

Obergefell v. Hodges **135 S. Ct. 2584 (2015)**

I. INTRODUCTION

The Fourteenth Amendment to the United States Constitution provides for both due process and equal protection under the laws.¹ Just what those two nebulous phrases mean has been a subject of much debate throughout the country's history, and remains so today. However, both clauses have been used to justify—and strike down—countless state laws concerning issues across the board. The Supreme Court of the United States signaled the beginning of the end—some say the death knell²—of the hotly contested issue of same-sex marriage with the landmark 2015 decision in *Obergefell v. Hodges*,³ in which the court upheld same-sex couples' fundamental right to marry on grounds of both equal protection and substantive due process.⁴

For much of the United States' storied past, homosexual conduct was considered a crime.⁵ However, following the Court's overruling of *Bowers v. Hardwick*⁶ in 2003,⁷ and with the striking down of section 3 of the Defense of Marriage Act,⁸ the Court seemed to turn the corner toward acceptance, assuming the role of keeping the Constitution "in tune with the times."⁹ Following a line of cases that deemed marriage a fundamental right,¹⁰ the Court has now included same-sex couples as holders of the same right.¹¹ Specifically, the *Obergefell* Court held that it is unconstitutional for

1. U.S. CONST. amend. XIV, § 1.

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) (“[T]he Court ends this debate in an opinion lacking even a thin veneer of law.”).

3. 135 S. Ct. 2584.

4. *Id.* at 2604 (“[T]he 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.”)

5. *See, e.g.*, TEX. PENAL CODE ANN. § 21.06(a) (Westlaw 2003).

6. 478 U.S. 186 (1986) (ruling that Georgia's sodomy statute did not violate the fundamental rights of homosexuals).

7. *See* *Lawrence v. Texas*, 539 U.S. 558, 594 (2003) (overruling *Bowers* and striking down a Texas statute forbidding homosexual conduct).

8. *See* *United States v. Windsor*, 133 S. Ct. 2675 (2013) (DOMA's definition of both “marriage” and “spouse” for federal purposes violated citizens' constitutional rights on grounds of both equal protection and due process).

9. *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965).

10. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Virginia statute banning interracial marriage violates both Equal Protection and Due Process Clauses); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Wisconsin statute requiring fathers with delinquent child support to obtain a court order to remarry substantially burdens the fundamental right to marriage and declared unconstitutional on equal protection grounds); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (Missouri marriage regulation interfered with prison inmates' constitutional rights).

11. *Obergefell*, 135 S. Ct. at 2604.

states to bar same-sex couples from marrying and, as a result, may not refuse to recognize a lawful same-sex marriage performed in another state.¹²

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Fourteen same-sex couples, hailing from Ohio, Michigan, Kentucky, and Tennessee, brought suit in their respective district courts alleging respondents violated their Fourteenth Amendment rights by denying them—or refusing to recognize—their right to marry.¹³ Each of the several district courts ruled in favor of the same-sex marriage proponents.¹⁴ Respondents appealed and the cases were consolidated by the Court of Appeals for the Sixth Circuit, who reversed the judgments of the various district courts; holding that a state is not constitutionally mandated to legalize same-sex marriage or to recognize such marriages performed in other states.¹⁵ The Supreme Court of the United States then granted certiorari on two issues: (1) whether the Fourteenth Amendment requires a state to license same-sex marriages; and (2) whether the Fourteenth Amendment requires a state that does not permit same-sex marriages to recognize these marriages licensed and performed in a state which does recognize the right.¹⁶

The Court addressed the array of problems state-enforced marriage bans can have on same-sex couples by focusing on three of the petitioners' relationships, turning first to James Obergefell, who started his life with his partner, John Arthur, nearly twenty years ago.¹⁷ Arthur was subsequently diagnosed with ALS, and the couple vowed to marry before his death.¹⁸ The couple traveled from Ohio to Maryland where they were married on a medical transport plane, as Arthur had trouble moving due to the progression of his ALS; he died three months later.¹⁹ Under Ohio law, Obergefell could not be listed 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.'"²⁰

12. *Id.* at 2607-08.

13. *Id.* at 2593.

14. *Id.* (citing *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky 2014); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky 2014).

15. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

16. *Obergefell*, 135 S. Ct. at 2593.

17. *Id.* at 2594.

18. *Id.*

19. *Id.*

20. *Id.* at 2594-95 (quoting Brief for Petitioner at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556)).

April DeBoer and her partner Jayne Rowse were united in a commitment ceremony in 2007.²¹ They have since adopted three children who, because of Michigan law, only have the name of one parent on their birth certificates.²² The couple feared tragedy—such as an emergency at school or one of their own deaths—and brought suit to avoid an emergency situation where the children would be treated as if they only had one parent.²³

The Court touched on the story of Army Reserve Sergeant First Class Ijpe DeKoe and Thomas Kostura, co-plaintiffs in the Tennessee case.²⁴ The pair married in New York in 2011, after receiving news that DeKoe would be deployed to Afghanistan.²⁵ After DeKoe returned from combat nearly a year later, the couple relocated to Tennessee—a state that did not recognize same-sex marriage.²⁶ As they traveled across state lines, their marital status changed, coming and going based upon state law.²⁷

The Court acknowledged the myriad difficulties posed by state marriage bans on these men and women and, in doing so, extended the liberties guaranteed by the Fourteenth Amendment by declaring the right to marry for same-sex couples a fundamental right which preempts state law: “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.”²⁸

III. COURT’S DECISION AND RATIONALE

A. Majority Opinion by Justice Kennedy

Justice Kennedy delivered the opinion of the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.²⁹ Justice Kennedy first explored the history of marriage and its centrality to the human condition, describing the institution as one of both “continuity and change.”³⁰ As social structures changed throughout history, so did the way the United States viewed marriage. For example, the law of coverture is now long-abandoned as

21. *Obergefell*, 135 S. Ct. at 2595.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Obergefell*, 135 S. Ct. at 2595.

27. *Id.*

28. *Id.* at 2590.

29. *Id.* at 2593.

