration is key to Jim Fritsch naming Bill Parker as his beneficiary for benefits gained while working for the city of Dallas. Parker and Fritsch didn’t want to put the wrong date on the form for many reasons, including the fact that falsifying information would be a felony, punishable by time in prison. They talked to their attorney, John Nelson, who was readying to move forward with a lawsuit to ensure they could receive an accurate declaration of common law or “informal” marriage. Then Tarrant County Clerk Mary Louise Garcia’s office weighed in, stating that they checked back with state officials, who initially said same-sex common law marriages couldn’t be dated before June 26. This time, the Texas Department of State Health Services “indicated there had been a miscommunication regarding the issue,” the statement read. “Applicants, regardless of gender, may apply for an informal marriage license using any date applicable to their relationship.” Fritsch and Parker returned to the Arlington Sub-Courthouse Monday, with their paperwork seeking the marriage declaration and a copy of Garcia’s statement. After an employee reviewed the paperwork, and made a phone call, the two were issued a formal declaration of their marriage. “It was very much a relief,” Fritsch said. “We finally got what was coming to us.” “It felt pretty damn good,” Parker added. “But (Monday) was just Round One. Dallas is Round Two.” In the beginning this issue arose because Fritsch retired six years ago from working for the city of Dallas. At the time, Fritsch couldn’t list Parker as his beneficiary because same-sex couple marriages in Texas — traditional or common law — weren’t recognized due to the state’s ban on gay marriage. And the city said Fritsch had to prove he was married when he retired. Nelson suggested the men file a declaration stating they’ve been in a common law marriage since they’ve been living together since 1992. A common law marriage in Texas is recognized if an adult couple lives together for a certain amount of time, agrees to marry and tells other people they are a married couple. It can be declared at any time and it is recognized starting on the date when the couple first claimed they were married. “We’ve been together for 23 years,” Fritsch said. “We have bought houses and vehicles together and we have combined our money almost since Day One.” Nelson said he didn’t want the couple to perjure themselves by putting a false date on the document to declare their marriage, as suggested by a worker in the county clerk’s office. The statement from the county clerk’s office said in addition to checking back with the state agency over marriages, they also asked the Tarrant County District Attorney’s office to weigh in on the issue. “They agree with the position of the Department of State Health Services,” the statement said. Nelson praised Tarrant County’s DA and Clerk’s office for working to right a wrong once they had updated legal information. Since the Supreme Court’s ruling in June, an estimated 2,500 same-sex couples have received marriage licenses in Texas, including nearly 300 in Tarrant County. There is no exact accounting of how many same-sex marriage licenses have been issued in Texas or Tarrant County because gender is no longer listed on licenses. State officials estimate that around 2,500 licenses were issued across Texas to same-sex couples during the first two months after the Supreme Court ruling. And a Star-Telegram review of marriage licenses issued in Tarrant County shows that at least 296 licenses appear to have been issued to same-sex couples during that time. These were issued to couples with the first names of Robert and Edward, for instance, or Christa and Wendy, Nicole and Maria, Ricky and Robert, David and Paul. Now that Fritsch and Parker have been able to document their common law marriage, their last step is moving forward.

to make sure Parker is listed as Fritch's beneficiary on his retirement benefits in Dallas. "I'm very confident," Fritsch said. "We will present this to the Dallas retirement board and I believe this will happen."  

In Texas, basic equity principles should still protect an innocent third party dealing with one person who is vested with title. If the title is vested in one spouse's name only, a bona fide purchaser for value will be protected against a claim by the other spouse or the other spouse's heirs under a conveyance by that spouse alone. The deed into one spouse vests legal title in that spouse, while an equitable title is vested in the other spouse, and the deed is not noticed to a purchaser for value of the community interest of the equitable title of other spouse.

V. APPLICATION OF OBERGEFELL CASE TO PROPERTY IN OTHER STATES

The remnants of dower and curtesy (a right in the widow or widower to a forced portion of the deceased spouse's estate, usually for life) are available only in a few states, and have not been recognized in Texas. In some cases, such right has been replaced by a statutory forced share of an estate.

Some of the benefits of marriage, as cited in the Goodridge case in Massachusetts can include: joint tax filings, tenancy by the entireties in many states, homestead protection to a spouse or child, inheritance, right of elective share or of dower, curtesy, entitlement to wages of deceased spouse, right to continue business of deceased spouse, health coverage continuation, pension rights, access to veterans' spousal benefits, community property rights, equitable division of property on divorce, right to support on separation, alimony, separate support on separation, wrongful death and loss of consortium claims, funeral and burial expenses and punitive damages in tort actions.

Tenancy by entirety held by spouses, which results in automatic transfer of title on death and protection against alienation and severance, is a right previously granted only to heterosexual married couples, but that must extend to married same-sex couples. Where the vesting of title in other states as tenants by the entireties occurs when spouses acquire property during marriage, or when the vesting deed recites they are married, or, where required by law, when the spouses expressly acquire as tenants by the entireties, their title is not subject to state judgment liens against one spouse. Even if state law requires that the vesting must be in "husband and wife," these rights and interests should extend to a same-sex married couple, from the time they were lawfully married. In keeping with that principle, the Massachusetts Land Court Guidelines on Registered Land, Section 50, Tenancies by the Entirety (May 1, 2000, Revised February 27, 2009) state:

When presented with a deed or other document to be registered which refers to, or establishes or conveys title in or to two individuals "as tenants by the entirety," (or which uses any similar form of words intended to create, establish, or refer to title in those individuals as tenants by the entirety), registration districts of the Land Court should not—as a prerequisite to registration—inquire, conduct investigation or require production of proof in any form concerning the marital status of the two individuals, or their qualification or entitlement to be married to each other. This is so without regard to whether the two individuals are or are not (or appear from their names to be or not be) either of the same sex or of the opposite sex. A document referring to, establishing, or conveying title in or to two individuals may, but to be registered need not, contain words reciting the marriage of the two individuals to each other.

The proper form for these recitations and notations on certificates of title is "A and B, as

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35 Ellett v. Mitcham, 145 S.W.2d 917 (Tex. Civ. App.—Eastland 1940, writ dism'd); Buckalew v. Butscher-Arthur, Inc., 214 S.W.2d 194 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.) (The purchaser "was only bound: (1) to investigate the records of instruments affecting the title to the land, (2) to determine whether the land was in possession, and if it was, what rights were claimed by the possessor, and (3)...to pursue the inquiry suggested by any fact known to him which 'would have prompted a prudent man, desirous to protect himself and willing to act fairly with others' to make a further investigation of the title and which, if followed up 'would have led to the knowledge of the equitable right of the appellants.")
39 See Lewis v. Harris, 188 N.J. 415, 908 A.2d 196 (2006). See also N.J. Stat. § 46:3-17.2 (a tenancy by entirety is created when the husband and wife together take to real or personal property by a written instrument designating both of their names as husband and wife).
tenants by the entirety” without references such as “husband and wife,” “married to each other,” or similar language. (emphasis added).

Property held as tenants by the entirety is not protection from federal tax liens or judgments. 40

VI. VESTING OF TITLE PRACTICES AND MARITAL HISTORY

Vesting of title is sometimes shown as “a married couple,” “married to each other,” “husband and husband,” “wife and wife,” “a married couple as tenants by the entirety,” or “spouses.” It is commonly a matter directed by the couple. These are matters any person should discuss with their attorney. You should determine that your system does not automatically populate using inconsistent language.

Examples of requirements, exceptions, or certifications used to address marital history include:

“Proof of the record owner’s marital status is required, and, if married, or if the Land has ever been occupied as the principal marital residence of the record owner, then she or his spouse should join in the deed or mortgage and affidavit of title.”

“The Affiant’s marital status is __________ (single/married) this status __________ (has/has not) changed since the date of the acquisition of the Land. If there has been a change in marital status since the acquisition of the Land, please describe: (Please list or if “None”, please write the word "None". Please note: if left blank, the answer will be deemed “None”)

“Affiant(s), if married, has/have not been divorced after the acquisition of title nor has/have a divorce action pending as of the date set forth herein.”

“Any right, title, or interest of the spouse, if any, of any married owner of the title.”

“The Company requires evidence of the marital history and status of __________. If said person is married, the Company requires the joinder of the spouse.”

“Any right, title, or interest of the spouse, if any, of any married owner of the title.”

“Any right, title, or interest of __________ who joined in that instrument recorded __________.”

Same-sex couples would expect the same requirements regarding marriage that have been applied to heterosexual married couples to be applied to them. For instance, if a company relied upon a certification or affidavit by a party for disclosure of marital history (e.g. whether married, whether divorced, when married, current marital status), they would expect similar treatment (and not additional requirements such as a copy of a marriage license). It is customary in many places to secure an Owner's Affidavit that recites marital status and history during ownership of the title.

The Texas Owner’s Policy (T-1) and the Texas Residential Owner Policy (T-1R) include in Schedule B the following exception, which remains accurate:

3. Homestead or community property or survivorship rights, if any, of any spouse of any insured.

As a general principle, title insurance policies do not insure the marital status of an insured and usually do not recite the marital status in an Owner's Policy. Even if the vesting language is used, the title and rights of a spouse remains a matter that is agreed to by the insured or known by the insured and is not insured against.

The same homestead requirements and protections apply to same-sex married couples as apply to heterosexual married couples.

VII. ANTI-DISCRIMINATION LAWS

Federal law does not prohibit discrimination in the sale, rental, or financing of dwellings based on sexual orientation or gender identity, but a significant number of states, cities, and counties do. Some states that prohibit discrimination because of sexual orientation do not prohibit discrimination because of gender identity.

Sexual orientation and gender identity are not the same. According to the Human Rights Campaign (HRC), sexual orientation, previously referred to as sexual preference, “is the preferred term used when referring to an individual’s physical and/or emotional attraction to the same and/or opposite gender. ‘Heterosexual,’ ‘bisexual’ and ‘homosexual’ are all sexual

orientations. A person’s sexual orientation is distinct from a person’s gender identity and expression.” HRC also states that the “term ‘gender identity,’ distinct from the term ‘sexual orientation,’ refers to a person’s innate, deeply felt psychological identification as male or female, which may or may not correspond to the person’s body or designated sex at birth (meaning what sex was originally listed on a person’s birth certificate).”

Federal law prohibits discrimination in the sale, rental, or negotiation of a dwelling because of a person’s race, color, religion, sex, familial status, or national origin. The U.S. Equal Employment Opportunity Commission takes the position that discrimination against a person because the person is transgender is discrimination based on sex and violative of Title VII of the Civil Rights Act of 1964.

The Department of Housing and Urban Development has taken the position that some forms of discrimination based on sexual orientation or gender identity are prohibited by Federal Law.

Were this an earlier decade, the government’s motion to dismiss for lack of jurisdiction need only state that “[d]iscrimination based on sexual orientation is not covered under the [FHA].” Swinton v. Fazekas, 2008 U.S. Dist. LEXIS 20318, 2008 WL 723914, at *5 (W.D.N.Y. Mar. 14, 2008); see 42 U.S.C. § 3601-19 and 24 C.F.R. § 100 et seq. Recently, however, the Department of Housing and Urban Development ("HUD") has taken several steps to clarify and reinforce the fact that certain acts of discrimination based on sexual orientation are in fact within its jurisdiction. Therefore, a more exacting review is required by the court of HUD’s jurisdiction over discrimination based on sexual orientation and whether the particular discrimination alleged by Thomas is within such jurisdiction....While Congress has not amended the FHA for some time, HUD has taken an increasingly expansive view of its delegated authority under the FHA relating to discrimination based on sexual orientation. In the summer of 2010, HUD issued a guidance document stating [*3] that "while the [FHA] does not specifically include sexual orientation and gender identity as prohibited bases... [an] LGBT person's experience with sexual orientation or gender identity housing discrimination may still be covered by the [FHA]." U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, ENDING HOUSING DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER INDIVIDUALS AND THEIR FAMILIES, June 15, 2010 (emphasis added). "The new [agency] guidance treats gender identity discrimination... as gender discrimination under the Fair Housing Act, and instructs all HUD staff to inform individuals filing complaints." Press Release, HUD Issues Guidance on LGBT Housing Discrimination Complaints: Department addresses housing discrimination based on sexual orientation and gender identity, HUD No. 10-139 (July 1, 2010). When a complaint is filed on these grounds, "HUD now begins a formal investigation under the Fair Housing Act... [and] [s]ince issuing this guidance... [has] investigated more than 150 discrimination complaints under this authority." Prepared Remarks, Secretary of U.S. Dept. of Housing and Urban Development Shaun Donovan, Before the National Association of Gay and Lesbian [*4] Real Estate Professionals, May 15, 2013.... In HUD’s comments accompanying the final Equal Access Rule, HUD noted that "certain complaints from LGBT persons would be covered by the Fair Housing Act... including discrimination because of nonconformity with gender stereotypes." 77 Fed. Reg. 5666. "HUD may also have jurisdiction to process a complaint filed under the Fair Housing Act if an LGBT person obtains housing but then experiences discrimination in the form of sexual harassment." Id. "A claim of discrimination based on nonconformity with gender stereotypes may be investigated and enforced under the Fair Housing Act as sex discrimination... [and] HUD recently published guidance on this... [with] [s]uch claims... filed through HUD’s Office of Fair Housing and Equal Opportunity." 77 Fed. Reg. 5671.... Given these recent agency actions broadly interpreting the jurisdictional scope of HUD acting under the FHA for discrimination based on sexual orientation, before addressing whether Thomas’ claim falls under this expanded jurisdictional scope, the court must determine whether HUD's interpretation of its authority squares with the statutory language of the FHA.... Here, the FHA explicitly makes it

