

ISSUE

Selected, Edited, and with Issue Framing Material by:
Thomas J. Hickey, State University of New York at Cobleskill



Should Same-sex Marriage Be Lawful in the United States?

YES: Anthony Kennedy, from "Majority Opinion, *Obergefell v. Hodges*," United States Supreme Court (2015)
NO: Antonin Scalia, from "Dissenting Opinion, *Obergefell v. Hodges*," United States Supreme Court (2015)

Learning Outcomes

After reading this issue, you will be able to:

- Discuss the U.S. Supreme Court's rulings in *Griswold v. Connecticut* (1965).
- Discuss the U.S. Supreme Court's rulings in *Bowers v. Hardwick* (1986) and *Lawrence v. Texas* (2005).
- Discuss the Constitutional "Right to Privacy."
- Discuss whether a Constitutional "Right to Privacy" should protect the right of same-sex couples to be married in the United States.
- Discuss whether the U.S. Supreme Court should "find or discover implied rights" in the U.S. Constitution.

ISSUE SUMMARY

YES: Justice Anthony Kennedy asserts 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.

NO: The late Justice Antonin Scalia argues that the Court's majority in this case effectively establishes that the Supreme Court is the "Ruler" of 320 million Americans. This decision is the furthest extension one can imagine of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention.

Most Americans are keenly aware that they are protected by the U.S. Constitution and they have a variety of "Constitutional Rights." For example, the First Amendment provides several different rights including the freedom of speech, freedom of the press, the right to petition the government for redress of grievances, freedom of religion, and freedom of assembly. Likewise, the Fifth Amendment expressly states that, among other things, we have a right to due process of law, the right to be free from self-incrimination, and the right to be free from double jeopardy. There is little question about the legitimacy and

origin of rights such as these: they are clearly and unequivocally stated in the text of the Bill of Rights.

More controversial, however, are those rights that the U.S. Supreme Court has determined are "implied" by the Constitution. This controversy has existed throughout our nation's history and is still not resolved today. Proponents of "implied rights" believe that the Constitution is not static and must evolve as the American people change. For example, the Constitution's framers could not have envisioned the computer age and the various legal challenges it would pose. Opponents of implied rights, on the other hand, emphasize that it should not be the job of the

Supreme Court to "find" or "discover" rights in the Constitution; rather, the job of establishing new rights should be left to the Congress and state legislatures. In fact, some justices have even asserted that when the Supreme Court does find implied rights in the Constitution, it is acting as a "super-legislature" that is violating the separation of powers principle by doing the job of the legislative branches.

The case excerpted in this section illustrates the dilemma. It involved 14 same-sex couples and two men whose same-sex partners were deceased. They asserted, among other things, that Michigan, Kentucky, Ohio, and Tennessee, which defined marriage as a union between one man and one woman, violated the Fourteenth Amendment. Justice Kennedy, writing for the majority, observed that the Court had first given detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U.S. 186 (1986), where it upheld the constitutionality of a Georgia law that criminalized homosexual sodomy. Several years later, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court overruled *Bowers*, holding that a Texas law that made same-sex intimacy a crime "demea[ned] the lives of homosexual persons." It further held that a constitutional right to privacy, recognized previously in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was broad enough to protect the right of same-sex couples to engage in intimate relations in the privacy of their own homes. *Griswold* involved a Connecticut law that among other things had prohibited the sale of contraceptives to heterosexual couples. Writing for the Court's majority, justice William O. Douglas asserted that certain protections in the Bill of Rights formed a "penumbra," that was broad enough to protect a zone of privacy that the State could not regulate. The Court later held that the same privacy principle protected a woman's right to an abortion during the first trimester of the gestation process in *Roe v. Wade*, 410 U.S. 113 (1973).

Obergefell v. Hodges further extended the privacy principle. Justice Kennedy stated several reasons that marriage is a fundamental right that States may not restrict to heterosexual couples only. First, the right to personal

choice regarding marriage is inherent in the concept of individual autonomy. Second, the right to privacy protects the right of same-sex couples to marry because it "supports a two-person union unlike any other in its importance to the committed individuals. A third reason for protecting the right to marry 'is that it safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education. Therefore, denying same-sex couples the right to marry violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment."