30. *Id.* at 2595.

women have gained legal, political, and property rights.³¹ “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.”³²

A dynamic such as the one described above was the backdrop for gays’ and lesbians’ quest for equal rights, which began to take hold in the mid-20th century.³³ For decades, gay men and women were prohibited from accepting government employment, could not serve in the military, and were targeted by police—especially when exercising their right to associate in groups.³⁴ As a result of state legislation, gay men were criminalized for violations of sodomy laws—a reflection of the view that homosexuality was immoral.³⁵ In fact, The American Psychiatric Association declared homosexuality a mental disorder from 1952 until 1973.³⁶ “For this reason, among others, many 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.”³⁷

History laid the groundwork for the issue before the *Obergefell* Court. The Due Process Clause of the Fourteenth Amendment guarantees that no state shall “deprive any person of life, liberty, or property without due process of law.”³⁸ The vast majority of rights contained in the Bill of Rights have been declared fundamental liberties protected by this clause.³⁹ Other unenumerated rights, particularly those involving intimate choices that define personal identity, have been included in this category as well.⁴⁰ However, just how the Court should identify some rights as fundamental, while at the same time excluding others, is “not reduced to any formula.”⁴¹ Similar to other constitutional analyses which are guided by broad principles, “history and tradition guide and discipline this inquiry, but do

31. *Obergefell*, 135 S. Ct. at 2595 (citing Brief for Historians of Marriage et al. as Amici Curiae Supporting Petitioners at 16-19, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2014 WL 2800980).

32. *Id.* at 2596.

33. *Id.*

34. *Id.* (citing Brief for Organization of American Historians as Amicus Curiae Supporting Petitioners at 5-28, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556)).

35. *See, e.g.*, TEX. PENAL CODE ANN. § 21.06(a); GA. CODE ANN. § 16-6-2 (Westlaw 2011).

36. *Obergefell*, 135 S. Ct. at 2596.

37. *Id.*

38. U.S. CONST. amend. XIV, § 1

39. *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

40. *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (Compulsory Education Act infringed on fundamental rights of private schools as well as parents’ rights to decide who will educate their children); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Massachusetts law prohibiting distribution of contraceptives to unmarried persons violates Equal Protection Clause).

41. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

not set its outer boundaries.”⁴² The Court focused on the present, noting that new insights are ever-present and should be considered when making a determination of whether a right is fundamental:

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.⁴³

The Court based the notion that same-sex couples are constitutionally permitted to exercise the right to marry on four interconnected principles, noting first that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”⁴⁴ This principle, according to Justice Kennedy, was rooted in the Court’s decision in *Loving v. Virginia*,⁴⁵ in which the Court struck down a Virginia ban on interracial marriage on grounds of both equal protection and due process.⁴⁶ The racial classifications found in the Virginia statute were found to be “so directly subversive of the principle of equality at the heart of the Fourteenth Amendment,” that the majority found they “surely deprive[d] all the State’s citizens of liberty without due process of law.”⁴⁷ Moreover, throughout the 20th century, the Court has protected choices concerning family, procreation, childbearing, contraception, and the like—all choices that fall under the general umbrella of privacy.⁴⁸ The Court found that 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.”⁴⁹ The choice to marry is a dignified one, and that choice allows the married individuals to make profound life decisions within the marital relationship.⁵⁰ This importance to the individual was further highlighted by the Court’s second point, which highlights the unique commitment and its effect on the parties involved.

Next, Justice Kennedy found that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individual.”⁵¹ As described by Justice Douglas:

42. *Obergefell*, 135 S. Ct. at 2598.

43. *Id.*

44. *Id.* at 2599.

45. 388 U.S. 1 (1967).

46. See generally *Loving*, 388 U.S. 1.

47. *Id.* at 12.

48. See, e.g., *Griswold*, 381 U.S. at 485.

49. *Zablocki*, 434 U.S. at 386.

50. *Obergefell*, 135 S. Ct. at 2599.

51. *Id.*

Marriage is a coming together for better or 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; 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.⁵²

*Griswold v. Connecticut*⁵³ built on the fundamental right to marry, reasoning that certain rights that have long been seen as fundamental have certain penumbras that cannot be infringed upon without constituting an infringement of the fundamental right itself.⁵⁴ These penumbras create a shadowy outer region of fundamental rights which “help give them life and substance.”⁵⁵ Applying this principle, “the right of privacy is a fundamental personal right, emanating ‘from the totality of the constitutional scheme under which we live.’”⁵⁶

Nearly forty years later in *Lawrence v. Texas*,⁵⁷ the Court further built upon the fundamental rights of gay men and women by striking down a Texas law forbidding intimacy between same-sex couples.⁵⁸ The Court there acknowledged sexual intimacy, when performed within the confines of a committed relationship, “can be but one element in a personal bond that is more enduring.”⁵⁹ The *Obergefell* Court held that although the holding in *Lawrence* was a step in the right direction, the rights guaranteed by the Fourteenth Amendment do not stop there: “Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”⁶⁰

According to Justice Kennedy, the third basis for protecting the fundamental right to same-sex marriage is that it “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”⁶¹ There are myriad connections between the right to raise a child and the stability a marital relationship can bring to the family dynamic; the Court described these connections as a “unified whole” that is protected under the Due Process Clause.⁶² A marital relationship demonstrates to children that their family is akin to a family with

52. *Griswold*, 381 U.S. at 486.

53. 381 U.S. 479.

54. *Id.* at 487 (Goldberg, J., concurring).

55. *Id.* at 484.

56. *Id.* at 494 (Goldberg, J., concurring) (quoting *Poe*, 367 U.S. at 521).

57. 539 U.S. 558.

58. *See generally Loving*, 388 U.S. 1.

59. *Lawrence*, 539 U.S. at 567.

60. *Id.*

61. *Id.*

62. *Id.*

heterosexual parents, as well as gives stability⁶³ and integrity to the familial relationship, which is fostered by giving this structure legal recognition.⁶⁴ It is undisputed that same-sex couples can offer loving, stable homes to their children, and hundreds of thousands of children are currently being raised by these couples.⁶⁵ A large majority of states have allowed same-sex couples to adopt and “[t]his provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”⁶⁶ For these reasons, the Court found that the exclusion of same-sex couples from the institution of marriage conflicts with one of the central underlying purposes 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 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.⁶⁷

Despite making these points, Justice Kennedy noted that having children is not—and never has been—a prerequisite to marriage; thus, the constitutional right to marry has many facets, of which procreation is just one.⁶⁸

Finally, Justice Kennedy acknowledged that legal precedent, along with our Nation’s history and tradition, “make clear that marriage is a keystone of our social order.”⁶⁹ Marriage is an essential part of Americans’ private and public lives, and is the “foundation of the family and of society, without which there would be neither civilization nor progress.”⁷⁰ The Court in *Maynard v. Hill*⁷¹ established the notion that marriage is “a great public institution, giving character to our whole civil polity.”⁷² As ideals and socio-political values regarding marriage have changed, the overall

63. *Obergefell*, 135 S. Ct. at 2600 (citing Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners at 22-7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1088972).