43 Broussard v. First Tower Loan, LLC, NO. 15-1161, 2015 U.S. Dist. LEXIS 134778 (E.D. La. Oct. 1, 2015); 42 U.S.C. §§ 2000e et seq.; Merriam-Webster defines "transgender" as "of or relating to people who have a sexual identity that is not clearly male or clearly female."
unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b) (emphasis added). While Congress [*10] included precise definitions for certain terms in the FHA (such as "familial status" in 42 U.S.C. § 3602(k)), Congress did not define the scope of "sex" discrimination. Rather, Congress generally delegated administration of the FHA to HUD, 42 U.S.C. § 3608, which implicitly includes the authority to interpret the precise meaning and scope of "sex" for purposes of § 3604(b). See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 697-98, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (finding "harm" undefined in the Endangered Species Act to be ambiguous and subject to the EPA's reasonable interpretation)....Given the ambiguity of "sex" in the FHA, the court must determine whether HUD's interpretation is permissible. Importantly, HUD's expanded definition of "sex" under § 3604(b) does not broadly include all types of discrimination based on sexual orientation, but rather discretely includes discrimination for gender nonconformity. Mirroring the reasoning in the Supreme Court's plurality opinion in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), prohibited discrimination by individuals of the same sex stems from non-conformity to male and female stereotypes rather than separate and distinct sexual orientation grounds. As an example of this type of impermissible stereotyping under the FHA, HUD points to discrimination for a gay man walking "like a girl" or a lesbian woman dressing in masculine [*11] clothes. BRYONE at 6-7. These types of expanded protections for such individuals under the FHA is directly rooted in non-conformity with male or female gender stereotypes, and not directly derivative of sexual orientation as an independent and separate ground for protection.... Considering the deference due by the court to agency interpretations, HUD's narrow tailoring of jurisdiction for discrimination based on sexual orientation to protections for gender stereotyping in its interpretation of the FHA is a permissible reading of "sex." Price Waterhouse v. Hopkins, 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); but see McPherson, 914 F.Supp.2d at 1242 n.8 ("This may or may not be good jurisprudence")....While HUD has jurisdiction under the FHA over discrimination based on gender non-conformity, HUD lacks jurisdiction to enforce Thomas' claim which flatly alleges discrimination "because he is not gay." (Doc. 1 at 6 and Doc. 9 at 7). Thomas does not petition under a theory of gender non-conformity but rather relies on sexual orientation as the sole basis for discrimination separate and independent of gender. (Doc. 1 and Doc. 9). In fact, Thomas alleges that he was discriminated against based on his conformity to male stereotypes, such as stereotypes regarding cooking and buying furniture. (Doc. 9 at 37). Even under HUD's expanded interpretation of the FHA for gender stereotyping, these allegations [*13] are outside the scope of the FHA's "sex" discrimination protection and therefore HUD lacks the jurisdiction for respondents to act upon them. 44

A minority of States prohibit discrimination based on sexual orientation (and often based on gender identity). For example, discrimination in housing based on sexual orientation (subject to applicable exemptions) is prohibited in the following states (as is discrimination based on gender identity in most of these states): California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, Wisconsin. 45

California Government Code Section 12955 is an example of a state law that prohibits discrimination in housing based upon sexual orientation, gender identity, or gender expression. Like many laws relating to discrimination in housing, it also prohibits the owner of any housing accommodation from making, printing, or publishing any notice or statement with respect to the sale or rental of a housing accommodation that discriminates based on sexual orientation, gender identity, or gender expression.16

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Numerous cities and counties in the United States also prohibit discrimination based on sexual orientation (and in some cases gender identity). In Texas Cities and Counties with non-discrimination ordinances (relating to sexual orientation, and in many cases to gender identity) include: Austin, Brownsville, Dallas, Dallas County, El Paso, Fort Worth, Grand Prairie, Lubbock, Plano, San Antonio, Waco, and Walker; however, these ordinances vary in reach and in some cases, apply only to city employees.

The Austin ordinance is an example of an ordinance prohibiting discrimination in sale or rental of housing based on sexual orientation and gender identity. Section 5-1-51 of the Austin Ordinances prohibits a person from refusing to sell or rent a dwelling to any person based on sexual orientation or gender identity and Section 5-1-52 prohibits a person from printing or publishing any notice that indicate discrimination based on sexual orientation or gender identity.

The potentially competing rights recognized by the Obergefell case and applicable anti-discrimination laws and ordinances concerning sexual orientation and gender identity and religious rights recognized under Federal and State Religious Freedom Restoration Acts have not yet been resolved and may be litigated in the future. Further, many laws and ordinances prohibiting discrimination contain religion exceptions.

Federal law provides that the government may substantially burden a person’s free exercise of religion only if the burden is the least restrictive alternative to further a compelling government interest. In Texas, a government agency may not substantially burden a person’s free exercise of religion unless the government agency demonstrates that the burden is in furtherance of a compelling government interest and is the least restrictive means to further that interest. See also Texas Attorney General Opinion No. KP-0025, which states that:

In recognizing a new constitutional right in 2015, the Supreme Court did not diminish, overrule, or call into question the rights of religious liberty that formed the first freedom in the Bill of Rights in 1791. This newly minted federal constitutional right to same-sex marriage can and should peaceably coexist with longstanding constitutional and statutory rights, including the rights to free exercises of religion and freedom of speech.

VIII. DISCRIMINATORY COVENANTS, CONDITIONS, OR RESTRICTIONS

The Fair Housing Law prohibits the publication or printing of any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin.

This law has been interpreted as prohibiting reproduction and distribution of such restrictions (containing discriminatory provisions) to customers. The District of Columbia Circuit Court in Mayers v. Ridley stated that: At the request of the Justice Department, the major title companies have agreed not to report the existence of racial covenants appearing in the records of title on property for which they issue title insurance.... We have referred to the role of title insurance companies, the usual link


50 TEX. CIV. PRAC. & REM. CODE § 110.003 (Texas Religious Freedom Restoration Act).

51 Texas AG Opinion No. KP-0025 (June 20, 2015).

52 42 U.S.C. § 3604(c).
between the official records of the Recorder and the buyer and seller in a real estate transaction. Highly significant for the interpretation we make here of the Fair Housing Act (Section 3604(c)) applicability to the Recorder is the similar applicability to the title insurance companies previously asserted by the Department of Justice. By letter of 26 November 1969 to eighteen major title insurance companies in the District of Columbia the Department of Justice advised that the Fair Housing Act of 1968 “broadened the Shelley prohibition to cover not only judicial enforcement of such covenants, but also their inclusion in public records such as deeds or insurance policies.” The Department informed the companies they were violating the law by their practice of reporting the existence of racial restrictions appearing in the records of title on property for which they were issuing title insurance policies. All eighteen title companies replied that in future policies they would eliminate any reference to such restrictions.... The interpretation of the 1986 Act as applying to the title companies applies with even more obvious logic to the Recorder himself. If a deed can be considered a publication, it can only be an effective publication when it is recorded for the world to see. The title abstracts and recitals of restrictions in title insurance policies are but republications, taken from the Recorder’s official records. If the title companies’ publications are covered by Section 3604(c), so must the Recorder’s publications.  

In extending restrictions that contained discriminatory provisions in the case of United States v. University Oaks Civic Club, the University Oaks Civic Club did not violate the Fair Housing Act, since the new declaration and the Club disclaimed the racial restriction. The court also noted that Anita Rodeheaver, the County Clerk of Harris County, had previously been sued and is required to notify all who receive copies of instruments from the County Clerk’s office that racial restrictions are void under federal law. The clerk also must post in her office and affix to all documents relating to real property a notice that racial restrictive covenants are void under federal law. That suit against Anita Rodeheaver was styled United States v. Anita Rodeheaver, County Clerk of Harris County, Texas, Civil Action No. H-84-4809, and an Order of Summary Judgment was signed May 30, 1986. As a consequence of the suit brought against Anita Rodeheaver, the following language was required to be affixed to all documents pertaining to real property rights that were furnished by her office to members of the public, or are received and recorded by her office:

ANY PROVISION HEREIN WHICH RESTRICTS THE SALE, RENTAL, OR USE OF THE DESCRIBED PROPERTY BECAUSE OF COLOR OR RACE IS INVALID AND UNENFORCEABLE UNDER FEDERAL LAW.

A similar notice was required to be posted in the County Clerk office as a clearly visible and legible notice to all members of the public who come to the office to record or to obtain copies of documents pertaining to real property.

In order to adhere to the requirements of the Fair Housing Act, the ALTA Standard Exceptions include the following language:

…but omitting any covenant, condition or restriction, if any, based on race, color, religion, sex, handicap, familial status, or national origin unless and only to the extent that the covenant, condition or restriction (a) is exempt under Title 42 the United States Code, or (b) relates to handicap, but does not discriminate against handicapped persons.

Examples of current exceptions in use elsewhere:

Hawaii:

Covenants, conditions and restrictions, but omitting any covenants or restrictions, if any, including but not limited to those based upon race, color, religion, sex, sexual orientation, familial status, marital status, disability, handicap, national origin, ancestry, source of income, gender, gender identity, gender expression, medical condition or genetic information, as set forth in applicable state or federal laws, except to the extent that said covenant or restriction is permitted by applicable law, as contained in the following document:...

California:

…but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, national origin,

sexual orientation, marital status, ancestry, source of income or disability, to the extent such covenants, conditions or restrictions violate Title 42, Section 3604(c), of the United States Codes. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status.

California Government Code Section 12956.1:

(b) (1) A county recorder, title insurance company, escrow company, real estate broker, real estate agent, or association that provides a copy of a declaration, governing document, or deed to any person shall place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following:

“If this document contains any restriction based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, genetic information, national origin, source of income as defined in Subdivision (p) of Section 12955, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to Section 12956.2 of the Government Code. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status.”

In light of the Obergefell case and applicable state laws, proposed ALTA (and Texas) Commitment language could be revised to be substantially as follows:

THIS COMMITMENT AND ANY POLICY ISSUED BY THE COMPANY OMITS AND DOES NOT REPUBLISH ANY COVENANT, CONDITION, RESTRICTION, OR LIMITATION CONTAINED IN AN INSTRUMENT REFERRED TO IN THIS COMMITMENT TO THE EXTENT THAT THE SPECIFIC COVENANT, CONDITION, RESTRICTION, OR LIMITATION VIOLATES STATE OR FEDERAL LAW BASED ON RACE, COLOR, RELIGION, SEX, SEXUAL ORIENTATION, GENDER IDENTITY, HANDICAP, FAMILIAL STATUS, OR NATIONAL ORIGIN.

In distributing copies of instruments that may contain restrictions violating applicable anti-discrimination law, some persons will:

(1) Leave a blank where the covenant appears and state “This covenant omitted,” or
(2) Cross out the covenant, or
(3) Stamp, type, or print across the covenant or in the margin “This covenant omitted,” or
(4) Add on the first page of the instrument a stamp that omits any discriminatory covenant.
## EXHIBIT 1
PUBLIC LAW 104-199 [H.R. 3396]

<table>
<thead>
<tr>
<th>PUBLIC LAW 104-199 [H.R. 3396]</th>
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<tbody>
<tr>
<td>SEPTEMBER 21, 1996</td>
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<tr>
<td>DEFENSE OF MARRIAGE ACT</td>
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</table>

104 P.L. 199; 110 Stat. 2419; 1996 Enacted H.R. 3396; 104 Enacted H.R. 3396

BILL TRACKING REPORT: 104 Bill Tracking H.R. 3396
FULL TEXT VERSION(S) OF BILL: 104 H.R. 3396

104 CIS Legis. Hist. P.L. 199

An Act
To define and protect the institution of marriage.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.
This Act may be cited as the "Defense of Marriage Act".

SEC. 2. POWERS RESERVED TO THE STATES.
(a) In General.--Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following:

"Sec. 1738C. Certain acts, records, and proceedings and the effect thereof

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.".

(b) Clerical Amendment.--The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 17388 the following new item:

"1738C. Certain acts, records, and proceedings and the effect thereof.".

Sec. 3. DEFINITION OF MARRIAGE.
(a) In General.--Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

"Sec. 7. Definition of 'marriage' and 'spouse'

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.".

(b) Clerical Amendment.--The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by inserting after the item relating to section 6 the following new item:

"7. Definition of 'marriage' and 'spouse'".

Speaker of the House of Representatives.
Vice President of the United States and President of the Senate.
EXHIBIT 2

OBERGEBELL v. HODGES

Obergefell v. Hodges
Supreme Court of the United States
April 28, 2015, Argued; June 26, 2015, Decided
Nos. 14-556, 14-562, 14-571, 14-574

Reporter


Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: 
574, 14 decision; 4 disse


Disposition: 772 F. 3d 388, reversed.

Case Summary

Overview
HOLDINGS: [1]—Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples have a fundamental right to marry. Laws of Michigan, Kentucky, Ohio, and Tennessee were held invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples; [2]—Because same-sex couples can exercise the fundamental right to marry in all states, it follows that 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.

Outcome
Judgment reversed. 5-4 decision; 4 dissents.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Scope
HN1 The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.

Constitutional Law > Substantive Due Process > Scope
HN2 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. The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview
HN3 The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects history and extends from it without allowing the past alone to rule the present.

Constitutional Law > Bill of Rights > General Overview
HN4 The nature of injustice is that one may not always see it in one's own time. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as they learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions
HN5 The right to marry is protected by the Constitution. Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men. The right to marry is fundamental under the Due Process Clause.

Family Law > Marriage > Nature of Marriage

Family Law > Marriage > Types of Marriages > Same Sex Marriages

Family Law > Marriage > Nature of Marriage

*Together with No. 14-562, Tanco et al. v. Haslam, Governor of Tennessee, et al., No. 14-571, DeBoer et al. v. Snyder, Governor of Michigan, et al., and No. 14-574, Bourke et al. v. Beshear, Governor of Kentucky, also on certiorari to the same court.
The right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving v. Virginia invalidated inter racial marriage bans under the Due Process Clause. The right to marry is of fundamental importance for all individuals. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intense that an individual can make. Indeed, it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in U.S. society.

As the U.S. Supreme Court held in Lawrence v. Texas, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. Lawrence invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The U.S. Supreme Court has recognized these connections by describing the varied rights as a unified whole: The right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause.


Washington v. Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach the U.S. Supreme Court has used in discussing other fundamental rights, including marriage and intimacy.

