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## Marriage equality in the United States: a look at *Obergefell* and beyond

### Casamento igualitário nos Estados Unidos: uma abordagem do caso *Obergerfell* e mais além

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#### Resumo

O artigo tem o objetivo de analisar a questão do casamento igualitário nos Estados Unidos, dando especial enfoque para o caso *Obergefell v. Hodges*, no qual a Suprema Corte norte-americana decidiu, em junho de 2015, por maioria de 5 votos a 4, pela inconstitucionalidade da proibição do casamento entre pessoas do mesmo sexo. Além disso, analisa a jurisprudência da Suprema Corte sobre temas relacionados a essa discussão e o movimento democrático ocorrido nos Estados norte-americanos nos últimos anos sobre o casamento homossexual, demonstrando todo o caminho percorrido para que se chegasse à decisão tomada em *Obergerfell*. Por fim, destaca algumas possíveis repercussões que o caso pode gerar em outras questões atinentes ao casamento igualitário.

**Palavras-chave:** caso *Obergefell*; casamento igualitário; casamento homossexual; igualdade; Estados Unidos.

#### Abstract

*The article aims to analyze the marriage equality in the United States, with a special focus at Obergefell v. Hodges case, in which the US Supreme Court held, in June 2015, in a 5-4 decision that is unconstitutional to forbid same-sex marriage. Furthermore, it analyzes the Supreme Court jurisprudence about some issues related to this discussion and the democratic movement in the states in favor of same-sex marriage in the years leading up to Obergefell. Lastly, it makes some modest observations about the case and the larger issue of gay marriage in the United States.*

**Keywords:** *Obergefell*; marriage equality; same-sex marriage; equality; United States.

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## CONTENTS

**1.** Introduction; **2.** Jurisprudential and Legal Background; **2.1.** Judicial Decisions Underlying the Decision in *Obergefell*; **2.1.1.** Early Substantive Due Process Cases; **2.1.2.** Miscegenation Laws Struck Down; **2.1.3.** Claim to Marriage Equality Found Not to Present Substantial Federal Question; **2.1.4.** Sodomy Laws Upheld; **2.1.5.** State Law Invalidated for Animus Toward Gay People; **2.1.6.** Same Sex Marriage Issue Reemerges in the States and Congress Responds with the Defense of Marriage Act; **2.1.7.** Vermont Requires Same-Sex Couples to Receive Same Benefits as Married Couples; **2.1.8.** Supreme Court Reverses Course and Finds that State Laws Criminalizing Sodomy Violates Due Process; **2.1.9.** More Marriage Cases Reach the States with Mixed Outcomes; **2.1.10.** Federal Defense of Marriage Act Invalidated by Supreme Court; **2.2.** The Democratic Movement Toward Same-Sex Marriage; **3.** The *Obergefell* Decision; **3.1.** The Constellation of the Justices; **3.2.** Facts in *Obergefell*; **3.3.** Procedural History; **3.4.** The Majority Opinion; **3.4.1.** History and Background of Marriage and the Struggle for Equality; **3.4.2.** Marriage as a Protected Right under the Due Process Clause; **3.4.2.1.** Notions of Individual Autonomy; **3.4.2.2.** The Importance and Uniqueness of Marriage; **3.4.2.3.** The Need to Protect Children and Families; **3.4.2.4.** Marriage as a Bedrock of Society; **3.4.3.** The Right to Marriage Under the Equal Protection Clause; **3.4.4.** Refutation of Arguments by Respondents; **3.4.4.1.** Petitioners should wait for the social movement in favor of gay marriage to take its course; **3.4.4.2.** Allowing gay marriage would harm the institution; **3.4.4.3.** Finding a constitutional right to gay marriage would conflict with the right to free exercise of religion; **3.4.5.** Full Faith and Credit Applies to Same-Sex Marriages; **3.5.** The Dissenting Opinions; **3.5.1.** The Majority's Flawed Due Process and Equal Protection Analysis; **3.5.2.** The Court's Role in our Democratic System; **3.5.3.** The Nature of the Institution of Marriage; **3.5.4.** The Proper Role of the States in our Federal System; **4.** Reflections on *Obergefell*; **4.1.** The Court's Missed Opportunity to Solidify its Equal Protection Jurisprudence; **4.2.** *Obergefell's* Fundamentally Conservative Vision of Marriage; **4.3.** The Open Question of Religious Accommodation; **4.4.** Moderate Backlash; **4.5.** Is Polygamy Next? **4.6.** Is there a Right to Marriage or a Right to Marriage Equality? **5.** Conclusion; **6.** References.