64. *Windsor*, 133 S. Ct at 2694.

65. *Obergefell*, 135 S. Ct. at 2600 (citing Brief for Gary J. Gates as Amici Curiae Supporting Petitioners at 4, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1021451).

66. *Id.*

67. *Id.* at 2600-01 (citing *Windsor*, 133 S. Ct at 2694-95).

68. *Id.* at 2601.

69. *Id.*

70. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

71. 125 U.S. 190.

72. *Id.* at 213.

institution of marriage has remained one of primary importance to Americans.⁷³

Similarly, just as marriage is meaningful to the committed individuals, society also recognizes the importance of the union by offering recognition to—and conferring benefits on—the couple. While states are free to vary precisely what benefits are conferred, marriage has long been the basis of the expansion of the same. Just a few of these numerous and varied marital rights include: inheritance and property rights, rules of intestate succession, privilege in the law of evidence, medical decision making authority, adoption rights, birth and death certificates, campaign finance restrictions, professional ethics rules, workers' compensation, health insurance, and child custody.⁷⁴ By making marriage a central facet to so many legal rights presents the question: What is the difference between same-sex and opposite-sex couples with respect to these rights? The majority found none: “Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that States have linked to marriage,” which results in a burden many opposite-sex couples would deem “intolerable.”⁷⁵

The Court addressed Respondents' stance on the issue as well. It found Respondents did not appropriately frame the issue when relying on *Washington v. Glucksberg*,⁷⁶ a case that called for caution when declaring what rights are fundamental under the Constitution.⁷⁷ Respondents posited that Petitioners were not seeking to exercise the right to marriage, but rather were seeking to create a non-existent right—the right to same-sex marriage.⁷⁸ The majority, despite conceding that *Glucksberg* called for an attention to history and judicial restraint when addressing fundamental rights, found this approach inconsistent with the Court's approach to addressing many fundamental rights, including rights to marriage and intimacy.⁷⁹ The Court found the right to marriage to be a comprehensive one, noting that *Loving* did not frame the issue as whether there is a fundamental right to interracial marriage, but whether interracial couples had the right to marry.⁸⁰ The true question—there and here—is “[whether]

73. *Obergefell*, 135 S. Ct. at 2601.

74. *Id.* (citing Brief for the United States as Amici Curiae Supporting Petitioners at 6-9, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1004710); *Id.* (citing Brief for American Bar Association as Amici Curiae at 8-29, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (No. 14-556)).

75. *Id.*

76. 521 U.S. 702 (1997).

77. *Id.* at 722.

78. *Obergefell*, 135 S. Ct. at 2602.

79. *Id.*

80. *Id.*

there [is] a sufficient justification for excluding the relevant class from the right.”⁸¹

Although history plays an important role in the examination, rights cannot be determined by who has previously exercised them or “received practices could serve as their own continued justification and new groups could not invoke rights once denied.”⁸² This premise motivated the Court’s previous assertion that while historic sources of law are indeed informative, new understandings of the Constitution can inform new questions of constitutional law. For example, religious principles are one such historic source of law:

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.⁸³

The Court, until this point, based its analysis of the issue on the liberties guaranteed by the Due Process Clause. The Court next turned to the guarantee of equal protection under the laws—a guarantee also found within the Fourteenth Amendment.⁸⁴ However, Justice Kennedy noted that there is a profound connection between the two clauses.⁸⁵ “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.”⁸⁶ *Loving* is one instance which illustrates this point. There, the Court invalidated a Virginia law prohibiting miscegenation on grounds of both equal protection and due process.⁸⁷ The *Loving* Court held that the racial classifications of the Virginia statute were a clear violation of the Equal Protection Clause, while at the same time violating constitutional notions of liberty: “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth

81. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. at 752-73 (Souter, J., concurring)).

82. *Id.*

83. *Obergefell*, 135 S. Ct. at 2602.

84. *Id.*

85. *Id.* at 2602-03.

86. *Id.* at 2603.

87. *See generally Loving*, 388 U.S. 1.

Amendment, is surely to deprive all the State's citizens of liberty without due process of law."⁸⁸

A similar analysis was employed in *Zablocki v. Redhail*,⁸⁹ where the Court held that a Wisconsin statute requiring fathers with delinquent child support to obtain a court order before remarrying violated the Fourteenth Amendment.⁹⁰ There, the Court's reasoning was based in equal protection, yet, at the same time, the law was held to burden a right "of fundamental importance"—an illustration of the synergy between the two clauses.⁹¹ The *Obergefell* Court relied on these analyses in drawing a parallel 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."⁹² In essence, the several state statutes at issue in *Obergefell* were unequal in the sense that they afforded benefits to some couples, while denying them to others, making their imposition a continuing harm to same-sex couples prohibited by both the Due Process and Equal Protection Clauses.⁹³ Whereby, the Court found it necessary to overrule *Baker v. Nelson*,⁹⁴ a one-line opinion from 1972 that held the exclusion of same-sex couples from marrying did not present a substantial federal question.⁹⁵ On the issue of whether a state is constitutionally required to license a marriage between two people of the same-sex, the Court held that the challenged state laws were "unconstitutional to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."⁹⁶

Before turning to the second issue before the Court, Justice Kennedy addressed Respondents' counterargument that because of a lack of discourse on the issue, the Court should proceed with caution and await further legislation and litigation on the issue of same-sex marriage.⁹⁷ The Court acknowledged that democracy is the appropriate vehicle for change, yet declared this is not so when a law abridges the fundamental rights of citizens: "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."⁹⁸ Therefore, when fundamental

88. *Id.* at 12.

89. 434 U.S. 374 (1978).

90. *Id.* at 400.

91. *Id.* at 383.

92. *Obergefell*, 135 S. Ct. at 2604.

93. *Id.*

94. 409 U.S. 810 (1972).

95. *Obergefell*, 135 S. Ct. at 2605 (citing *Baker v. Nelson*, 409 U.S. 810).