The late justice Antonin Scalia, in a Dissenting Opinion, disputed the majority's holding. Justice Scalia believed that decisions about the legality of same-sex marriage should be left to the legislative branch of government. Scalia Stated: "This is a naked judicial claim to legislative—indeed *super*-legislative power; a claim fundamentally at odds with 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."

After reading the excerpts from *Obergefell v. Hodges*, where do you stand on this highly controversial issue? Should the U.S. Supreme Court have declared that an implied Constitutional right to privacy was broad enough to protect the right of same-sex couples to be married? Or, should the Court have sanctioned the right of state legislatures to pass laws that outlaw same-sex marriage? Are there any limits on how far the Supreme Court could go in recognizing "implied rights" in the Constitution? For example, could the Court at some future date establish a right of persons who desire to enter into multiple-party marriages? Do you think it possible to "love the outcome" of *Obergefell v. Hodges*, while at the same time recognizing that the dissenting justices may have a point about the Supreme Court acting as a "super-legislature"?



YES ←

Majority Opinion, *Obergefell v. Hodges*

Anthony Kennedy

Justice Kennedy delivered the opinion of the court. 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, and Tennessee, states that define marriage as a union between one man and one woman. 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. 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 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 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, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 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." 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 references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and

lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

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 relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis. 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 the rest of time" App. In No. 14-556, and so on, 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 relation 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 Ijpe 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 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 the Nation's founding, it was understood to be a voluntary contract between a man and a woman. 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. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. 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.

These new insights have 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 persons did not deem homosexual 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 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.

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. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

In the late 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 sectors 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 (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. 620 (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 "demean the lives of homosexual persons" *Lawrence v. Texas*, 539 U.S. 558, 575.

Against this background, 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 strict scrutiny under the Hawaii Constitution, *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too 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.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts 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. ____ (2013), this court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court 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 ____ (slip op., at 14).

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After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, *The State of Marriage Equality in America*, State-by-State Supp. (2015).

III

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. See *Duncan v. Louisiana*, 391 U.S. 145, 147-149 (1968). In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, for example,

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-486 (1965).

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, 542 (1961; Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect (see *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. That method respects our history and learns from it without allowing the past alone to rule the present.

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 new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12 (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."

...

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 on history, tradition, and other constitutional liberties inherent in this intimate bond. . . .

This analysis compels the conclusion that same-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. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the

Due Process Clause. 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, the Court has noted 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 our society." (*Zablocki*, *supra*, at 386).

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils 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 322, 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 _____ - _____ (slip op., at 22-23). 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. Cf. *Loving*, *supra*, at 12. ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.")

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. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U.S., at 485. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; and a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. *Id.*, at 486.

...

Windsor, *supra*, at _____ (slip op., at 14). 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 and understanding and assurance that

while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, 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 "[w]hen 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." 539 U.S., at 567. 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 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. The court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home, and bring up children' is a central part of the liberty protected by the Due Process Clause." Under the laws of the several 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 concord with other families in their community and in their daily lives." *Windsor*, *supra*, at ____ (slip op., at 23). Marriage also affords the permanency and stability important to children's best interests.

As all parties agree, many 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. Most States have allowed 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 the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of 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 here thus harm and humiliate the children of same-sex couples.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. 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 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:

There is certainly no country in the world 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.

In *Maynard v. Hill*, 125 U.S. 190, 211 (1888), the court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "a great public institution, giving character to our whole civil polity." *Id.*, at 213. This idea has been reiterated 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.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

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 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 marriage all 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 transcendent 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.

...

The right to marry is fundamental as a 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. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

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 coextensive, 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 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 Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

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. *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 await 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. . . .

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

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 the Constitution "was 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." It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

...

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 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.

V

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 complication[s]" in the law of domestic relations. 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 or friends risks causing severe hardship in the event 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 already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

...

The court, in 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 to 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.

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

It is so ordered.

ANTHONY KENNEDY is the senior associate justice of the Supreme Court. He attended Stanford University, the London School of Economics, and Harvard Law School. Appointed to the Supreme Court in 1988, he has been the swing vote on many of the Supreme Court's recent 5-4 decisions.

Antonin Scalia

Dissenting Opinion, *Obergefell v. Hodges*

Justice Scalia, with whom justice Thomas joins, dissenting.