## 1. INTRODUCTION

On June 26, 2015, as millions prepared to celebrate gay pride events in the United States and around the world, the Supreme Court of the United States announced its much-anticipated decision in *Obergefell v. Hodges*.<sup>1</sup> As is now well known, the Supreme Court, in a closely divided opinion, held that same-sex couples have a right to marry under the Fourteenth Amendment of the Constitution.<sup>2</sup> This decision prompted vituperative dissents from the four most conservative justices on the Court and both effusive praise and abject criticism from scholars and the public at-large.

This article discusses the *Obergefell* decision and more broadly the underlying issue of same-sex marriage in the United States. Part 2 explores the Court's jurisprudence

<sup>1</sup> 576 U.S. \_\_\_ (2015). Citations in this paper to *Obergefell* will be to the Slip Opinion (slip op.), available on the official webpage of the Supreme Court of the United States at [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).

<sup>2</sup> As noted in Part 4.6., *infra*, it is not entirely clear whether the Court found a constitutional right to marriage or merely to marriage equality.

underlying the Supreme Court's decision in *Obergefell* and the democratic movement in the states in favor of same-sex marriage in the years leading up to *Obergefell*; Part 3 explains the majority decision and dissenting opinions in *Obergefell*; and Part 4 makes some modest observations about the case and the larger issue of gay marriage in the United States.

## 2. JURISPRUDENTIAL AND LEGAL BACKGROUND

In order to fully understand *Obergefell*, it is important to explore the historical background of some of the major themes underlying the legal analysis in the Court's decision. This includes (A) the Court's substantive due process jurisprudence and cases involving the right to marry and the rights of gay individuals (involving sexual intimacy, political power, and marriage); and (B) the recent democratic movement in favor of permitting same-sex marriage.

### 2.1. Judicial Decisions Underlying the Decision in *Obergefell*

As discussed in detail below,<sup>3</sup> the Supreme Court's decision in *Obergefell* rested largely

on constitutional due process protections and the fundamental nature of the right to marry. As such, this decision drew heavily on a number of earlier Court precedents involving several interrelated issues – the right to liberty in matters relating to sexual intimacy, procreation, and decisions relating to family, as well as a series of cases on marriage and the rights of gay men and lesbians to engage in private consensual sexual activity and to exercise political rights.

The evolution of the law with regard to marriage, sexual liberty, gay rights, and related matters is best understood through a chronological recitation of the most important cases on these issues, as set forth below.

#### 2.1.1. Early Substantive Due Process Cases

The Supreme Court's early substantive due process cases on matters relating to liberty interests under the Fourteenth Amendment provide an essential backdrop for the Court's more recent decisions on marriage and sexual intimacy. These include *Meyer v. Nebraska*, 262 U.S. 390 (1923) (permitting the teaching of modern foreign languages to children during times of peace); *Pierce v. Soc'y of Sisters*<sup>4</sup> (affirming a parent's right to direct the education of his or her child); *Griswold v. Connecticut*<sup>5</sup> (acknowledging a right

<sup>3</sup> See Part 3, *infra*.

<sup>4</sup> 268 U.S. 510 (1925).

<sup>5</sup> 381 U.S. 479 (1965).

to privacy in the marital bedroom in the context of the use of contraceptives); *Eisenstadt v. Baird*<sup>6</sup> (recognizing that non-married people have a constitutional right to use contraceptives); *Roe v. Wade*<sup>7</sup> (establishing a woman's right, with certain limitations, to obtain an abortion); *Carey v. Population Servs.*<sup>8</sup> (permitting minors to obtain access to contraceptives); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>9</sup> (affirming the essential holding of *Roe v. Wade*).

### 2.1.2. *Miscegenation Laws Struck Down*

In 1967, the Supreme Court decided the landmark case of *Loving v. Virginia*.<sup>10</sup> Mildred and Richard Loving, an interracial married couple living in their native state of Virginia, were indicted for violating Virginia's ban on miscegenation. The Lovings challenged Virginia's Racial Integrity Act of 1924 as infringing their rights under the Fourteenth Amendment of the Constitution.<sup>11</sup> The Supreme Court agreed, holding that the law violated both the equal protection and due process guarantees of the Constitution.