96. *Id.*

97. *Id.*

98. *Schuetz v. BAMN*, 134 S. Ct. 1623, 1636 (2014).

rights are violated, the judicial system is the proper vehicle for redress.⁹⁹ Citizens need not await legislative action when the harm posed by current legislation creates an urgent need for amelioration, a need the Court found Petitioners clearly demonstrated.¹⁰⁰ The Constitution serves 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”—not to submit such rights to a majority vote.¹⁰¹ This notion serves to protect a minority opinion “even if the broader public disagrees, and even if the legislature refuses to act.”¹⁰² An urgency to exercise these rights, coupled with a harmful inconsistency in state law, founded the majority’s holding for Petitioners: “Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights intertwined with marriage.”¹⁰³

The Court’s ruling in favor of Petitioners on the first issue presented made the answer to the second simple. If there was no lawful basis to prohibit same-sex couples from marrying, there also was not one for any state refusing to recognize a lawful marriage performed in another state on the same grounds.¹⁰⁴ Like Petitioners Ijpe DeJKoe and Thomas Kostura asserted in the district court, being married in one state and unmarried in another is one of “the most perplexing and distressing complication[s]” in domestic relations law.¹⁰⁵ Acknowledging this hardship, the Court held that in deciding the first issue, the merits of the second were severely undermined.¹⁰⁶ In closing, Justice Kennedy opined for the newly-found rights of the several Petitioners and same-sex couples across the United States:

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 they once 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

99. *Id.* at 1637.

100. *Obergefell*, 135 S. Ct. at 2606.

101. *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

102. *Obergefell*, 135 S. Ct. at 2605.

103. *Id.* at 2606.

104. *Id.* at 2608.

105. *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (quoting *Dunham v. Dunham* 44 N.E. 841 (1896)).

106. *Obergefell*, 135 S. Ct. at 2608.

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.¹⁰⁷

“The Constitution,” Justice Kennedy concluded, “grants them that right.”¹⁰⁸

B. Dissenting Opinion by Chief Justice Roberts

Chief Justice Roberts, with whom Justices Scalia and Thomas joined, dissented on constitutional grounds.¹⁰⁹ The Chief Justice acknowledged the validity of the majority's policy arguments, countering, however, with the question: “Just who do we think we are?”¹¹⁰ According to Chief Justice Roberts, the Court's role is not that of a legislature, and to substitute the Court's judgment for a state's definition of marriage is improper: “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.”¹¹¹ His focus was not on whether there is a fundamental right to marriage—which is undisputed—but rather on who decides what constitutes a marriage.¹¹²

States with the traditional definition of marriage have drawn from millennia of history which dictate that marriage is between one man and one woman; from the Han Chinese to the Aztecs and beyond, the social institution has bore such a definition.¹¹³ Although “marriage equality” relies heavily on modern social movements and emotion, Chief Justice Roberts found the historical function of marriage to be procreation:

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

107. *Id.*

108. *Id.*

109. *Id.* at 2611 (Roberts, C.J., dissenting).

110. *Id.* at 2612.

111. *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

112. *Id.* at 2613.

113. *Id.* at 2612.

occur only between a man and a woman committed to a lasting bond.¹¹⁴

From the founding of the United States, marriage was understood as a union between a man and a woman. Relying on scholars like John Locke and William Blackstone, those who drafted the Constitution identified marriage as a source of family values, structure, and stability.¹¹⁵ Furthermore, Chief Justice Roberts argued that much of the Court's precedent relied on that very point: *Loving* described marriage as “fundamental to our very existence and survival,” a point which the dissent found to imply a procreative element.¹¹⁶

Much of Chief Justice Roberts' constitutional argument is couched in terms of states' rights.¹¹⁷ The framers intended the individual states to control “[t]he whole subject of the domestic relations of husband and wife.”¹¹⁸ Until just over a decade ago, all fifty states defined marriage as a union between a man and a woman.¹¹⁹ In 2003, Massachusetts interpreted its state constitution to require recognition of same-sex marriages.¹²⁰ Since then, ten other states legislatures have amended their definition of marriage along with five state supreme courts that have done so by judicial decree.¹²¹ However, the Sixth Circuit held that while democratic momentum was trending toward allowing same-sex marriages, Petitioners had not made “the case for constitutionalizing the definition of marriages and for removing the issue from the place it has been since the founding: in the hands of state voters.”¹²² Chief Justice Roberts agreed.

Furthermore, in addressing Petitioners' due process argument, Chief Justice Roberts posited the notion that Justice Kennedy's opinion is rooted in one of social policy, not law.¹²³ Relying on the Court's precedent post-*Lochner v. New York*,¹²⁴ the Chief Justice found that the Court itself has championed the idea of judicial restraint in the field of substantive due process.¹²⁵ In other words, merely because a majority of the Court finds a law displeasing does not allow it to abolish a state law on constitutional

114. *Id.* at 2613.

115. *Id.*

116. *Loving*, 388 U.S. at 12.

117. *Obergefell*, 135 S. Ct. at 2624-26 (Roberts, C.J., dissenting).

118. *Windsor*, 133 S. Ct. at 2691.

119. *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting).

120. *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (2003).

121. *Obergefell*, 135 S. Ct. at 2615.

122. *DeBoer*, 772 F.3d at 396.

123. *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

124. 198 U.S. 45, 58 (1905) (Court struck down a New York law setting maximum hours for bakery workers, holding it was not “appropriate as a health law”).

125. *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

grounds. Because the right to marriage is not one enumerated in the Constitution, substantive due process seeks to imply that the state laws at issue in *Obergefell* infringed on the liberty guaranteed by the Fourteenth Amendment,¹²⁶ despite any process afforded by the particular law at issue.¹²⁷ “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.”¹²⁸ Chief Justice Roberts was concerned with the potential for overreaching such an approach gives the Court. The *Lochner* line of cases—which invalidated nearly 200 state laws over the span of several decades¹²⁹—gave way to the interpretation made in *Glucksberg*, which stated that the Court ought to exercise extreme caution when dealing with fundamental rights “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”¹³⁰ The Court expressly recognized the self-described error made in *Lochner* nearly sixty years later in *Ferguson v. Skrupa*.¹³¹ “The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature acted unwisely has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgement of legislative bodies, who are elected to pass laws.”¹³²

In short, Chief Justice Roberts’ dissent implied that the Court was overstepping its bounds: “The majority’s driving themes are that marriage is desirable and petitioners desire it.”¹³³ He refuted the majority’s use of precedent such as *Turner v. Safley*,¹³⁴ *Zablocki*, and *Loving*, noting that these cases did not hold that anyone who desires to marry has the constitutional right to do so.¹³⁵ In his view, none of those cases sought to change the traditional presumptive definition of marriage, which is why they held as they did.¹³⁶ Cases such as *Loving* rested on the ground that denying the right of one man and one woman to marry violated due process—not on grounds that the traditional definition of marriage ought to be changed: “Neither petitioners nor the majority cites a single case or other

126. *Id.* at 2615.