In interpreting the Equal Protection Clause, the U.S. Supreme Court has recognized that new insights and societal understandings can reveal unjustified inequality within the United States’ most fundamental institutions that once passed unnoticed and unchallenged.

The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. The Supreme Court has noted the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times. Indeed, it is most often through democracy that liberty is preserved and protected in one’s life. But the freedoms secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in the United States’ basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature
refuses to act. The idea of the Constitution is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. This is why fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN18 Same-sex couples may exercise the fundamental right to marry in all States. It follows that 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.

Lawyers' Edition Display

Decision
("*568") Same-sex couples held able to exercise right to marry in all states; no lawful basis held to exist for state to refuse to recognize lawful same-sex marriage performed in another state on ground of same-sex character.

Summary

Overview: HOLDINGS: [1]-Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples have a fundamental right to marry. Laws of Michigan, Kentucky, Ohio, and Tennessee were held invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples; [2]-Because same-sex couples can exercise the fundamental right to marry in all states, it follows that 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.

Outcome: Judgment reversed. 5-4 decision; 4 dissents.

Headnotes

CONSTITUTIONAL LAW §525 > RIGHTS – LIBERTY > Headnote:
LEdHN[1][1]
The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525 > DUE PROCESS – PERSONAL CHOICES > Headnote:
LEdHN[2][2]
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. The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §9 > CONSTITUTION – JUDICIAL CONSTRUCTION > Headnote:
LEdHN[3][3]
The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects history and learns from it without allowing the past alone to rule the present. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §9 CONSTITUTION – JUDICIAL CONSTRUCTION > Headnote:
LEdHN[4][4]
The nature of injustice is that one may not always see it in one's own time. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as they learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525 MARRIAGE §1 > DUE PROCESS – RIGHT TO MARRY > Headnote:
LEdHN[5][5]
The right to marry is protected by the Constitution. Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men. The right to marry is fundamental under the Due Process Clause. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525 MARRIAGE §1 > RIGHT TO MARRY – SAME-SEX COUPLES > Headnote:
LEdHN[6][6]
Same-sex couples may exercise the right to marry. The reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525 MARRIAGE §1 > DUE PROCESS – RIGHT TO MARRY > Headnote:
LEdHN[7][7]
The right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving v. Virginia invalidated interracial marriage bans under the Due Process Clause. The right to marry is of fundamental importance for all individuals. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter that relationship is the foundation of the family in U.S. society. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §528.1 > LIBERTY AND FREEDOM – SAME-SEX COUPLES > Headnote:
LEdHN[8][8]As the U.S. Supreme Court held in Lawrence v. Texas, same-sex couples have the same right as opposite- sex couples to enjoy intimate association. Lawrence invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)
CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- RIGHT TO MARRY > Headnote: 

LedHn[9][10] [9]
A basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The U.S. Supreme Court has recognized these connections by describing the varied rights as a unified whole: The right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- RIGHT TO MARRY > Headnote: 

LedHn[10][10] [10]
An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the U.S. Supreme Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §17 CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- RIGHT TO MARRY > Headnote: 

Washington v. Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach the U.S. Supreme Court has used in discussing other fundamental rights, including marriage and intimacy. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §313.3 CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- EQUAL PROTECTION -- RIGHT TO MARRY > Headnote: 

LedHn[12][12]
The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always congruous, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers the U.S. Supreme Court's understanding of what freedom is and must become. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §348.5 > EQUAL PROTECTION -- UNJUSTIFIED INEQUALITY > Headnote: 

LedHn[13][13] In interpreting the Equal Protection Clause, the U.S. Supreme Court has recognized that new insights and societal understandings can reveal unjustified inequality within the United States' most fundamental institutions that once passed unnoticed and unchallenged. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §348.5MARRIAGE §1 > EQUAL PROTECTION -- INSTITUTION OF MARRIAGE > Headnote: 

LedHn[14][14]
The Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §348.5 CONSTITUTIONAL LAW §525.5 > FOURTEENTH AMENDMENT -- SAME-SEX COUPLES -- RIGHT TO MARRY > Headnote: 

LedHn[15][15] The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 85 (1972) must be and is overruled, and Mich. Const. art. I, § 25, Ky. Const. § 235b, Ohio Rev. Code Ann. § 3109.01 (2008), and Tenn. Const. art. XI, § 18 are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §101 > FUNDAMENTAL RIGHTS -- GOVERNMENTAL POWER -- JUDICIAL REDRESS > Headnote: 

LedHn[16][16] The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. The Supreme Court has noted the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times. Indeed, it is most often through democracy that liberty is preserved and protected in one's life. But the freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §101 > FUNDAMENTAL RIGHTS -- JUDICIAL REDRESS > Headnote: 

LedHn[17][17] The dynamic of the United States' constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in the United States' basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials to establish them as legal principles to be applied by the courts. This is why fundamental rights may not be submitted to a vote; they depend on the outcome of no elections. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

CONSTITUTIONAL LAW §525.5MARRIAGE §1 > RIGHT TO MARRY -- SAME-SEX COUPLES > Headnote: 

LedHn[18][18] Same-sex couples may exercise the fundamental right to marry in all States. It follows that 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. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, J.)

Syllabus

[*614] [2588] Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials [***] violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.
Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. ___ U.S. ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2015).

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. ___ U.S. ___, 133 S. Ct. 2675, 2678, 186 L. Ed. 2d 808 (2015).

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean the institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to deprive marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners’ own experiences. ___ U.S. ___, 133 S. Ct. 2675, 2679, 186 L. Ed. 2d 808 (2015).

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked *** deep transformations in the structure of marriage, affecting aspects of marriage as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation’s experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gay and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in <i>Bowers v. Hardwick</i>, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime “denim[ed] the lives of homosexual persons.” ___ <i>Lawrence v. Texas</i>, 539 U.S. 558, 575, 123 S. Ct. 2472, 155 L. Ed. 2d 508 (2004). In 2012, the federal Defense of Marriage Act was also struck down. ___ <i>Windsor</i>, 570 U.S. ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2015).

Numerous same-sex marriage cases reaching the federal *** courts and state supreme courts have added to the dialogue. ___ U.S. ___, 133 S. Ct. 2675, 2681, 186 L. Ed. 2d 808 (2015).

(b) The Fourteenth Amendment protects a State to license a marriage between two people of the same sex. ___ U.S. ___, 133 S. Ct. 2675, 2681, 186 L. Ed. 2d 808 (2015).


Courts must exercise reasoned judgment in identifying the personal choices that are fundamental. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, the right to marry was an important right that was a “cornerstone of the Nation’s identity.” ___ <i>Lawrence v. Texas</i>, 539 U.S. 558, 575, 123 S. Ct. 2472, 155 L. Ed. 2d 508 (2004). In 1967, Justice Douglas reaffirmed the right of prisoners not to be denied the right to marry. ___ <i>Feenstra v. Shadrick</i>, 494 U.S. 374, 99 S. Ct. 1029, 1029, 192 L. Ed. 2d, at 625 (1979). The Court has acknowledged the interlocking nature of these co...

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force and rationale to same-sex cases. First, the history of marriage as a union between two persons of the opposite sex marks the beginning of the Nation’s identity. ___ <i>Lawrence v. Texas</i>, 539 U.S. 558, 575, 123 S. Ct. 2472, 155 L. Ed. 2d 508 (2004).

Second, marriage is a keystone of the Nation’s social order. ___<i>Mayo Clinic v. turkey</i>, 562 U.S. 482, 495, 131 S. Ct. 1824, 179 L. Ed. 2d 727 (2011). This is true for all persons, whatever their sexual orientation.

The first premise of this Court’s relevant precedent requires a State to license a marriage between two people of the same sex. ___<i>Lawrence v. Texas</i>, 539 U.S. 558, 575, 123 S. Ct. 2472, 155 L. Ed. 2d 508 (2004). The first premise of this Court’s relevant precedent requires a State to license a marriage between two people of the same sex.

Finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of the Nation’s social order. ___<i>Mayo Clinic v. turkey</i>, 562 U.S. 482, 495, 131 S. Ct. 1824, 179 L. Ed. 2d 727 (2011). This is true for all persons, whatever their sexual orientation.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment’s guarantee of equal protection. The <i>Due Process Clause</i> and the <i>Equal Protection Clause</i> are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different premises of the same species but are connected in a profound way.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. ___<i>Lawrence v. Texas</i>, 539 U.S. 558, 575, 123 S. Ct. 2472, 155 L. Ed. 2d 508 (2004).

The dynamic can b...
right to marry. Baker v. Nelson is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. *Pp. *— 192 L. Ed. 2d, at 631.

(5) There may be an initial inclination to await further legislation, litigation, [*618*] and debate, but referring, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. Bowers, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women [*10] suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after Bowers was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners’ stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents’ argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples’ decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. *Pp. *— 192 L. Ed. 2d, at 631–634.

The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now 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. *Pp. *— 192 L. Ed. 2d, at 634–635, 772 F. 3d 388, reversed.

Counsel:
Mary L. Bonauto argued the cause for petitioner on Question 1.
Donald B. Verrilli, [*11] Jr., argued the cause for the United States, as amicus curiae, by special leave of court on Question 1.
John J. Bursch argued the cause for respondents on Question 1.
Douglas Hallward-Driemeier for the petitioners on Question 2.
Joseph F. Whalen for the respondents on Question 2.

Judges:
Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia, Thomas, Sotomayor, and Alito, J., joined. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

Opinion by: Kennedy

Opinion

[*2593*] Justice Kennedy delivered the opinion of the Court.

HN1 LedH(N[*1]) [1] The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, [*12*] and Tennessee, States that define marriage as a union between one man and one woman. See, e.g., Mich. Const., Art. I, § 25; Ky. Const. § 23(A); Ohio Rev. Code Ann. § 3101.01 (Lexis 2008); [*618*] Tenn. Const., Art. XI, § 8. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, infra. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder,* 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State. The petitioners sought certiorari. This Court granted review, limited to two questions, 574 U.S. ___ (2015).

The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage [*13*] between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history [*2594*] reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, [*14*] marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1867). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these refer to the United States Court of Appeals for the Sixth Circuit.

To the United States Court of Appeals for the Sixth Circuit.

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Recounting the circumstances of three of these cases illustrates the urgency of the petitioners’ cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relationship. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur’s death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems “hurtful for [2595] the rest of time.” App. in No. 14-556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur’s death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relationship in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class [**621**] Iupe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial [***18***] burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses’ memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time. For example, marriage was once viewed as an arrangement by the couple’s parents based on political, religious, and financial concerns; but by the time of its founding it was understood to be a voluntary partnership. See N. Cott, Public Vows: A History of Marriage and the Nation 9-17 (2000); S. Coontz, Marriage, A History 15-16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, [***19***] and property rights, and as society began to understand that women that have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as Amici Curiae 16-19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage, H. [*2596*] Hartog, Man & Wife in America: A History (2000).

This Nation has strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation’s experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many [***20***] persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness [***22***] of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as Amicus Curiae 5-28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both [***21***] a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as Amici Curiae 7-17.

In the 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private spheres and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in Romer v. Evans, 517 U.S. 609, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), the Court invalidated an amendment to Colorado’s Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled Bowers, holding that laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2485, 156 L. Ed. 2d 508 (2003).

Against this background, [***22***] the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii’s law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to [2597] strict scrutiny under the Hawaii Constitution, Bchl. Am. 17, 74 Haw. 858, P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed their laws. In 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as “only a legal union between one man and one woman as husband and wife.” 1 U.S.C. §7. [***23***]

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts [*623*] held the State’s Constitution guaranteed same-sex couples the right to marry. See Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, infra. Two Terms ago, in United States v. Windsor, 570 U.S. ___ (2014), the Court invalidated DOMA to the extent it barred the [***23***] Federal Government from treating same-sex married couples as married even when they held, impermissibly disparaged those same-sex couples “who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.” Id., at ___.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to both decide cases on principled reasons and neutral discussions, without clouding or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With
the exception of the opinion here under review and one other, see Citizens for Equal Protection v. Bruce, 455 F. 3d 959, 964-968 (CA9 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, infra.


III

**HN2** 


**HN3** 

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” Poe v. Ullman, 367 U.S. 497, 410, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise *[*624]* reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *[*259*] ibid. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See Lawrence, supra at 572, 123 S. Ct. 2472, 186 L. Ed. 2d 508. That method respects our history and learns from it without allowing the past alone to rule the present.

**HNA LedHN[4]** 

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When now new insights reveal discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Among established tenets of the Constitution is the right to marry. The right to marry is protected by the Constitution. In Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” The Court reaffirmed *[*26]* that holding in Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in Turner v. Safley, 482 U.S. 78, 95, 107 S. Ct. 2202, 95 L. Ed. 2d 78 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, e.g., *[*38]* M. L. B. v. S. L. J., 519 U.S. 102, 116, 117 S. Ct. 1571, 156 L. Ed. 2d 49 (1997); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639-640, 94 S. Ct. 797, 39 L. Ed. 2d 92 (1974); Griswold, supra, at 485, 85 S. Ct. 1671, 14 L. Ed. 2d 510; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, e.g., *[*2599]* Lawrence, supra at 574, 123 S. Ct. 2472, 166 L. Ed. 2d 508; Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 510; Zablocki, supra, *[*27]* at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618; Loving, *[*625]* supra, at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010; Griswold, supra, at 485, 85 S. Ct. 1671, 14 L. Ed. 2d 510. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., Eisenstadt, supra at 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349; Poe, supra, at 542-553, 86 S. Ct. 1752, 186 L. Ed. 2d 499 (Harlan, J., dissenting).