... I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval 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. 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 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

decided not to. 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, infringing the right to keep and bear arms, authorizing unreasonable searches and seizures, and so forth. Aside from these limitations, those powers "reserved to the States, respectively, or to the people" 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 *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same justices who join him today):

[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.

[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague



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constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mumblings and straining-to-be-memorable passages of the opinion is a candid and startling assertion: no matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its “reasoned judgment,” thinks the Fourteenth Amendment ought to protect. That is so because “[t]he 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” 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.” The “we,” needless to say, is the nine of us. “History and tradition guide and discipline [our] inquiry but do not set its outer boundaries.” 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.

This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with 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-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about $\frac{1}{4}$ of Americans) or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today’s social upheaval would be irrelevant if they were functioning as judges, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the justices in today’s majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today’s judicial Putsch. 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 marriages in 2003. They have discovered in the Fourteenth Amendment 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 certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their “reasoned judgment.” These justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, 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 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 can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] 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" 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 pop-philosophy; 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.

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The judiciary is the "least dangerous" of the federal branches because it has "neither force nor will, but merely judgment; and must ultimately depend 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 unabashedly 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.

ANTONIN SCALIA was an associate justice of the U.S. Supreme Court from 1986 until he died in 2016. He attended Harvard University, Georgetown University, and Harvard Law School. He has been described as the court's intellectual anchor for the originalist philosophy among Supreme Court conservatives.



EXPLORING THE ISSUE

Should Same-sex Marriage Be Lawful in the United States?



Critical Thinking and Reflection

1. What did the U.S. Supreme Court hold in *Griswold v. Connecticut* (1965) and how did it influence its decision in *Obergefell v. Hodges*?
2. Discuss the U.S. Supreme Court's rulings in *Bowers v. Hardwick* (1986) and *Lawrence v. Texas* (2005).
3. Discuss the Constitutional "Right to Privacy."
4. Should a Constitutional "Right to Privacy" should protect the right of same-sex couples to be married in the United States?
5. Should the Supreme Court find or discover "implied rights" in the U.S. Constitution?

Is There Common Ground?

Whether the Supreme Court should recognize "implied rights" in the United States Constitution is one of the more contentious issues in American Constitutional law. Some people believe that it is imperative for the Supreme Court to do so: the framers of the Constitution could not have envisioned the future social and legal challenges that the Supreme Court would face. A static Constitution grounded in 1786 would not have kept up with the exigencies of modern life. From this perspective, the Constitution is a "living" document that must keep pace with changes in society.

It is noteworthy that one of the Dissenting Opinions in *Obergefell* asserted that the U.S. Constitution does not enshrine John Stuart Mill's conception of *liberty*. While it would have been an easy passage to miss, the point the dissent is making is a very interesting one. Mill's conception of liberty asserted that all persons should be free to engage in any conduct they wished, as long as their behavior did not harm others. Do you believe that this principle should apply to same-sex marriage? Or, does same-sex marriage erode the essential foundation of society, the traditional nuclear family? And, should the U.S. Supreme Court be the ultimate arbiter of this contentious debate in American society? Or, should an issue such as this be left to the legislative branches to decide? These are difficult questions. Taking issue with the Dissenting Opinion mentioned above, perhaps the best common ground that may result

from *Obergefell v. Hodges* is the acceptance of Mill's perception of liberty and the recognition of the legitimacy of the choices that other people may make, even if those choices conflict with our personal viewpoints or religious philosophies. Marriage confers many benefits on persons in our society. In the final analysis, it does not seem right to deny those benefits to persons simply because of their sexual orientation, just as it was not right to deny the opportunity to marry to members of different racial groups. *Loving v. Virginia*, 388 U.S. 1 (1967), established this principle almost 50 years ago and it has come to be widely accepted in American society. Perhaps we may also hope that in the future, the United States will evolve to accept same-sex marriage in the same manner.

Additional Resources

Ryan T. Anderson, Tony Evans & Robert P. George, "One Year after Obergefell." *National Review*, June 25, 2016.

Amy Davidson Sorkin, "The Here and Now of Same-sex Marriage." *The New Yorker*, April 28, 2015.

Supreme Court of the United States, "Party Briefs on the Merits." *Obergefell v. Hodges*. Washington, D.C.

Robert Barnes, "Supreme Court Rules Gay Couples Nationwide Have a Right to Marry." *The Washington Post*, June 26, 2015.