127. *See generally* *Reno v. Flores*, 507 U.S. 292 (1993).

128. *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

129. *Id.* at 2617.

130. *Glucksberg*, 521 U.S. at 720.

131. 372 U.S. 726 (1993).

132. *Id.* at 730.

133. *Obergefell*, 135 S. Ct. at 2619 (Roberts C.J., dissenting).

134. 482 U.S. 78 (1987).

135. *Obergefell*, 135 S. Ct. at 2619 (Roberts, C.J., dissenting).

136. *Id.*

legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.”¹³⁷

Aside from due process, the majority relied on a second, less involved argument of equal protection. The majority discussed a synergy between the two clauses, noting that while both serve distinct functions, the line between the two is sometimes blurred by particular substantive questions such as the one presented in *Obergefell*.¹³⁸ Chief Justice Roberts, however, wrote this argument off as “difficult to follow.”¹³⁹ He asserted that although the majority used equal protection as an alternative basis for its rationale, it did not “attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions.”¹⁴⁰ The legitimacy and acumen of the Court in the eyes of the citizens of the United States rests upon the respect accorded to its reasoning and judgments.¹⁴¹ “That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and the law.”¹⁴² Chief Justice Roberts opined that the majority flouted the idea of judicial restraint and skirted the democratic process by ending state and nationwide debate on the issue of same-sex marriage on grounds of urgency.

Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and 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.’ In our democracy, debate 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 either 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 unsolved

137. *Id.*

138. *Id.* at 2603.

139. *Id.* at 2623.

140. *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (citing *Nw. Austin Mun. Dist. v. Holder*, 557 U.S. 193, 197 (2009)).

141. *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., dissenting).

142. *Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting).

by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.¹⁴³

The Chief Justice lamented the majority's quelling of the spirit of democratic debate. In his view, the Court took away the chance of voters to challenge their minds on such an issue and, at the expense of same-sex couples, put a stigma on a group of marriages that will appear forced upon the American people: "Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide."¹⁴⁴ Chief Justice Roberts implored same-sex couples and their advocates to celebrate the *Obergefell* decision. However, he cautioned, "do not celebrate the Constitution. It had nothing to do with it."¹⁴⁵

C. *Dissenting Opinion by Justice Scalia*

Justice Scalia, joined by Justice Thomas, echoed many of the points made by Chief Justice Roberts, including the argument made in favor of states' rights.¹⁴⁶ According to Justice Scalia, the majority's decision was an improper overreaching of judicial power, which violates the founders' proposed vision of American democracy: "This practice of constitutional revision by an unelected committee of nine, always accompanied . . . 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."¹⁴⁷ Justice Scalia's pithy dissent essentially discredits the majority at every turn, describing it as baseless and "couched in a style that is as pretentious as its content is egotistic."¹⁴⁸

D. *Dissenting Opinion by Justice Thomas*

Justice Thomas, with whom Justice Scalia joined, turned his focus on liberty and its place within the constitutional scheme under the Due Process Clause.¹⁴⁹ He asserted that the liberty guaranteed by the Fourteenth Amendment has its roots in history, beginning with the framers of the Constitution who, drawing from sources such as the Magna Carta and

143. *Id.* (quoting *Obergefell*, 135 S. Ct. at 2596 (majority opinion); William Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 700 (1976)).

144. *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

145. *Id.*

146. *Id.* at 2626-27 (Scalia, J., dissenting).

147. *Id.*

148. *Id.* at 2630.

149. *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting).

William Blackstone, likely meant liberty to mean freedom from physical restraint.¹⁵⁰ This liberty has been vastly expanded by the Court, and in Justice Thomas's opinion, improperly so: "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."¹⁵¹ Regardless of one's view on liberty, however, Justice Thomas argued that the *Obergefell* Petitioners had not been deprived of it, noting that they had not been restrained physically by the state in the denial of their right to marry:

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 the petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.¹⁵²

The case made by Petitioners was, according to Justice Thomas, one of seeking benefits that exist solely because of the government, not one seeking freedom from government interference, which is quite the opposite of the liberty contemplated by the framers of the Constitution.¹⁵³

Justice Thomas also focused on dignity and its source. The majority argued that the state-imposed marriage bans at issue deprived Petitioners and other same-sex couples of their dignity.¹⁵⁴ However, Justice Thomas discredited this argument made by Justice Kennedy, noting that perhaps the dignity argument was made in light of the fact that their argument for liberty is stretching, perhaps overreaching, its bounds.¹⁵⁵ "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

150. *Id.* at 2632-33.

151. *Id.* at 2634 (emphasis in original).

152. *Id.* at 2635.

153. *Id.* at 2636.

154. *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

155. *Id.*

dignity.”¹⁵⁶ Justice Thomas found dignity innate in each human being, making the corollary that such dignity cannot be taken away by the government.¹⁵⁷

In haste to reach a desired result, the majority misapplies a clause focused on ‘due process’ to afford substantive rights, disregards the most plausible understanding of the ‘liberty’ protected by that clause, and distorts the principles on which the Nation was founded. Its decision will have inestimable consequences for our Constitution and our society.¹⁵⁸

Thus, Justice Thomas dissented, opining that he respects the dignity of same-sex couples while urging a more restrictive view of the Fourteenth Amendment in order to shield its guarantees from governmental interference.

E. Dissenting Opinion by Justice Alito

Justice Alito authored the fourth dissenting opinion, with whom Justices Scalia and Thomas joined.¹⁵⁹ Justice Alito harbored many of the same viewpoints as his fellow dissenting Justices, noting the importance of the judicial restraint posited by the Court in *Glucksberg*: “To prevent five 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 the Nation’s history and tradition.’”¹⁶⁰ According to Justice Alito, the right to same-sex marriage is not one such right. He asserts that the *Obergefell* Petitioners seek to create a new right—improperly by way of the judicial process—that has not yet been recognized.¹⁶¹

Justice Alito also lamented for the rule of law and the view of the Court in the eyes of the citizenry. The federalism contemplated by the framers of the Constitution was one created to foster a society of people with varying beliefs and, in doing so, maintain social order.¹⁶² Recognizing this, some states would recognize same-sex marriage while others would not—a process that was already occurring by way of the democratic process

156. *Id.*

157. *Id.*

158. *Id.* at 2640.