This analysis compels the conclusion that *[*HN6 LedHN][6]* same-sex couples may exercise the right to marry. The four principles and traditions to be discussed are that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court’s relevant precedents is that *[*HN7 LedHN][7]* the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010; see also Zablocki, supra, at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (observing Loving held “the right to marry is of fundamental importance for all individuals”). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual may make. See Lawrence, supra at 573, 123 S. Ct. 2472, 166 L. Ed. 2d 510. Indeed, the Court has said, “marriage is a right ‘older than the Bill of Rights’” and that to “recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” Zablocki, supra, at 386, 98 S. Ct. 673, 54 L. Ed. 2d 618.

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” Goodridge, 440 Mass., at 722, 798 N. E. 2d, at 955.

The nature of marriage is, that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See Windsor, 570 U.S., at 133, 136 S. Ct. 2679, 194 L. Ed. 2d 868. There is dignity in the bond between two men or two women who seek to marry and in the State’s authority to foster our societal commitment of such companionship, at 134, 136 S. Ct. 2679, 194 L. Ed. 2d 868. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship, at 133, 136 S. Ct. 2679, 194 L. Ed. 2d 868. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship, *[*30]* and understanding and assurance that while both still live there will be someone to care for the other. *[*HN8 LedHN][8]* As Hoblock states, same-sex couples have the same right as opposite-sex couples to enjoy intimate association.

Lawrence invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that “when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” *[*36]* S. Ct. 539, 123 S. Ct. 2475, 156 L. Ed. 2d 510 (2003).

Ed. 2d 508. But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outlaw may be a step forward, but it does not achieve the full promise of liberty.

**HN9 LEDHN[9]** [9] A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); Meyer, 262 U.S. at 399, 43 S. Ct. 625, 67 L. Ed. 1042. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘make and purport to make a home and bring up children’ is a central part of the *right to marry*.” Zablocki, 434 U.S. at 394, 98 S. Ct. 673, 54 L. Ed. 2d 618 (quoting Meyer, supra, at 399, 43 S. Ct. 625, 67 L. Ed. 1042). Under the laws of the several [*31] States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its accord with other families in their community and in their daily lives.” Windsor, supra, at 133 S. Ct. 2675, 186 L. Ed. 2d 828. Marriage also affords the permanency and stability important to children’s best interests. See Brief for Scholars of the Constitutional Rights of Children as Amici Curiae 22-27.

As all parties agree, same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as Amicus Curiae 4. Most States have allowed [*627] gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see id., at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without [*332] the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the material costs that being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue [*2601] here thus harm and humiliate the children of same-sex couples. See Windsor, supra, at 133 S. Ct. 2675, 186 L. Ed. 2d 828.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. **HN10 LEDHN[10]** [10] An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of preceding protection of the right to marry not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago: “The country in the world is the United States,” [*333] where the tie of marriage is so much respected as in America . . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . . [H]e afterwards carries [that image] with him into public affairs.” 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In Maynard v. Hill, 185 U.S. 191, 211, 22 S. Ct. 723, 31 L. Ed. 654 (1892), the Court echoed de Tocqueville, explaining that marriage is “the foundation of the American social order, without which there would be, in this country, no great public institution, giving character to our whole civil polity.” Id., at 213, 8 S. Ct. 723, 31 L. Ed. 654. This idea has been reinvented even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that same reason as a couple vows to support each other, so does society pledge to support them in the exercise of their rights. Though the States are free to vary the benefits they confer on all married couples, and to deny some benefits to opposite sex couples, [*287] equal protection requires the States to extend all the rights and benefits of marriage to both same sex couples. See, e.g., Brief for Scholars of the Constitutional Rights of Child Amici Curiae 22; id. at 23.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation [*35] of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes [*2002] marriage the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.

Same-sex couples, too, may aspire to the transcendental purposes of marriage and seek fulfillment in its highest meaning. The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

It may not be accurate to say that the institution of marriage has a single, consistent meaning. Different cultures have understood marriage in different ways, and our own understanding of marriage has evolved over time. See, e.g., Windsor, supra, at 133 S. Ct. 2675, 186 L. Ed. 2d 824. But contrary to respondent’s claim, [*630] the same-sex right has many aspects, of which childbearing is only one. It includes a commitment to a loving relationship, an understanding that the State, like parents, participates in bringing about a child’s life, and a promise to procreate.

The limitation of marriage to opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation [*35] of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes [*2002] marriage the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.

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Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), which called for a “careful description” of fundamental rights. They assert [*336] the petitioners do not seek to extend marriage to same-sex couples but rather a right to marry as a fundamental right. See id. at 14-15, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (2017) (per curiam).

[11] Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. Loving did not ask about a “right to interacial marriage;” Turner did not ask about a “right of inmates to marry;” and Zablocki did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also Glucksberg, 521 U.S., at 752-773, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (Souter, J., concurring in judgment); id. at 799-792, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (Breyer, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, rather than by who is entitled to exercise them today, the State could deny rights to veterans, prisoners or the infirm. See, e.g., Meyer, supra, at 399, 43 S. Ct. 625, 67 L. Ed. 1042; Bdor v. Virginia, 461 U.S. 600, 605, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

This interrelation of the two principles further our understanding of what freedom is and must become.
The Court’s cases touching upon the right to marry reflect this dynamic. In Loving the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. With this link to equal protection the Court proceeded to hold [*39] the prohibition offered central precepts of liberty: “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes—which were designed to subjugate and control a race with a view to their ultimate elimination—the Court is surely to deprive all the State’s citizens of liberty without due process of law.” Id. The reasons why marriage is a fundamental right became more clear and compelling from a full awareness [*630] of understanding the harm that results from laws banning interracial marriages. The sympathy between the two protections is illustrated further in Zablocki. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court’s holding that the law burdened a right “of fundamental importance.” 434 U.S., at 383, 98 S. Ct. 673, 54 L. Ed. 2d 618. It was the essential nature of the marriage right, discussed at length in Zablocki, see id., that made apparent the law’s incompatibility with requirements of equal liberty. This concept—liberty and equal protection—leads to a stronger understanding [*40] of the other.

Indeed, HN13 LedHN[13] in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970’s and 1980’s. Notwithstanding the general erosion of the doctrine of coverture, see supra, at 6, invisi


In Lawrence the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U.S., at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508. Although Lawrence elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. [*42] See id. Lawrence drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State “cannot demean their existence or control their destiny by making their private sexual conduct a crime.” Id., at 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Constitution cannot permit this disregard for the right and liberty. The Court now holds that the challenged law is unconstitutional, and under the Fourteenth Amendment prohibits this unjustified infringement of the fundamental right to marry. See, e.g., Zablocki, supra, at 383-388, 98 S. Ct. 673, 54 L. Ed. 2d 618; Skinner, 316 U.S., at 541, 86 S. Ct. 1110, 86 L. Ed. 1655.

These considerations lead to the conclusion that HN15 LedHN[15] the right to marry is a fundamental right inherent in the liberty of the person, and under the [*43] Due Process and Equal Protection Clauses of the Fourteenth Amendment, the same may not be deprived of that right and the reasons why. The Court now holds that [*630], same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. Baker v. Nelson must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV. There may be an initial inclination in these cases to proceed with caution—to avoid further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents’ States to await further public discussion and political measures before licensing same-sex marriages. See DeBoer, 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots [*632] campaigns, as well as countless studies, papers, [*44] books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, infra. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 amici make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments noted above as a matter of constitutional law.

Of course, HN16 LedHN[16] the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in Schuette v. BAMN, 572 U.S. 134, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014), noting the “right of citizens to debate so they can learn and decide [*45] and then, through the political process, act in concert to try to shape the course of their own times.” Id., at 134 S. Ct. 1623, 188 L. Ed. 2d 626. Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as Schuette also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” Id., at 134 S. Ct. 1623, 188 L. Ed. 2d 626. Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. Id., at 134 S. Ct. 1623, 188 L. Ed. 2d 626. This holds true even when protecting individual rights amounts to affirming a decision by the people acting through their elected representatives as a matter of constitutional law.

HN17 LedHN[17] The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of [*2606] the Constitution was to withhold certain subjects from [*46] the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish as legal principles to be applied by the courts. West Virginia Bd. of Ed. v.
This is why “fundamental rights may not be submitted to a vote; they depend on the people’s most basic compact. Were the Court to stay rly presented with the issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry. This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In Bowers, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U.S., at 186, 190-195, 106 S. Ct. 2841, 92 L. Ed. 2d 140. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, Bowers upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the Court. See id., at 199, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (Blackmun, J., joined by Brennan [***47] , Marshall, and Stevens, J.J., dissenting); id., at 214, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (Stevens, J., joined by Brennan and Marshall, J.J., dissenting). That is why Lawrence held Bowers “was not correct when it was decided.” 539 U.S., at 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508. Although Bowers was eventually repudiated in Lawrence, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after Bowers was overruled. Dignity wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like Bowers, would be unjustified under the Fourteenth Amendment. The petitioners’ stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to long-time partner. Obergefell—sincere convictions with marriage. All that argument, however, rests on a counterintuitive view of opposite-sex couple’s decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See Kitchen v. Herbert, 755 F. 3d 1150, 1153 (CA10 2014) (“[I]t is wholly illogical to believe that state recognition [***54] of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples”). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties. Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection so as to seek the principles that are so fulfilling and so central to their lives and faiths, and to their own deep convictions to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of “the most perplexing and distressing complications” in the law of domestic relations. Williams v. North Carolina, 317 U.S. 287, 299, 63 S. Ct. 207, 87 L. Ed. 279 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family [***51] or friends risks causing severe hardship in the visit of a spouse’s hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages have already occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, then the State’s refusal to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds [HN19] Leh[HN18] [18] in the law of sales—same-sex couples may exercise the fundamental right to marry in all States. It [***208] follows that the Court also must hold—and it now does hold—that 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.

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, exclusion from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

APPENDICES

A

State and Federal Judicial Decisions

Addressing Same-Sex Marriage

United States Courts of Appeals Decisions

Adams v. Howerton, 673 F. 3d 1058 (CA9 2012)
Snedd v. County of Orange, 444 F. 3d 673 (CA9 2006)
Citizens for Equal Protection v. Brumming, 455 F. 3d 858 (CA8 2006)
Windsor v. United States, 699 F. 3d 169 (CA2 2012)
Marriage Recognition v. Department of Health and Human Services, 682 F. 3d 1 (CA1 2012)
Perry v. Brown, 671 F. 3d 1052 (CA9 2012)
Latta v. Otter, 771 F. 3d 456 (CA9 2014)

2015 Title Insurance & Doc Prep Basics—Endorsements in Texas (Non-Survey and Survey Issues)
United States District Court Decisions


[2809]

Dragovich v. Department of Treasury, 764 F. Supp. 2d 1117 (ND Cal. 2011)
Dragovich v. Department of Treasury, 872 F. Supp. 2d 944 (ND Cal. 2012)
Windsor v. United States, 833 F. Supp. 2d 934 (SUNY 2012)
Kelly v. Orr, 4 F. Supp. 3d 994 (ND Ill. 2013)
Kitchen v. Herbert, 961 F. Supp. 2d 1181 (Utah 2013)
Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (SD Ohio 2013)
Bourke v. Beshear, 996 F. Supp. 2d 542 (WD Ky. 2014)
De Leon v. Perry, 975 F. Supp. 2d 832 (WD Tex. 2014)
Tango v. Haslam, 7 F. Supp. 3d 759 (MD Tenn. 2014)
Henry v. Himes, 14 F. Supp. 3d 1036 (SD Ohio 2014)
Latta v. Otter, 19 F. Supp. 3d 1034 (Idaho 2014)
Evans v. Utah, 21 F. Supp. 3d 1192 (Utah 2014)
Baskin v. Bogan, 12 F. Supp. 3d 1144 (SD Ind. 2014)
Browning v. Pence, 39 F. Supp. 3d 1025 (S.D. Ind. 2014)
General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (WDNC 2014)
Hamity v. Parnell, 56 F. Supp. 3d 1056 (Alaska 2014)


Majors v. Horn, 14 F. Supp. 3d 1313 (Ariz. 2014)
Cordei-Vidal y Garcia-Padilla, 54 F. Supp. 3d 157 (PR 2014)

Rolando v. Fox, 23 F. Supp. 3d 1227 (Mont. 2014)
Strawser v. Strange, 44 F. Supp. 3d 1206 (SD Ala. 2015)
Waters v. Ricketts, 48 F. Supp. 3d 1271 (Neb. 2015)

State Highest Court Decisions

Baker v. Nelson, 291 Minn. 310, 191 N. W. 2d 185 (1971)
Jones v. Hallahan, 507 S. W. 2d 588 (Ky. 1973)
Baeth v. Lewis, 74 Haw. 530, 852 P. 2d 44 (1993)
Li v. State, 338 Or. 376, 110 P. 3d 91 (2005)


In re Marriage Cases, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 663, 183 P. 3d 384 (2008).


[*2611] B

State Legislation and Judicial Decisions

Legalizing Same-Sex Marriage

Legislation


D. C. Act No. 18-248, 57 D. C. Reg. 27 (2010)


Ill. Pub. Act No. 98-597


2012 Md. Laws p. 9

2013 Minn. Laws p. 404

2009 N. H. Laws p. 60

2011 N. Y. Laws p. 749

2013 R. I. Laws p. 7

2009 Vt. Acts & Resolves p. 33


Judicial Decisions


Dissent by: Roberts; Scalia; Thomas; Alito

Dissent

Chief Justice Roberts, with whom Justice Scalia and Justice Thomas join, dissenting.

Petitioners make strong arguments rooted in social [***639**] policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what [***639**] it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State’s decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. [***640**] In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That [*2612] ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire [***639**] for what the law is, not what [***639**] it should be. The people who ratified the Constitution authorized courts to exercise “neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex. But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what [***639**] it should be. The people who ratified the Constitution authorized courts to exercise “neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

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Today, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That [*2612] ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire [***655**] to remake society according to its own “new insight” into the “nature of injustice.” *Ante, at ___* (2014) (dissenting). As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are? It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex. But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what [***639**] it should be. The people who ratified the Constitution authorized courts to exercise “neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution “is made for people of fundamentally differing views.” *Lochner v. New York, 198 U.S. 45, 76, 25 S. Ct. 539, 49 L. Ed. 937 (1905)* (Holmes, J., dissenting). Accordingly, “courts are not concerned with the wisdom or policy of legislation.” *Id., at 69, 25 S. Ct. 539, 49 L. Ed. 937 (1905)* (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.” *Ante, at ___* (2014) (dissenting). I have no choice but to dissent.