159. *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting).

160. *Id.* (quoting *Glucksberg*, 521 U.S. at 720-721).

161. *Id.*

162. *Id.* at 2643.

nationwide.¹⁶³ “By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas.¹⁶⁴ “Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play.”¹⁶⁵ Because a bare majority of the Court sought to impose this view nationwide, Justice Alito warned that this may undermine the credibility of the Supreme Court and its ability to maintain the rule of law. He predicted, that despite one’s political views, the effect may be lasting: “But all Americans, whatever their thinking on that issue, should worry about what the majority’s claim of power portends.”¹⁶⁶

IV. ANALYSIS

A. Introduction

Much of the tension between the *Obergefell* majority and the several dissenters comes from the Court’s differing perceptions of the role of the Court and its declaration of substantive rights. Both Chief Justice Roberts and Justice Scalia make it clear they are not taking a side on the issue of same-sex marriage, but rather are objecting on constitutional grounds.¹⁶⁷ Since its inception, the Court takes a somewhat hands-off approach to making value judgments, rather looking at the case or controversy before it and ruling on the merits within the confines of the law. However, with a hot-button issue like same-sex marriage (or an issue like miscegenation that was before the Court almost four decades ago¹⁶⁸) it is an extremely difficult task to keep socio-political views—or the appearance of impropriety—out of the picture.

When analyzing the dispositive issue of whether a state should be required to license same-sex marriages, it is important to examine just where due process fits within the boundaries of the Fourteenth Amendment. Is the Due Process Clause a “font of substantive rights,”¹⁶⁹ or should the Court exercise the extreme judicial restraint called for in *Glucksberg*?¹⁷⁰ The answer to this question lies in one’s view of history and the Nation envisioned by the framers of the Constitution. On one hand, Justice Kennedy and the majority seem to circumvent the democratic process in legalizing same-sex marriage, which at the time of the decision was lawful

163. *Id.*

164. *Obergefell*, 135 S. Ct. at 2643 (Alito, J., dissenting).

165. *Id.*

166. *Id.*

167. *Id.* at 2611 (Roberts, C.J., dissenting); 2626-27 (Scalia, J., dissenting).

168. *See generally Loving*, 388 U.S. 1.

169. *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting).

170. *Glucksberg*, 521 U.S. 702.

under eleven state legislatures¹⁷¹. However, contemporary America is one likely not envisioned—or even dreamed of—by the founding fathers, and the *Obergefell* Court takes it upon itself to keep the Constitution “in tune with the times.”¹⁷² Although the dissenting justices make cogent points concerning the constitutionality of the majority’s decision, an examination of the precedent concerning the fundamental right to marry shows that the Court has long been keeping the Constitution up to speed with societal views on who may—and who may not—marry. The following analysis runs Justice Kennedy’s opinion through filters of both substantive due process and equal protection, as well as delves into an examination of *Obergefell*’s influence on the future of fundamental rights.

B. Analysis

1. *The Role of the Court and the Font of Substantive Rights*

One’s view of the *Obergefell* holding boils down to a simple question: What is the role of the Supreme Court? Political views aside, one must examine the power of the Court in determining substantive rights. Both Chief Justice Roberts and Justice Scalia make a pointed effort to note that their opinion was not based on a stance against same-sex marriage.¹⁷³ Rather, they take the stand that it is not the Court’s place to declare rights not enumerated (or other rights that have historically been declared so) in the Constitution to be fundamental.¹⁷⁴ Substantive due process has long been a contested issue, as the fear that the Court may go rogue in declaring new rights grew with modern society.¹⁷⁵ At first glance, the *Obergefell* dissenters seem correct. Simply because the declaration of a fundamental right is an agreeable one politically—to many Americans—it does seem flout states’ rights on the subject of marriage, an area that has long been left to state determination.¹⁷⁶ However, other precedent has spoken to the notion that those once excluded from marriage are constitutionally vested with the right to participate in the institution.¹⁷⁷ While the dissents state that Petitioners seek to change the definition of marriage, it would appear that prior case law sought to do the same.¹⁷⁸ Respondents asserted that Petitioners are seeking recognition of a new right—a fundamental right to

171. See *Obergefell*, 135 S. Ct. at 2611 (App. B).

172. *Griswold*, 381 U.S. at 522.

173. *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting); *Id.* at 2626-2627 (Scalia, J., dissenting).

174. *Id.* at 2624 (Roberts, C.J., dissenting).

175. See, e.g., *Glucksberg*, 521 U.S. at 722.

176. See generally *Maynard*, 125 U.S. 190.

177. See generally *Loving*, 388 U.S. 1; *Turner*, 482 U.S. 78.

178. *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

same-sex marriage.¹⁷⁹ The majority, however, disagreed, noting that *Loving* never begged the question of whether there is a fundamental right to marry interracially and *Turner* never posed the issue as whether inmates had a constitutional right to marry.¹⁸⁰

Respondents sought to draw a line that simply does not exist. The underlying issue in the above cases was whether a state may exclude people from the institution of marriage on grounds drawn by the state.¹⁸¹ Because marriage has historically been defined as a union between one man and one woman, it is not dispositive on the issue of due process. Although tradition may be informative in an examination of fundamental rights, “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”¹⁸²

This millennia old historical background packs a heavy punch for Respondents. However, history, particularly in the context of *Obergefell*, can serve to stand in the way of progress. Had the *Loving* Court put too much emphasis on history (and not enough on the interracial couples who were being denied the right to marriage), miscegenation laws would still be constitutional. Leaving such laws in the hands of the states would have allowed states with more racially charged histories, particularly southern states, to keep these bans in place until the majority of their populations changed their views on interracial marriage. How long such progress could have taken remains unknown as a result of the *Loving* decision. *Turner* could have had much the same result. It is no surprise that prison inmates are not viewed favorably by the majority of voters, yet the Court there sought to protect their constitutional right to marry. Following suit, the *Obergefell* majority did much the same thing. Same-sex couples were being denied the right to marry, and it was affecting them in a substantial manner.

Although to the dissenters and their supporters this case seems to lack a strong basis in law or precedent,¹⁸³ it is foolish to say the Court has never ventured for an extension of the law on shaky grounds in order to reach a landmark decision. Perhaps the reason behind this is the Court’s recognition that failure to do so would cause stagnation in the effects of social policy on the law. It calls to mind Justice Stewart’s famous concurrence describing obscenity: “I know it when I see it.”¹⁸⁴ Surely the

179. *Id.* at 2602.

180. *Id.*

181. See *Loving*, 388 U.S. 1; *Zablocki*, 434 U.S. 374; *Turner*, 482 U.S. 78.

182. *Lawrence*, 539 U.S. at 572 (quoting *City Of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

183. *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

184. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Obergefell majority is more than Justice Stewart's ventured—yet now revered—guess.

Justice Kennedy began his expansion of substantive due process rights for homosexuals when he authored the majority opinion in *Lawrence*:

Had those who drew and ratified the Due Process Clauses of the . . . Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹⁸⁵

He recognized that constitutional rights—as well as societal views—are not stagnant. Certainly this is illustrated by cases such as *Loving* and *Lawrence*.¹⁸⁶ Even *Glucksberg*, which specifically called for extreme caution when declaring fundamental rights, recognized the need for some sense of constitutional flexibility:

The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.¹⁸⁷

This notion of judicial restraint, cited by Chief Justice Roberts in his dissent,¹⁸⁸ comes directly from *Ferguson* itself and its critique of

185. *Lawrence*, 539 U.S. at 579.

186. See *Loving*, 388 U.S. 1; *Lawrence*, 539 U.S. 558.

187. *Glucksberg*, 521 U.S. at 765-766 (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

188. *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting).

Lochner.¹⁸⁹ However, as the quote above describes, this standard is not an inflexible one. It specifically speaks to the sometimes-necessary break with tradition that comes with the evolution of social policy. Although *Lochner* has long been overruled,¹⁹⁰ and is severely critiqued by the Chief Justice Roberts,¹⁹¹ the approach to fundamental rights employed there is not the one employed by the *Obergefell* majority. The Chief Justice offered a snippet of *Lochner*'s reasoning: “[W]e 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.”¹⁹² He discounted this “harm principle” posited by *Lochner*.¹⁹³ However, this analysis essentially claims that aside from the perceived harm to same-sex couples, there is no other compelling argument for ruling in favor of a right to same-sex marriage. Yet, as the relevant precedent illustrates, there is certainly a fundamental right to marriage.¹⁹⁴ And, assuming *arguendo* the validity of the Chief Justice’s rejection of substantive due process,¹⁹⁵ grounds of equal protection alone are sufficient to justify extending this right to same-sex couples.

Additionally, Justice Scalia’s dissent in *Lawrence*—although arguably less scathing—echoed his dissent that would come twelve years later in *Obergefell*. In *Lawrence*, he reasoned that the Court skirted the political process by “tak[ing] sides in the culture war, departing from its role of assuring, as natural observer, that the democratic rules of engagement are observed.”¹⁹⁶ This, he says, quells the debate and circumvents the democratic process in a way not intended by the constitutional framers.¹⁹⁷

However, the issue with Justice Scalia’s argument is that fundamental rights are not subject to debate; they cannot be submitted to a vote because by their very nature, they are protected from governmental interference.¹⁹⁸ The majority recognized this precept:

The dynamic of our constitutional system is that individuals need to 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,

189. *Id.* at 2617-2619.

190. *See Ferguson*, 372 U.S. 726.

191. *Obergefell*, 135 S. Ct. at 2621-22 (Roberts, C.J., dissenting).

192. *Id.* at 2622 (quoting *Lochner v. N.Y.*, 198 U.S. at 57).

193. *Id.*

194. *See, e.g., Zablocki*, 434 U.S. at 406.

195. *Obergefell*, 135 S. Ct. at 2602-06.

196. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

197. *Id.* at 603.

198. *Barnette*, 319 U.S. at 638.

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.¹⁹⁹

It is well established that the Constitution sought to establish rights untouchable by policy rationale: “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 rights of same-sex couples to marry.”²⁰⁰ It follows then that if the issue is framed—and appropriately so—as whether Petitioners sought to exercise a fundamental right, the state statutes challenged in *Obergefell* violate substantive due process.

2. Equal Protection: Issue or Nonissue?

The issue in *Obergefell* is framed by the majority and the dissent in two very different ways. The view taken by the majority—that same-sex couples are a class of people being denied equal protection under the several state laws at issue—finds them unconstitutional on grounds that such laws arbitrarily prohibit that class from marrying.²⁰¹ On the other hand, Chief Justice Roberts argued that Petitioners are not seeking to exercise their fundamental right to marriage, but rather to change the traditional definition of marriage to include same-sex couples.²⁰² Equal protection must naturally coexist with the “practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”²⁰³

In evaluating a statute’s constitutionality under the Equal Protection Clause, one must examine “what burden of justification the classification created thereby must meet,” by “looking to the nature of the classification and the individual interests affected.”²⁰⁴ Since it has long been clear that marriage is a fundamental right,²⁰⁵ the statutes at issue in *Obergefell* deserve a “critical examination” of what state interest is advanced in support of the classification required.²⁰⁶ Various state interests were set forth in *Obergefell*, including the furtherance of procreation or the protection of

199. *Obergefell*, 135 S. Ct. at 2605.

200. *Id.*

201. *Id.* at 2604-05.

202. *Id.* at 2611 (Roberts, C.J., dissenting).

203. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

204. *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974).

205. *See, e.g., Loving*, 388 U.S. 1.

206. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

morality and family values.²⁰⁷ However, these state interests are not only illegitimate—they are false. Hundreds of thousands of children are currently part of adoptive families headed by same-sex couples.²⁰⁸ These children would otherwise be left to the mercy of foster homes, which lack the stability of family life. Furthermore, although historically—and presently—marriage has had a procreative element, this has never been the sole purpose for marriage.²⁰⁹ Certainly it is no startling notion that some couples do not wish to have children, and others who may wish to unfortunately cannot. Few would be daring enough to say these heterosexual couples should be excluded from marrying. It follows that a married couple without children is indeed still a family.

The Court has addressed hundreds of equal protection cases—in fact, many of the United States’ widely-recognized landmark cases have been decided on such grounds. For example, *Brown v. Board of Education*²¹⁰ acknowledged the “separate but equal” notion at issue there eloquently:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.²¹¹

The same is true for same-sex couples and their place in the current socio-political arena. Returning again to the notion put forth in *Griswold*, that it is the Court’s duty to keep the Constitution “in tune with times,”²¹² the American political conscious ought not be shocked when a disadvantaged group gains fundamental rights.