Understand well what this dissent is [***656**] about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the [***640**] people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

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Petitioners and their allies based their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—who decides what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, ante, at ___; 192 L. Ed. 2d, at 620, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. Town of Greece v. Galloway, 572 U.S. ___; 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014).

A

As the majority acknowledges, marriage "has existed for millennia and as across civilizations." Ante, at ___; 192 L. Ed. 2d, at 619. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See ante, at ___; 192 L. Ed. 2d, at 620; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2000).

[**2613**] As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." United States v. Windsor, 570 U.S. ___; 133 S. Ct. 2787, 186 L. Ed. 2d 823 (2013).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, divorce, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1998); cf. M. Ciceró, De Officinis 57 (W. [*58*] Miller transl. 1913) ("For since the reproductive instinct is by nature’s gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman. See ante, at ___; 192 L. Ed. 2d, at 620; Robinson v. California, 374 U.S. 660, 662, 83 S. Ct. 1670, 10 L. Ed. 2d 744 (1963) (per curiam).

This core meaning of marriage has endured. It reflects our constitutional and moral understanding of relationships; it shapes our legal system; and it forms "the foundation of the family and of society, without which there would be neither civilization nor progress," Maynard v. Hill, 125 U.S. 285, 31 L. Ed. 212, 8 S. Ct. 789 (1888) (Harlan, J., dissenting). As the majority observes, "none of these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." Ante, at ___; 192 L. Ed. 2d, at 621.

B

Shortly after this Court struck down racial restrictions on marriage in Loving, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected [*63] their analogy to Loving, and this Court summarily dismissed an appeal. Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972).

In the decades after Baker, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage required a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the [*643] four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing

accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic “momentum” in favor of “expanding the definition of marriage to include gay couples,” but concluded that petitioners had not made “the case for constitutionalization of the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.” 772 F. 3d, at 386, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause, The Solicitor General of the United States, appearing in support of petitioners, expressly disclaimed that position before this Court. See Tr. of Oral Arg. on Question 1, at 38-39. The majority [**65] nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four “principles and traditions” in this Court’s due process precedents that support a fundamental right for same-sex couples to marry. Ante, at 192, L. Ed. 2d, at 625. In reality, however, [**2616] the majority’s approach has no basis in principle or tradition, except for an avowedly ad hoc constitutional policymaking that characterized discriminatory decisions such as Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937. Stripped of its shiny rhetorical gloss, the majority’s argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority’s position indefensible as a matter of constitutional law.

A

Petitioners’ "fundamental right" claim falls into the customary category of constitutional adjudication. Petitioners do not contend that their States’ marriage laws violate an enumerated constitutional right, such as the freedom of speech protected by the First Amendment; there is, after all, no "countervailing tradition of constitutional policymaking that characterized discriminatory decisions such as Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937.

They [**66] instead argue that the states violate a right implied by the Fourteenth Amendment’s requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." Palko v. Connecticut, 302 U. S. 319, 326, 58 S. Ct. 149, 154, 82 L. Ed. 288 (1937). The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. Snyder v. Massachusetts, 291 U. S. 97, 105, 54 S. Ct. 390, 78 L. Ed. 747 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental" and to strike down state laws on the basis of that determination raises obvious concerns about the judicial role of judges exercising "the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." Washington v. Glucksberg, 521 U. S. 709, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that this essential, or fundamental, right should exist in any just society.") It [*2617] does not follow that each of these essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system."

To avoid the necessity of administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a state statute in Palko v. Connecticut, 302 U. S. 319, 326, 58 S. Ct. 149, 154, 82 L. Ed. 288 (1937). The Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." id., at 450, 199. S. Ct. 1535, 15 L. Ed. 691 (1957). The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." id., at 450, 199. S. Ct. 1535, 15 L. Ed. 691 (1957). The Court has subsequently disavowed the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating Palko’s error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the Fourteenth Amendment’s requirement that "liberty" may not be deprived without "due process of law.""

The need for due process under the written Constitution. The Fourteenth Amendment’s requirement that "liberty" may not be deprived without "due process of law."}

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*Page 36*
ordered [*771] liberty, such that neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S., at 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in Glucksberg, many other cases both before and after have adopted the same approach. See, e.g., District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 79, 129 S. Ct. 2368, 174 L. Ed. 2d 38 (2009); Flores, 307 U.S., at 300113 S. Ct. 1349, 123 L. Ed. 2d 57; United States v. Salseno, 381 U.S. 729, 751, 107 S. Ct. 2594, 98 L. Ed. 2d 691 (1987); Moore v. East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1982, 52 L. Ed. 2d 531 (1977) (plurality opinion); see also id., at 544, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (White, J., dissenting). ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with little or no cognizable roots in the language or even the legal design of the Constitution."); Troxel v. Granville, 530 U.S. 57, 96-101, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (Kennedy, J., dissenting) (consulting "[o]ur Nation's history, legal traditions, and practices" and concluding that "we owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting Glucksberg, 521 U.S., at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. Ante, at 192 L. Ed. 2d, at 626. But given the few "guideposts for responsible decisionmaking in this unchartered area" [*772] Collins, 503 U.S. at 125, 112 S. Ct. 1981, 117 L. Ed. 2d 261, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula." Moore, 431 U.S., at 504, n. 12, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, ante, at 192 L. Ed. 2d, at 623-634, does not provide a meaningful constraint on a judge, for what he is likely to be "discovering," whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." Griswold v. Connecticut, 381 U.S. 479, 501, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of [*647] this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades [*2619] of precedent and returns the Court to the unprincipled approach of Lochner.

1

The majority's driving themes are that marriage is desirable and petitioners desire [*773] it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. Ante, at 192 L. Ed. 2d, at 619, 620, 621, 623. The compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant. When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." Turner v. Safley, 482 U.S. 78, 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); Zablocki v. Redhail, 434 U.S. 374, 380, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1972); see Lawrence, 192 L. Ed. 2d, at 1010. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In Loving, the Court held that racial restrictions on the right to marry lacked a compelling justification. In Zablocki, restrictions based on child support debts did not suffice. In Turner, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core [*774] definition of marriage as the union of a man and a woman. The laws challenged in Zablocki and Turner did not define marriage as "the union of a man and a woman, where neither party owes child support or is in prison." Nor did the interracial marriage ban at issue in Loving define marriage as "the union of a man and a woman of the same race." See Tragen, Comment, Statutory Protections Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); post, at ___-___, n. 5, 192 L. Ed. 2d, at 666 (Thomas, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." Ante, at 192 L. Ed. 2d, at 624. In short, "the right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage as traditionally defined violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See Windsor, 570 U.S., at ___-___, 133 S. Ct. 2675, 186 L. Ed. 2d at 852 (Alito, J., dissenting) ("What Windsor and the United States [*775] seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

[*648] 2

The majority suggests that there are "other, more instructive precedents" informing the right to marry. Ante, at 192 L. Ed. 2d, at 624. Although not entirely clear, we understand the majority to refer to two cases from the Roberts Court: Lawrence v. Texas, 539 U.S. 556, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), which struck down a Texas statute criminalizing homosexual sodomy; Lawrence relied on the position that criminal sodomy laws, like bans on contraceptives, invaded [*776] privacy by inviting "unwanted government intrusions that [touch] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." Id., at 562, 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508.

Neither Lawrence nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to form intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. Ante, at 192 L. Ed. 2d, at 635. At the same time, the laws in no way interfere with the "right to be let alone." The majority also relies on Justice Harlan's influential dissenting opinion in Roe v. Ullman, 387 U.S. 497, 87 S. Ct. 1752, 16 L. Ed. 2d 998 (1967). As the majority recounts, that opinion states that "[i]f the process has not been reduced to any formula," id., at 542, 87 S. Ct. 1752, 16 L. Ed. 2d 998, "but far from conferring the broad and imprecise protection that the majority discards. Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation may take them." Ibid. They must instead have regard [*777] to what history teaches" and exercise not only "judgment" but "restraint." Ibid. Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine on that basis," id., at 546, 87 S. Ct. 1752, 16 L. Ed. 2d 998. In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek private, quite the opposite, they seek [*649] public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 199, 109 S. Ct. 1092, 103 L. Ed. 2d 160 (1989); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); post, at ___-___, 192 L. Ed. 2d, at 664-667 (Thomas, J., dissenting). Thus,
although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive [***78] from precedent, the majority goes out of its way to jettison the “careful” approach to implied fundamental rights [**2621] taken by this Court in Glucksberg. Ante, at 192 L. Ed. 2d at 628 (quoting 521 U.S., at 721, 117 S. Ct. 2258, 132 L. Ed. 2d 772). It is revealing that the majority’s position requires it to effectively overrule Glucksberg, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority’s methodology. Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937. The majority opens its opinion by announcing petitioners’ right “to define and express their identity.” Ante, at 192 L. Ed. 2d at 618. The majority later explains that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” Ante, at 192 L. Ed. 2d at 625. This freewheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be free in his person and to power to contract in relation to his own labor.” Lochner, 198 U.S., at 58, 25 S. Ct. 539, 49 L. Ed. 937 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those accorded with its own “reasoned judgment,” informed [***79] by its “new” insight into the “nature of injustice,” which was invisible to all who came before but has become clear “as we learn [the] meaning” of liberty. Ante, at 192 L. Ed. 2d at 624, 624. The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that it would disparage their choices and diminish their personhood to deny them this right.” Ante, at 192 L. Ed. 2d at 629. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in Lochner. See 198 U.S., at 61, 25 S. Ct. 539, 49 L. Ed. 937 (“We do not believe in the soundness of the views which uphold this law,” which “is an illegal interference with the rights of individuals … to make contracts regarding labor upon such terms as they may think best”).

The majority recognizes that today’s cases do not mark “the first time [**650] the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights.” Ante, at 192 L. Ed. 2d at 632. On that much, we agree. The Court was “asked”—and it agreed—to “adopt a cautious approach” to implying fundamental rights after the debacle of the Lochner era. Today, the majority casts caution aside and revives [***80] the great errors of that period.

One immediate question invited by the majority’s position is whether States may retain the definition of marriage as a union of two people. Cf. Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Although the majority randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element remains.*

Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can avoid the small step.

It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If there is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” ante, at 192 L. Ed. 2d at 625, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex [***81] couple has the constitutional right to marry because their children would otherwise “suffer the stigma of knowing their families are somehow lesser,” ante, at 192 L. Ed. 2d at 627, why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry prevents “serving to disapprove and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” ante, at 192 L. Ed. 2d at 631, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian “Triouple” Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, Three May Not Be A Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L. J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that complicate different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State “doesn’t have such an institution.” Tr. of Oral Arg. on Question 2, at ___ (CA10). The majority’s approach today is different: it is using is sufficiently related to the goals it is pursuing.” G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & [*652] P. Karlan, Constitutional Law 453 (7th ed. 2013).

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would “pose no risk of harm to ourselves or third parties.” Ante, at 192 L. Ed. 2d at 641. This argument again echoes Lochner, which relied on its assessment that “we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.” 198 U.S., at 57, 25 S. Ct. 539, 49 L. Ed. 937.

Then and now, this assertion of the “harm principle” sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice’s “convincing” does not confer any special moral, political, or social insight sufficient to transcend the opinions on fellow citizens under the pretense of “due process.” There is indeed a process declared by the people on issues of this sort—the democratic process. Respecting that understanding requires [***83] the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes’s dissent in Lochner, the Fourteenth Amendment does not enact John Stuart Mill’s On Liberty any more than it enacts Herbert Spencer’s Social Statics. See Randolph. Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol’y 1035, 1036-1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority’s understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarnished social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when selected judges strike down [**2623] democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overrules our country’s entire history and tradition but actively repudiates it, preferring to live only in the heady days of the year and now. I agree with the majority that the [***84] “nature of injustice is that we may not always see it in our own times.” Ante, at 192 L. Ed. 2d at 624. As petitioners put it, “times can blind.” Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. “The past is never dead. It’s not even past.” W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discssion is, quite frankly, difficult to follow. The central point seems to be that there is a “synergism” between the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Ante, at 192 L. Ed. 2d at 632. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casenotes doctrine in Glucksberg’s treatment of the modern Supreme Court’s treatment of equal protection claims has used a means-end methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing.” G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & [*652] P. Karlan, Constitutional Law 453 (7th ed. 2013).

[***85] The majority’s approach today is this: “Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right
in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. Ante, at ___, 192 L. Ed. 2d, at 629.

The majority goes on to assert in conclusionary fashion that the Equal Protection Clause provides an alternative basis for its holding. Ante, at ___, 192 L. Ed. 2d, at 631. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See Northwest Acts, 539 U.S., at 585, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (O’Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners [*66] have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners’ lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to [*2624] license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests upon the respect accorded to its judgments. Republican Party of Minn. v. White, 536 U.S. 765, 793, 122 S. Ct. 2528, 153 L. Ed. 2d, at 694 (2002) (Kennedy, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority’s telling, it is the courts, not the people, who are responsible for [*67] making “new dimensions of freedom . . . apparent to new generations,” for providing “formal discourse” on social issues, and for ensuring “neutral discussions, without scornful or disparaging commentary.” Ante, at ___, 192 L. Ed. 2d, at 621-623.

Nowhere is the majority’s extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate [*653] regarding same-sex marriage. Yes, the majority concedes, on thousands of years of human history in every society known to have populated the planet. But on the other side, there has been “extensive litigation,” “many thoughtful District Court decisions,” “countless studies, books, and articles,” “over a hundred” amicus briefs in these cases alone. Ante, at ___, 192 L. Ed. 2d, at 623, 626, 632; What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers’ “better informed understanding” of “a liberty that remains urgent in our own era.” Ante, at ___, 192 L. Ed. 2d, at 629.