An equal protection argument was also made in *Lawrence*.²¹³ The issue there involved the constitutionality of a Texas statute prohibiting homosexual intercourse.²¹⁴ The statute was directed strictly at homosexual men, outlawing deviant sexual intercourse—particularly anal sex—between

207. Brief for Respondent at 35, 57-58, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

208. *Obergefell*, 135 S. Ct. at 2600 (citing Brief for Gary J. Gates as Amici Curiae Supporting Petitioners at 4, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1021451).

209. *Obergefell*, 135 S. Ct. at 2601.

210. 347 U.S. 483 (1954).

211. *Id.* at 493-94.

212. *Griswold*, 381 U.S. at 522.

213. *See Lawrence*, 539 U.S. 558.

214. *Id.*

persons of the same sex.²¹⁵ The state interest put forth by the prosecution in *Lawrence* was the protection of morality through their regulation of sexual acts considered deviant.²¹⁶ However, the Court spoke to morality and its place within American jurisprudence:

It must be acknowledged, of course, that the Court, in *Bowers* was making the broader point that for centuries, there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’²¹⁷

The *Lawrence* Court went on to examine the historical roots of societal rejections of homosexuality, yet found the most relevant aspect to be the trend toward acceptance of same-sex intimacy and homosexuality in general. Justice Thomas asserted that the *Obergefell* majority threatens religious liberty and traditional views of morality.²¹⁸ Yet, it seems that the liberty he speaks of is the liberty of only those who oppose same-sex marriage—not those who support it. It has long been held that “moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”²¹⁹

Therefore, it would seem that the several dissenters’ focus on liberty is misguided. Justice Thomas, for example, would have his audience believe that liberty is “individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.”²²⁰ The groups at odds in *Obergefell*—those wishing to exercise their fundamental right to marry and

215. TEX. PENAL CODE ANN. § 21.06(a).

216. *Lawrence*, 539 U.S. at 563.

217. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

218. *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting).

219. *Lawrence*, 539 U.S. at 583 (O’Connor, J., dissenting) (quoting *Romer*, 517 U.S. at 633).

220. *Obergefell*, 135 S. Ct. at 2634 (Thomas, J., dissenting) (emphasis in original).

those who morally oppose it—are both entitled to liberty as individuals under Justice Thomas’s interpretation. Choosing what group may exercise such liberty, and which one may not, runs directly counter to Chief Justice Roberts’s notion that “the history and tradition of our people is to ensure that when unelected judges strike down democratically elected laws, they do so based on something more than their own beliefs.”²²¹ To say that the majority opinion is based merely on the policy views of its several Justices is a misstatement. It has long been noted that the Court’s “obligation is to define the liberty of all, not to mandate our own moral code.”²²² For this reason, one could just as well posit that the participating Justices respect individual liberty and autonomy so profoundly that they held those who wish to marry someone of the same-sex ought to be constitutionally permitted to exercise their fundamental right to marriage, despite whatever public disapproval is circulating.

3. *The Future of Substantive Due Process*

The question remains: What does *Obergefell* mean for the future of substantive rights? The dissenters would have us believe that the Court now has free reign to declare anything they see politically desirable as a substantive right.²²³ After all, the Court is not to act as a “super-legislature” in order to strike down state laws they find unwise or imprudent.²²⁴ However, that notion insinuates that the *Obergefell* ruling has no basis in law—that the Court is acting on whim alone. Yet, as discussed above, there certainly exists a sturdy footing in law on grounds of both due process and equal protection.²²⁵

As noted in *Glucksberg*, fundamental rights are those deeply rooted in American history and tradition.²²⁶ However, marriage is a tradition rooted in American ideals as well as civilizations formed thousands of years beforehand.²²⁷ Simply because the majority sought to expand the class of who may exercise the right to marriage, doesn’t mean they are creating a new right. The fact that marriage has been a cornerstone of family and societal participation since the nation’s founding only bolsters the majority’s argument that this right is indeed fundamental. It follows then,

221. *Id.* at 2622-23 (Roberts, C.J., dissenting).

222. *Planned Parenthood*, 505 U.S. at 850.

223. *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

224. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

225. *See supra* Part IV.B.2.

226. *Glucksberg*, 521 U.S. at 720-21.

227. *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting).

that exclusion of a specified class of people from such an institution is violative of their fundamental rights.²²⁸

Clearly, there is no Constitutional right to contraception, yet the *Griswold* Court encompassed such a right on grounds of the right to privacy.²²⁹ Then, in *Eisenstadt v. Baird*,²³⁰ relying on equal protection, the Court held that the right to contraception, couched in terms of individual autonomy and privacy, could not be denied to people simply because of their marital status.²³¹ As the precedent illustrates, there are firm grounds for what may constitute a fundamental right.²³² The notion that the Court may now, post-*Obergefell*, run amuck and declare substantive rights is simply unfounded. The enumerated rights in the Constitution have oft been expanded to include other rights—for example, the right to privacy.²³³

Some Courts are more progressive than others. Political victories for minority groups, such as the same-sex Petitioners in *Obergefell*, are not an uncommon occurrence during a more progressive era. However, this decision does not create a fundamental right, but merely extends such a right to those being denied the opportunity to exercise it. This decision ruffled many feathers in the socio-political sphere. However, the United States was built upon the idea that all men are created equal²³⁴ and the Constitution exists to protect all views, even those that some find unpopular.

V. CONCLUSION

In short, all decisions involve some sort of value judgment. Justices of the Supreme Court are not robots. They are trained to look at the law and reason accordingly. But, as a trained thinker, it is not a difficult task to pick a side and meld the view one wishes to adopt into some essence of lawfulness. The majority does this—as does the dissent—and it would be foolish to ignore the fact that political views (and the justices that hold them) were a factor in the issuing of these opinions. However, when fundamental rights are infringed upon by state law, it is indeed the role of the Court to strike down such laws. The basis for doing so here lies in both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²³⁵ Same-sex couples now enjoy the same marriage rights that their heterosexual counterparts have always had.²³⁶ This is something to

228. *Id.* at 2602.

229. *See generally Griswold*, 381 U.S. 479.

230. 405 U.S. 438 (1972).

231. *See generally id.*

232. *See, e.g., Glucksberg*. 521 U.S. 720-21.

233. *See generally Griswold*, 381 U.S. 479.

234. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

235. *See* U.S. CONST. amend. XIV, § 1.

236. *See generally Obergefell*, 135 S. Ct. 2584.

celebrate—and despite Chief Justice Roberts’ dissent²³⁷—the Constitution had everything to do with it.

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237. *See id.* at 2626 (Roberts, C.J., dissenting).