The answer is surely there in one of those amicus briefs or studies. Those who founded our country would not have recognized the majority’s novel conception of the judicial role. They after all risked their lives and [*68] fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after “a quite extensive discussion.” Ante, at ___, 192 L. Ed. 2d, at 626.

In our court decisions, “countless writings,” and “more than 100” times to creating rights. They have constitutional power only to resolve concrete cases or controversies; hence some of the ancillary legal benefits that arise. See [*67] Holder v. Human Right’s Campaign, Inc., 528 U.S. 828, 110 S. Ct. 1207, 108 L. Ed. 2d, at 527 (2000) (Scalia, J., dissenting).

There will be consequences to shutting down the political process. When decisions are rea for the first time in a generation questions that people oppose same-sex marriage. Yes, the majority concedes, on one side are thousan或许 thousands more than five thousand. And about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. “Surely the Constitution does not put each other the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.” Rehnquist, The Notion of a Living Constitution, (2003) 2014 Title Insurance & Doc Prep Basics—Endorsements in Texas (Non-Survey and Survey Issues) Page 39
their gay and lesbian neighbors. Ante, at ___.

These apparent assaults on the character of favored people will have an effect, in society and in court. See post, at 626, 629, 631, 633. These apparent assaults on the character of favored people will have an effect, in society and in court. See post, at 626, 629, 631, 633. They also reflect insight into moral and philosophical issues. It is [*2627] more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

Justice Scalia, with whom Justice Thomas joins, dissenting.

I join The Chief Justice's dissent. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree [*95] is not of immense personal importance to me. The law can recognize marriage whatever sexual attachments and living arrangements [*2627] it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. But these civil consequences—and the public approval [*656] that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention.

The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and [*96] won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more did not. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work. 

The Constitution places some constraints on self-rule—constraints adopted by the People themselves when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts," denying "Full Faith and Credit" to the "public Acts" of other States, prohibiting the free exercise of religion, abridging the freedom of speech, [*97] infringing the right to keep and bear arms, authorizing unreasonable searches and seizures, [*98] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people" [*99] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove the public Acts of other States, prohibiting the free exercise of religion, abridging the freedom of speech, [*97] infringing the right to keep and bear arms, authorizing unreasonable searches and seizures, [*98] and so forth. 

I would not celebrate an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and starting assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks [*97] the Fourteenth Amendment ought to protect. That is so because [*98] the amendments that wrote and ratified the Bill of Rights and the Fourteenth Amendment did [*99] not presume to know the extent of freedom in all of its dimensions . . . .

One would think that sentence would continue: " . . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps " . . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." [*658] The "we," needless to say, is the nine [*658] of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries." [*10] Thus, rather than focusing on the
People’s understanding of “liberty”—at the time of ratification or even today—the majority focuses on four “principles and traditions” that, in the majority’s view, prohibit States from defining marriage as an institution consisting of one man and one woman.

[*2629] This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with [**100] our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices’ “reasoned judgment.” A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy. Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross, as employed today, identifies nothing except a difference in treatment that this Court or government of the liberty they sought to protect. Along the way, it rejects the idea that the Government shall be governed by laws, and not by the “reasoned judgment” of the majority of this Court. The world does not expect logic and precision in policymaking; it expects reasoned judgment. If the opinion is correct that the two clauses “converge in the identification and definition of the right,” then the other, “even as the two Clauses may converge in the identification and definition of the right.” What say? What possible “essence” does substantive due process “capture” in an “accurate and comprehensive way”? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses “converge in the identification and definition of the right,” then is not (or should not be) relevant the majority’s likes and dislikes are predictably compatible. I could go on. The world does not expect logic and precision in poetry or inspirational populism; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.

... [*2631] Hubris is sometimes defined as o’erweening pride; and pride, we know, goeth before a fall. The majority’s view of the law is not (or should not be) relevant the majority’s likes and dislikes are predictably compatible. I could go on. The world does not expect logic and precision in poetry or inspirational populism; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.

II

But what really astounds is the hubris reflected in today’s judicial Puttsch. The five Justices who compose today’s majority [*102] are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment’s ratification and Massachusetts’ permitting of same-sex marriage in 2003. They have discovered in the Fourteenth Amendment [*659] a “fundamental right” overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certainly that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when [*2530] that is called for by their “reasoned judgment.” These Justices do not limit their ruling to marriage; they know that an institution as old as government itself, and accepted by every nation in history until 15 years ago, [*2630] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous [*103] judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. Of course the opinion’s showy profundities are often profoundly incoherent. “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.” (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can “rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era;” (Huh? How [*104] can a better informed understanding of how constitutional imperatives [whatever that means] define [what is an urgent liberty [never mind]], give birth to a right?) And we are told that, “[i]n any particular case,” either the Equal Protection or Due Process Clause “may be thought to capture the essence of [a] right in a more accurate and comprehensive way,” than the other, “even as the two Clauses may converge in the identification and definition of the right.” (What say? What possible “essence” [*660] does substantive due process “capture” in an “accurate and comprehensive way”? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses “converge in the identification and definition of [a] right,” that is only because the majority’s likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational populism; it demands them in the law. The stuff contained in today’s opinion has to diminish [*105] this Court’s reputation for clear thinking and sober analysis.

... [*2631] Hubris is sometimes defined as o’erweening pride; and pride, we know, goeth before a fall. The majority is the “least dangerous” of the federal branches because it has “neither force nor will, but merely judgment; and must use it ultimately upon the aid of the executive arm” and the States, “even for the efficacy of its judgments.” With each decision of ours that takes from the People a question properly left to them—with each decision that is unhesitatingly based not on law, but on the “reasoned judgment” of a bare majority of this Court—we move one step closer to being reminded of our impotence.

Justice Thomas, with whom Justice Scalia joins, dissenting.

The Court’s decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a “liberty” that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.
The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his [***109] "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. McDonald v. Chicago, 561 U.S. 742, 811-812, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Thomas, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U.S. Const., Amend. 14, § 1. Worse, it invites judges to do exactly what the majority has done here—"[r]ead[ing] at large in the constitutional field" guided by their personal [***661] views as to the "fundamental rights" protected by that document. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 953, 965, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part) (quoting Griswold v. Connecticut, 381 U.S. 479, 502, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14-562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their [***108] definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of [***2632] this Court, ante, ___, 192 L. Ed. 2d at 630, is able to grant this wish, wiping out with a stroke the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.1

II

Even if the doctrine of substantive due process were somehow definable—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority [***109] claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clause.

A

1

As used in the Due Process Clause, "liberty" most likely refers to "the power of loco-moto, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See Davidson v. New Orleans, 96 U.S. 97, 101-102, 24 L. Ed. 616 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseized, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the lawful sentence of law, according to the law of the land." Magna Carta, [***562] ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: [***110] "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any other way destroyed; nor will We not pass upon him except by the lawful judgment of his peers and by the lawful sentence of law, according to the law of the land." Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: [***110] "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any other way destroyed; nor will We not pass upon him except by the lawful judgment of his peers and by the lawful sentence of law, according to the law of the land." 1225 Magna Carta, ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964).

After Magna Carta became subject to renewed interest in the 17th century, see, e.g., ibid., William Blackstone referred to the provision as protecting the "absolute rights of every Englishman." 1 Blackstone 123. And he formulated those absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." 1 Blackstone 125.

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property." 2 State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the Fourteenth Amendment 39 Harv. L. Rev. 431, 441-445 (1926). Even [***112] one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding [***663] classically associated with obtaining freedom from physical restraint. Cl. id., at 444-445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the word "liberty" in Blackstone's time. See id. at 375. And that usage avoids rendering superfluous those protections for "life" and "property." If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See Hurtado v. California, 110 U.S. 516, 524, 4 S. Ct. 111, 28 L. Ed. 232 (1884). Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in [***2634] the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." Ibid. And this Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as [***114] "using "liberty" to mean freedom from physical restraint. In Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77 (1877), for example, the Court recognized the relationship between the

1 The majority states that the right it believes [***109] "is part of the liberty promised by the Due Process Clause is derived, too, from that Amendment's guarantee of the equal protection of the laws." Ante, at ___ 192 L. Ed. 2d at 629. Despite the "synergy" it finds "between the [these] two protections," ante, at ___, 192 L. Ed. 2d at 620, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

2 The "articulation can also be found in Henry Care's in his 1720 treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of England . . . principally regards and taketh Care of," as "Life, Liberty and Estate," and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free. Born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, e.g., id., at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, e.g., id., at 185, 209.

3 Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "[N]o freeman ought to be taken, or imprisoned, or be disinherited of his freehold, liberties, or privileges, outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, by the judgment of his peers, by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 The seal of State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XI (1778), in 6 id., at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 id., at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: ["N]o subject shall be arrested, imprisoned, dispossessed, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, of the law of the land." [***115] Mass. Const., pt. I, Art. XII (1780), in 3 id., at 1891; see also N. H. Const., pt. I, Art. XV (1864), in 4 id., at 2455.
two Due Process Clauses and Magna Carta, see id., at 123-124, 24 L. Ed. 77, and implicitly rejected the dissent's argument that "liberty" encompassed "something more ... than mere freedom from physical restraint or the bounds of a prison," id., at 142-143, 2 Ed. 77 (Field, J., dissenting).

That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the 'liberty' in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom from governmental action, not as a right to a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings on "natural rights and on the social and governmental contract" were cited [in pamphlet after pamphlet] by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the [***115] "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, §4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See id., at 507, at 49. Upon consenting to that order, men obtained civil liberty, [***649] or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." Id., §22, at 13.

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that "Liberty in the State of [***2635] Nature" was the "inherent natural Right" of "each Man" to make a free Use [***117] of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of; but that, "in Society, every Man parts with a Small Share of his natural Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Control." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 G. Hyman & D. Lutz, American Political Writing During the Founding Era 1760-1805, pp. 100, 308, 385 (1993).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed outside of government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L. J. 907, 918-919 (1993). As one later commentator observed, ["l]iberty in the eighteenth century was thought of much more in relation to "negative liberty," that is, freedom from, not freedom to, from intolerable social and political conditions, including arbitrary government power. J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, ["t]he common idea of liberty is merely negative, and is [***116] only the absence of restraint." R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from working after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hey, supra, at 101. Of those examples involved freedoms that existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental [***669] action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold marriage ceremonies in States that recognizes same-sex marriages and private religious ceremonies in [***119] all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approaching a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges [***2636] and benefits that exist solely because of government. They want, for example, to receive the State's [***120] imprimatur on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to lie outside of government's proper purview.

As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between [***121] parents and children." Locke §77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall eds. 2007) (concluding "that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14-556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of [***666] our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabitating in Virginia. Id., at 4, 8-9, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. They [***2637] were each

4

Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature" and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained [***116] by human laws." 1 Blackstone 121-122. And in a "treatise routinely cited by the Founders," Zivotofsky v. Kerry, ante, at 135 S. Ct. 2076, 192 L. Ed. 2d 83 (Thomas, J., concurring in judgment and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a man is subject to, is either in his own actions, or the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." Id., at 147-148.

1 447 U.S. at 132, 100 S. Ct. 2231 (1980). Petitioners and their co-religionists claim that this anticommiscitation law is akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pasco, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1661 law prohibiting marriages between "freeborn English women" and "Negro Slav[ies]" was passed as part of the very act that authorized lifelong slavery in the colony, id., at 19-20. Virginia's anticommiscitation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 2015 Title Insurance & Doc Prep Basics—Endorsements in Texas (Non-Survey and Survey Issues) Page 43
sentenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. Id., at 3, 87 S. Ct. 1917, 19 L. Ed. 2d 1016. In a similar vein, Zablocki v. Redhalah, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978), involved a man who was prohibited, on pain of criminal penalty, from “marry[ing] in Wisconsin or elsewhere” the man with whom he had lived for 30 years, and whom he had adopted. Id., at 377, 98 S. Ct. 673, 54 L. Ed. 2d 618. And Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons. Id., at 107, 107 S. Ct. 2254, 96 L. Ed. 2d 64. In none of these cases were individuals denied solely governmental recognition and benefits associated with marriage.

In a concession to petitioners’ misconception of liberty, the majority characterizes petitioners’ suit as a quest to “find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.” Ante, at ___. But “liberty” is not lost, nor can it be found in the way petitioners [*127] seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority’s “better informed understanding of how constitutional imperatives define . . . liberty,” ante, at ___, is a repository of views on homosexuality. See Brief for Ryan T. Anderson as amicus curiae.

The prohibition extended so far as to forbid even religious marriage ceremonies, thus raising a serious question under the Fourteenth Amendment—runs headlong into the reality that our Constitution is a “collection of ‘Thou shalt nots,’” Reid v. Covert, 354 U.S. 1, 9, 77 S. Ct. 1322, 1 L. Ed. 2d 1148 (1957) (plurality opinion), not “Thou shalt provides.”

III

The majority’s inversion [*125] of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, “give up all the power necessary to the ends for which they unite into society, to the majority of the community,” Locke §99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, id., §22, at 13; see also Hey §§52, 54, at 30-32. To protect that liberty from arbitrary interference, they establish a process by which that society can adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal government as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine any law on which all residents [*2638] of a State would agree. See Locke §98, at 49 (suggesting that [*126] society would cease to function if it required unanimous consent to laws). What matters is that the process established by the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14 146, pp. 37, 378. To protect that liberty from the result; indeed, it seems difficult to imagine any law on which all residents [*2638] of a State would agree. See Locke §98, at 49 (suggesting that [*126] society would cease to function if it required unanimous consent to laws). What matters is that the process established by the society has been honored.

B

Aside from undermining the political processes that protect our liberty, the majority’s decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422-1425 (1990). When they arrived, they created their own havens for [*688] religious practice. [*127] Ibid. Many of these havens were initially homogenous communities with established religions. Ibid. By the 1780’s, however, “America was in the wake of a great religious revival” marked by a move toward free exercise of religion. Id., at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789. Id., at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U.S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to protecting religious rights by codifying protections for religious practice. See, e.g., Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. §2000bb et seq.; Conn. Gen. Stat. §52-571b (2015).

Numerous amici—even some not supporting the States—have cautioned the Court that its decision here will “have unavoidable and wide-ranging implications for religious liberty.” Brief for General Conference of Seventh-Day Adventists et al. as Amici Curiae 5. In our country, marriage is not simply a governmental institution; it is a religious institution as well. Id., at 7. Today’s decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture to reconcile the religious liberty implications of the decision with the majority’s commitment to protecting that liberty. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

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Our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court’s constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority’s decision short-circuits that process, with potentially ruinous consequences for religious liberty.

3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). “It was not until the Civil War threw the future of slavery into [*123] doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made race a basis for all the laws which regulated white and black.” Pascoe, supra, at 27-28. Laws defining marriage as between one man and one woman do not share this sordid history. The majority appears unmoved by that inevitability. It makes only a weak gesture to reconcile the religious liberty implications of the decision with the majority’s commitment to protecting that liberty. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

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The prohibition extended so far as to forbid even religious [*124] ceremonies, thus raising a serious question under the First Amendment’s Free Exercise Clause. As at least one amicus brief at the time pointed out. Brief for John J. Russell et al. as Amici Curiae in Loving v. Virginia, 129 U.S. 148, No. 395, pp. 12-16.

5 Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §§20-80 (1980).
IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the “dignity” of same-sex couples. *Ante, at ___*, 192 L. Ed. 2d, at 619. *[*669]* 625, 633, 635. 8 The flaw in that reasoning, of course, is that the Constitution contains no “dignity” Clause, and even if it did, the government would be incapable of bestowing dignity. Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built. The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority’s musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority [*131*] demean. Its mischaracterization of the arguments presented by the States and their amici can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to [*2640*] mention one’s dignity, was something to be shielded from—not provided by—the State. Today’s decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on “due process” to afford substantive rights, disregards the most plausible understandable meaning of the “liberty” protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution [*132*] and our society. I respectfully dissent.

Justice Alito, with whom Justice Scalia and Justice Thomas join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States [*670*] should recognize same-sex marriage. 7 The question in these cases, however, is not what States should do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the *Due Process Clause of the Fourteenth Amendment* encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today’s majority, it has a distinctively postmodern [*133*] meaning.

To prevent unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that “liberty” under the *Due Process Clause* should be understood to protect only those rights that are “deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor*, 570 U.S. ___*, 133 S. Ct. 2675, 186 L. Ed. 2d 830 (2013) (Alito, J., dissenting). Indeed: “In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003). Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

What [those] arguing in favor of a constitutional right to same sex marriage seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.” *Id., at ___*, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 851 (footnote omitted).

For today’s majority, it does not matter [*134*] that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in [*2641*] the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding [*671*] of the purpose of civil marriage. Although the Court expresses the point in loftier terms, this is an argument that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer [*135*] special benefits on married persons, and also impose some special obligations. This understanding of the States’ reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States’ objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere [*136*] for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women. 2 This development undoubtedly is both a cause and a result of changes in our society’s understanding of marriage.

8 The majority also suggests that marriage confers “nobility” on individuals. *Ante, at ___*, 192 L. Ed. 2d, at 619. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more “noble” [*130*] than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

1 I use the phrase “recognize marriage” as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

2 See, e.g., Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court’s case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing
While, for many, the attributes [***137] of marriage in 21st-century America have changed, those States that do not want to [***2642] recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage’s further decay. It is far beyond the outer reaches of this Court’s authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and [***672] others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in Windsor:

“The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendancy of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.”

“We can expect [***138] something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

“At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people [***139] through their elected officials.”

III

Today’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. E.g., ante at ___; 192 L. Ed. 2d, at 624-625. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent. Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. Ante at ___, 192 L. Ed. 2d, at 633-634. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses [***673] of their homes, but if they repeat [***2643] those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools. The system of federalism established by [***140] our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today’s decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope [***141] of the power that today’s majority claims.

Today’s decision shows that decades of attempts to restrain this Court’s abuse of its authority have failed. A lesson that so

References

3 Civil Rights Actions P 12B.02 (Matthew Bender); Ed Digest, Constitutional Law §§348.5, 525.5; Marriage § 1L Ed Index, Homosexuality; Marriage Rights of, and validity of provisions [***142] ...
### EXHIBIT 3
**FAMILY CODE PROVISIONS**
**COMMON LAW OR INFORMAL MARRIAGE**

<table>
<thead>
<tr>
<th>TEXAS FAMILY CODE § 2.401</th>
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<tbody>
<tr>
<td><strong>§ 2.401. Proof of Inforamal Marriage</strong></td>
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<tr>
<td>(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:</td>
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<td>(1) a declaration of their marriage has been signed as provided by this subchapter; or</td>
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<tr>
<td>(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.</td>
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<tr>
<td>(b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.</td>
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<tr>
<td>(c) A person under 18 years of age may not:</td>
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<tr>
<td>(1) be a party to an informal marriage; or</td>
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<tr>
<td>(2) execute a declaration of informal marriage under Section 2.402.</td>
</tr>
<tr>
<td>(d) A person may not be a party to an informal marriage or execute a declaration of an informal marriage if the person is presently married to a person who is not the other party to the informal marriage or declaration of an informal marriage, as applicable.</td>
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<tr>
<th>TEXAS FAMILY CODE § 2.402</th>
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<tbody>
<tr>
<td><strong>§ 2.402. Declaration and Registration of Informal Marriage</strong></td>
</tr>
<tr>
<td>(a) A declaration of informal marriage must be signed on a form prescribed by the bureau of vital statistics and provided by the county clerk. Each party to the declaration shall provide the information required in the form.</td>
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<tr>
<td>(b) The declaration form must contain:</td>
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<tr>
<td>(1) a heading entitled &quot;Declaration and Registration of Informal Marriage, ________ County, Texas&quot;;</td>
</tr>
<tr>
<td>(2) spaces for each party's full name, including the woman's maiden surname, address, date of birth, place of birth, including city, county, and state, and social security number, if any;</td>
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<tr>
<td>(3) a space for indicating the type of document tendered by each party as proof of age and identity;</td>
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</table>
| (4) printed boxes for each party to check "true" or "false" in response to the following statement: "The other party is not related to me as:"

- (A) an ancestor or descendant, by blood or adoption;  
- (B) a brother or sister, of the whole or half blood or by adoption;  
- (C) a parent's brother or sister, of the whole or half blood or by adoption;  
- (D) a son or daughter of a brother or sister, of the whole or half blood or by adoption;  
- (E) a current or former stepchild or stepparent; or  
- (F) a son or daughter of a parent's brother or sister, of the whole or half blood or by adoption.";  

(5) a printed declaration and oath reading: "I SOLEMNLY SWEAR (OR AFFIRM) THAT WE, THE UNDERSIGNED, ARE MARRIED TO EACH OTHER BY VIRTUE OF THE FOLLOWING FACTS: ON OR ABOUT (DATE) WE AGREED TO BE MARRIED, AND AFTER THAT DATE WE LIVED TOGETHER AS HUSBAND AND WIFE AND IN THIS STATE WE REPRESENTED TO OTHERS THAT WE WERE MARRIED. SINCE THE DATE OF MARRIAGE TO THE OTHER PARTY I HAVE NOT BEEN MARRIED TO ANY OTHER PERSON. THIS DECLARATION IS TRUE AND THE INFORMATION IN IT WHICH I HAVE GIVEN IS CORRECT.";  

(6) spaces immediately below the printed declaration and oath for the parties' signatures; and  

(7) a certificate of the county clerk that the parties made the declaration and oath and the place and date it was made. |
| (c) [Repealed by Acts 1997, 75th Leg., ch. 1362 (H.B. 891), § 4, effective September 1, 1997.] |

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<tr>
<th>TEXAS FAMILY CODE § 2.403</th>
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<tr>
<td><strong>§ 2.403. Proof of Identity and Age; Offense</strong></td>
</tr>
<tr>
<td>(a) The county clerk shall require proof of the identity and age of each party to the declaration of informal marriage to be established by a document listed in Section 2.005(b).</td>
</tr>
<tr>
<td>(b) A person commits an offense if the person knowingly provides false, fraudulent, or otherwise inaccurate proof of the person's identity or age under this section. An offense under this subsection is a Class A misdemeanor.</td>
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</table>
§ 2.404. Recording of Certificate or Declaration of Informal Marriage

(a) The county clerk shall:
   (1) determine that all necessary information is recorded on the declaration of informal marriage form and that all necessary documents are submitted to the clerk;
   (2) administer the oath to each party to the declaration;
   (3) have each party sign the declaration in the clerk's presence; and
   (4) execute the clerk's certificate to the declaration.

(a-1) On the proper execution of the declaration, the clerk may:
   (1) prepare a certificate of informal marriage;
   (2) enter on the certificate the names of the persons declaring their informal marriage and the date the certificate or declaration is issued; and
   (3) record the time at which the certificate or declaration is issued.

(b) The county clerk may not certify the declaration or issue or record the certificate of informal marriage or declaration if:
   (1) either party fails to supply any information or provide any document required by this subchapter;
   (2) either party is under 18 years of age; or
   (3) either party checks "false" in response to the statement of relationship to the other party.

(c) On execution of the declaration, the county clerk shall record the declaration or certificate of informal marriage, deliver the original of the declaration to the parties, deliver the original of the certificate of informal marriage to the parties, if a certificate was prepared, and send a copy of the declaration of informal marriage to the bureau of vital statistics.

(d) An executed declaration or a certificate of informal marriage recorded as provided in this section is prima facie evidence of the marriage of the parties.

(e) At the time the parties sign the declaration, the clerk shall distribute to each party printed materials about acquired immune deficiency syndrome (AIDS) and human immunodeficiency virus (HIV). The clerk shall note on the declaration that the distribution was made. The materials shall be prepared and provided to the clerk by the Texas Department of Health and shall be designed to inform the parties about:
   (1) the incidence and mode of transmission of AIDS and HIV;
   (2) the local availability of medical procedures, including voluntary testing, designed to show or help show whether a person has AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS; and
   (3) available and appropriate counseling services regarding AIDS and HIV infection.
§ 3604. Discrimination in the sale or rental of housing and other prohibited practices.

As made applicable by section 803 [42 USCS § 3603] and except as exempted by sections 803(b) and 807 [42 USCS §§ 3603(b), 3607], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f) (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—
   (A) that buyer or renter;
   (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
   (C) any person associated with that buyer or renter.
   (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—
   (A) that person; or
   (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
   (C) any person associated with that person.
   (3) For purposes of this subsection, discrimination includes—
   (A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;
   (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or
   (C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after the date of enactment of the Fair Housing Amendments Act of 1988 [enacted Sept. 13, 1988], a failure to design and construct those dwellings in such a manner that—
      (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
      (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
      (iii) all premises within such dwellings contain the following features of adaptive design:
         (I) an accessible route into and through the dwelling;
         (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
         (III) reinforcements in bathroom walls to allow later installation of grab bars; and
         (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

   (4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).
   (5) (A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.
   (B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.
   (C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).
(D) Nothing in this title shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6) (A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 810(f)(3) of this Act [42 USCS § 3610(f)(3)] to receive and process complaints or otherwise engage in enforcement activities under this title.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this title.

(7) As used in this subsection, the term "covered multifamily dwellings" means--

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this title shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this title.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.
EXHIBIT 5
CALIFORNIA GOVERNMENT CODE § 12955

§ 12955. Unlawful practices
It shall be unlawful:

(a) For the owner of any housing accommodation to discriminate against or harass any person because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information of that person.

(b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, disability, or genetic information of any person seeking to purchase, rent, or lease any housing accommodation.

(c) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information or an intention to make that preference, limitation, or discrimination.

(d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, to discriminate against any person on the basis of sex, gender, gender identity, gender expression, sexual orientation, color, race, religion, ancestry, national origin, familial status, marital status, disability, genetic information, source of income, or on any other basis prohibited by that section. Selection preferences based on age, imposed in connection with a federally approved housing program, do not constitute age discrimination in housing.

(e) For any person, bank, mortgage company or other financial institution that provides financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information in the terms, conditions, or privileges relating to the obtaining or use of that financial assistance.

(f) For any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner's dominant purpose is retaliation against a person who has opposed practices unlawful under this section, inquired law enforcement agencies of practices believed unlawful under this section, has testified or assisted in any proceeding under this part, or has aided or encouraged a person to exercise or enjoy the rights secured by this part. Nothing herein is intended to cause or permit the delay of an unlawful detainer action.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so.

(h) For any person, for profit, to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, ancestry, disability, genetic information, source of income, familial status, or national origin.

(i) For any person or other organization or entity whose business involves real estate-related transactions to discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, source of income, familial status, disability, or genetic information.

(j) To deny a person access to, or membership or participation in, a multiple listing service, real estate brokerage organization, or other service because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, ancestry, disability, genetic information, source of income, or national origin.

(k) To otherwise make unavailable or deny a dwelling based on discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, source of income, disability, genetic information, or national origin.

(l) To discriminate through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, genetic information, national origin, source of income, or ancestry. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable. Discrimination under this subdivision also includes the existence of a restrictive covenant, regardless of whether accompanied by a statement that the restrictive covenant is repealed or void. This paragraph shall become operative on January 1, 2001.

(m) As used in this section, “race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information,” includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(n) To use a financial or income standard in the rental of housing that fails to account for the aggregate income of persons residing together or proposing to reside together on the same basis as the aggregate income of married persons residing together or proposing to reside together.
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CALIFORNIA GOVERNMENT CODE § 12955</strong></td>
<td></td>
</tr>
<tr>
<td>(o) In instances where there is a government rent subsidy, to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant.</td>
<td></td>
</tr>
<tr>
<td>(p) (1) For the purposes of this section, “source of income” means lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant. For the purposes of this section, a landlord is not considered a representative of a tenant.</td>
<td></td>
</tr>
<tr>
<td>(2) For the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income.</td>
<td></td>
</tr>
</tbody>
</table>
### EXHIBIT 6
**AUSTIN ORDINANCES**

#### AUSTIN ORDINANCES § 5-1-13

<table>
<thead>
<tr>
<th>§ 5-1-13 - DEFINITIONS.</th>
</tr>
</thead>
<tbody>
<tr>
<td>In this article:</td>
</tr>
<tr>
<td>(13) DWELLING means:</td>
</tr>
<tr>
<td>(a) a building, structure, or part of a building or structure that is occupied as, or designed or intended for occupancy as, a residence by one or more families; or</td>
</tr>
<tr>
<td>(b) vacant land that is offered for sale or lease for the construction or location of a building, structure or part of a building or structure described in Subsection (a).</td>
</tr>
<tr>
<td>(17) GENDER IDENTITY means a person’s various individual attributes, actual or perceived, that may be in accord with or sometimes opposed to, one’s physical anatomy, chromosomal sex, genitalia, or sex assigned at birth.</td>
</tr>
<tr>
<td>(23) SEXUAL ORIENTATION means an individual’s sexual preference or practice including homosexuality, heterosexuality, or bisexuality.</td>
</tr>
</tbody>
</table>

`Source: 1992 Code Section 7-1-22; Ord. 031106-12; Ord. 031211-11; Ord. 040610-7; Ord. 20051215-010; Ord. No. 20141211-050, Pt. 2, 1-12-15.`

#### AUSTIN ORDINANCES § 5-1-14

<table>
<thead>
<tr>
<th>§ 5-1-14 - CERTAIN SALES AND RENTALS EXEMPTED.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) Subject to Subsection (B), Division 3 (Prohibitions Against Discrimination) does not apply to:</td>
</tr>
<tr>
<td>(1) The sale or rental of a single-family house sold or rented by an owner if:</td>
</tr>
<tr>
<td>(a) the owner does not:</td>
</tr>
<tr>
<td>(i) own more than three single-family houses at any one time; or</td>
</tr>
<tr>
<td>(ii) own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to any right to any part of the proceeds from the sale or rental of more than three single-family houses at any one time; and</td>
</tr>
<tr>
<td>(b) the house was sold or rented without:</td>
</tr>
<tr>
<td>(i) the use of the services or facilities of a real estate agent or any other person in the business of selling or renting real estate; or</td>
</tr>
<tr>
<td>(ii) the publication, posting, or mailing of a notice, statement or advertisement prohibited by Section 5-1-52 (Publication Indicating Discrimination).</td>
</tr>
<tr>
<td>(2) The sale or rental of rooms or units in a dwelling containing living quarters occupied or intended to be occupied by no more than four families living independently of each other if the owner maintains and occupies one of the living quarters of the owner’s residence, except that the prohibition against discriminatory advertising shall apply to dwellings described in this paragraph.</td>
</tr>
<tr>
<td>(B) The exemption in Subsection (A)(1) applies only to one sale or rental in a 24-month period if the owner did not reside in the house at the time of sale or rental or was not the most recent resident of the house prior to the sale or rental.</td>
</tr>
</tbody>
</table>

`Source: 1992 Code Section 7-1-23; Ord. 031106-12; Ord. 031211-11; Ord. 040610-7.`
§ 5-1-15 - RELIGIOUS ORGANIZATION AND PRIVATE CLUB EXEMPTION.

(A) This article does not prohibit a religious organization, association, or society, or a nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from:

(1) limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion, unless membership in the religion is restricted because of race, color, or national origin; or

(2) giving preference to persons of the same religion unless membership in the religion is restricted because of race, color, or national origin.

(B) This article does not prohibit a private club not in fact open to the public that, as an incident to its primary purpose, provides lodging that it owns or operates for other than a commercial purpose from limiting the rental or occupancy of that lodging to its members or from giving preference to its members.

Source: 1992 Code Section 7-1-24; Ord. 031106-12; Ord. 031211-11; Ord. 040610-7.

§ 5-1-16 - HOUSING FOR ELDERLY EXEMPTED.

The provisions of this article relating to familial status do not apply to housing for older persons.

Source: 1992 Code Section 7-1-25; Ord. 031106-12; Ord. 031211-11; Ord. 040610-7.

§ 5-1-51 - DISCRIMINATION IN SALE OR RENTAL OF HOUSING.

(A) A person may not refuse to sell or rent a dwelling to a person who has made a bona fide offer; refuse to negotiate for the sale or rental of a dwelling; or otherwise make unavailable or deny to a dwelling to any person based on race, color, religion, sex, sexual orientation, gender identity, age, familial status, disability, marital status, student status, creed, national origin, or source of income.

(B) A person may not discriminate against a person in the terms, conditions, or privileges of sale or rental of a dwelling or in providing services or facilities in connection with the sale or rental, based on race, color, religion, sex, sexual orientation, gender identity, age, familial status, disability, marital status, student status, creed, national origin, or source of income.

(C) This section does not prohibit discrimination against a person because the person has been convicted under federal law or the law of any state of the illegal manufacture or distribution of a controlled substance, but does not permit discrimination based on a disability.

Source: 1992 Code Section 7-1-50; Ord. 031106-12; Ord. 031211-11; Ord. 040610-7; Ord. 20051215-010; Ord. No. 20141211-050, Pt. 3, 1-12-15.

§ 5-1-52 - PUBLICATION INDICATING DISCRIMINATION.

A person may not make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status, marital status, student status, creed, national origin, or source of income, or an intention to make such a preference, limitation, or discrimination.

Source: 1992 Code Section 7-1-51; Ord. 031106-12; Ord. 031211-11; Ord. 040610-7; Ord. 20051215-010; Ord. No. 20141211-050, Pt. 3, 1-12-15.
<table>
<thead>
<tr>
<th>STATE</th>
<th>DATE</th>
<th>MILESTONES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>February 9, 2015</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>Alaska</td>
<td>October 12, 2014</td>
<td>A federal judge issues a ruling allowing gay marriages in the state.</td>
</tr>
<tr>
<td>Arizona</td>
<td>October 17, 2014</td>
<td>U.S. District Court Judge John Sedwick strikes down Arizona's gay marriage</td>
</tr>
<tr>
<td>Arkansas</td>
<td>June 28, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>California</td>
<td>June 28, 2013</td>
<td>Same-sex marriages resume in California.</td>
</tr>
<tr>
<td>Colorado</td>
<td>October 6, 2014</td>
<td>Following the ruling by the 10th Circuit Court of Appeals, gay marriage</td>
</tr>
<tr>
<td>Connecticut</td>
<td>October 10, 2008</td>
<td>High court rules gay couples can marry.</td>
</tr>
<tr>
<td>Delaware</td>
<td>July 1, 2013</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>March 9, 2010</td>
<td>The District of Columbia joins Connecticut, Iowa, Massachusetts, New</td>
</tr>
<tr>
<td>Florida</td>
<td>January 6, 2015</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>Georgia</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Hawaii</td>
<td>November 13, 2013</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>Idaho</td>
<td>October 15, 2014</td>
<td>County clerks begin issuing marriage licenses to same-sex couples.</td>
</tr>
<tr>
<td>Illinois</td>
<td>June 1, 2014</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>Indiana</td>
<td>October 6, 2014</td>
<td>The U.S. Supreme Court turns down pending appeals in gay marriage cases.</td>
</tr>
<tr>
<td>Iowa</td>
<td>April 3, 2009</td>
<td>High court overturns ban on gay marriage.</td>
</tr>
<tr>
<td>Kansas</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Kentucky</td>
<td>June 28, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Louisiana</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Maine</td>
<td>November 6, 2012</td>
<td>Voters in Maine approve same-sex marriage.</td>
</tr>
<tr>
<td>Maryland</td>
<td>January 1, 2013</td>
<td>Gay marriage is legal in Maryland.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>May 17, 2004</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>Michigan</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Minnesota</td>
<td>August 1, 2013</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Missouri</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Montana</td>
<td>November 19, 2014</td>
<td>A federal judge strikes down the state's ban on same-sex marriage.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Nevada</td>
<td>September 9, 2014</td>
<td>Nevada begins issuing marriage licenses after the U.S. 9th Circuit Court of</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>January 1, 2010</td>
<td>Law allowing same-sex marriage goes into effect.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>October 21, 2013</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>December 19, 2013</td>
<td>New Mexico's high court rules it is unconstitutional to deny marriage</td>
</tr>
<tr>
<td>North Carolina</td>
<td>October 10, 2014</td>
<td>A federal District Court judge rules that the state's ban on gay marriages</td>
</tr>
<tr>
<td>North Dakota</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Ohio</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>October 6, 2014</td>
<td>The U.S. Supreme Court turns down pending appeals in gay marriage cases.</td>
</tr>
<tr>
<td>Oregon</td>
<td>May 19, 2014</td>
<td>Federal judge overturns Oregon gay marriage ban; licenses issued.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>May 20, 2014</td>
<td>A federal judge in Harrisburg, Pa., rules that Pennsylvania's 1996 ban on</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>August 1, 2013</td>
<td>Gay marriage is legal.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>November 20, 2014</td>
<td>In a 7-2 decision the U.S. Supreme Court denies an emergency stay of same-</td>
</tr>
<tr>
<td>South Dakota</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Tennessee</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Texas</td>
<td>June 26, 2015</td>
<td>The U.S. Supreme Court ruled that same-sex couples have a constitutional</td>
</tr>
<tr>
<td>Utah</td>
<td>October 6, 2014</td>
<td>The U.S. Supreme Court rules gay marriages to be legal.</td>
</tr>
<tr>
<td>Vermont</td>
<td>April 7, 2009</td>
<td>Gay marriage is legalized.</td>
</tr>
<tr>
<td>Virginia</td>
<td>October 6, 2014</td>
<td>The U.S. Supreme Court turns down pending appeals in gay marriage cases.</td>
</tr>
<tr>
<td>Washington</td>
<td>November 6, 2012</td>
<td>Voters in Washington approve same-sex marriage.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>October 9, 2014</td>
<td>The state's attorney general says he will seek to end all litigation</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>October 6, 2014</td>
<td>The U.S. Supreme Court turns down pending appeals in gay marriage cases.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>October 21, 2014</td>
<td>Wyoming Atty. Gen. Peter Michael says the state won't appeal the U.S.</td>
</tr>
</tbody>
</table>

BACKGROUND

- *Baehr v. Levin* and HAWAII’S foray into the issue in **1993**
- The *Defense of Marriage Act (DOMA)* in **1996**
- Full Faith and Credit
- Federal definition of **MARRIAGE**
APPROVALS RAISE THE BAR

- NETHERLANDS 2001
  the first Country

- MASSACHUSETTS 2003
  the first State

Goodridge v. Department of Public Health

THE ISSUE JOINED

- States Constitutional Amendments
- 11 adopted 6 MONTHS after Goodridge v. Department of Public Health in 2004
- TEXAS AMENDMENT 2005


WINDSOR DECISION

UNITED STATES V. WINDSOR

- Factual background
- 2 Sections of **DOMA** (Recognition and Definition)
- Federal definition **UNCONSTITUTIONAL**
- Dissent

SUCCEEDING FEDERAL CASES

- District Court decisions ruling prohibitions **UNCONSTITUTIONAL**
- Circuits ruling **in favor of SAME-SEX MARRIAGE**
OBERGEFELL

OBERGEFELL V. HODGES

- Plaintiffs
- KENNEDY delivers Opinion
- Due Process and Equal Protection
- All States

DISSENT

- Roberts
  Government of Laws, Not of Men
- Scalia
  Tall-Building Lawyers, Fortune Cookies
- Thomas
  No Dignity Clause
SOME PRINCIPLES

- Prohibitions **UNCONSTITUTIONAL** and **retroactive**
- Same-sex marriage **valid before June 26, 2015** entitled to **RECOGNITION**
- Same properties rights for same-sex married couples
- **If OBERGEFELL** retroactive:
  - then marriage elsewhere entitled to recognition
  - could have common law marriage
- **Pew** and **Gallup** and **Millenials**

CRITICAL DATES

- **NOVEMBER 18, 2003**—first ceremonial marriage
- **JUNE 26, 2015**—Obergefell decision
- **ANY DATE** for common law marriage where allowed
- **LIMITATIONS PERIODS**
- **BFP** and **PRACTICAL CONCERNS**
RECENT TEXAS DEVELOPMENTS

- *De Leon v. Abbott*
  “recognizing same-sex marriage”

- **ATTORNEY GENERAL OPINION** and **Texas Religious Freedom Restoration Act (RFRA)**

MEANING OF UNCONSTITUTIONALITY

- **Mr. Cooley**

- **JUSTICE FIELD**

- **Boales**
  - Declaration of fact, since lifeless and fatally smitten at birth
EXAMPLES OF RETROACTIVE APPLICATION OF STATE LAWS

- **Homestead** (e.g. Rural Homestead)
- Community Property
- Management Rules
- Intestate Succession

COMMON LAW MARRIAGE

- **Texas** and elsewhere
- Texas Family Code § 2.401
- Phrasavath and Powell
- Jitsch and Parker
VESTING OF TITLE AND MARITAL HISTORY

- Example of VESTING
- Example of Requirements
- Owner's Title Insurance Policies
  - Not insure marital status

ANTI-DISCRIMINATION LAWS

- 42 U.S.C. § 3604
- STATES (e.g. California)
- CITIES (e.g. Austin)
TREATMENT OF DISCRIMINATORY CCRS

- *Mayers v. Ridley*
- **COUNTY CLERKS** (e.g. Rodeheaver)
- **Disclaimer** by County Clerk

CCR EXCEPTION

- **ALTA STANDARD EXCEPTION**
- **Other Examples**
- **Proposed Disclaimer**
PROHIBITION ON PUBLICATION

- Omit
- Say Omitted
- DISCLAIMER

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