### 2.1.3. *Claim to Marriage Equality Found Not to Present Substantial Federal Question*

Four years later in *Baker v. Nelson* a gay couple in Minnesota challenged the denial of a marriage license, claiming that the denial deprived them of their due process, equal protection, and privacy rights under the Fourteenth Amendment. Both the district court and the Minnesota Supreme Court upheld the limitation of marriage to heterosexual couples.<sup>12</sup> The case went to the Supreme Court of the United States under mandatory appeal, but the Court dismissed the appeal "for want of a substantial federal question."<sup>13</sup> The Supreme Court explicitly overruled *Baker* in *Obergefell*.<sup>14</sup>

### 2.1.4. *Sodomy Laws Upheld*

In another disappointment for gay-rights advocates, the Supreme Court in the 1986 decision *Bowers v. Hardwick*<sup>15</sup> upheld the constitutionality of a Georgia

<sup>6</sup> 405 U.S. 438 (1972).

<sup>7</sup> 410 U.S. 113 (1973).

<sup>8</sup> 431 U.S. 678 (1977).

<sup>9</sup> 505 U.S. 833, 851 (1992).

<sup>10</sup> 388 U.S. 1 (1967).

<sup>11</sup> The Fourteenth Amendment to the U.S. Constitution, *inter alia*, prohibits the government from "depriv[ing] any person of life. Liberty, or property" or "deny[ing] to any person within its jurisdiction the equal protection of the laws."

<sup>12</sup> *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

<sup>13</sup> *Baker v. Nelson*, 409 U.S. 810 (1972).

<sup>14</sup> *Obergefell*, slip op. at 23.

<sup>15</sup> *Bowers v. Harwick*, 478 U.S. 186 (1986).

*statute criminalizing sodomy against claims that the law violated the petitioner's Fourteenth Amendment right to due process.*<sup>16</sup>

#### 2.1.5. State Law Invalidated for Animus Toward Gay People

The tide seemed to turn modestly in favor of recognizing gay rights when, ten years later, the Supreme Court in *Romer v. Evans*<sup>17</sup> struck down an amendment to the Colorado constitution that would have prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect ... homosexual persons or gays and lesbians.”<sup>18</sup> Noting that the amendment imposed a “broad and undifferentiated disability on a single named group,”<sup>19</sup> the Court rejected the notion that the “bare ... desire to harm a politically unpopular group,” constituted a legitimate governmental interest that could justify the action.<sup>20</sup>

#### 2.1.6. Same Sex Marriage Issue Reemerges in the States and Congress Responds with the Defense of Marriage Act

Also in the 1990s, the issue of same-sex marriage re-emerged, this time in Hawaii. Three same-sex couples argued that the state's prohibition of same-sex marriage violated the Hawaiian constitution. In the course of the somewhat protracted history of this case, the Supreme Court of Hawaii found that denying marriage licenses to same-sex couples constituted discrimination under the state constitution and that such action could be upheld only if the state could demonstrate that denying marriage licenses to gay couples “furthers compelling state interests” and that the proscription was narrowly drawn to avoid unnecessary abridgments of constitutional rights.<sup>21</sup> During the pendency of the case, Hawaii's constitution was amended to prohibit gay marriage, leading to a dismissal of the case in 1999.

The decision nevertheless set off a spate of statewide legislation and constitutional amendments across the country banning gay marriages. At the federal level, Congress passed and President Clinton signed the Defense of Marriage Act (DOMA) in 1996.<sup>22</sup> DOMA provided that same-sex marriages properly celebrated at the state level would not be recognized by the federal government.<sup>23</sup>

<sup>16</sup> The Supreme Court later overruled *Bowers* in *Lawrence v. Texas*. See Part 2.1.8., *infra*.

<sup>17</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>18</sup> *Id.* at 624.

<sup>19</sup> *Id.* at 632.

<sup>20</sup> *Id.* at 634-35.

<sup>21</sup> *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), *reconsideration and clarification granted in part*, 74 Haw. 645, 852 P.2d 74 (1993).

<sup>22</sup> Pub.L. 104-199, 110 Stat. 2419 (September 21, 1996).

<sup>23</sup> DOMA was later declared unconstitutional in *Windsor v. United States*. See Part II.A. 10., *infra*.

### 2.1.7. *Vermont Requires Same-Sex Couples to Receive Same Benefits as Married Couples*

Despite these setbacks in many states and at the federal level, the Vermont Supreme Court in 1999 ruled that the state was required to extend to same-sex couples all of the benefits and protections of marriage under state law.<sup>24</sup> The court ordered the Vermont legislature either to allow same-sex marriage or implement an alternative mechanism to provide similar benefits to gay couples.

### 2.1.8. *Supreme Court Reverses Course and Finds that State Laws Criminalizing Sodomy Violates Due Process*

A watershed decision came in 2003 with *Lawrence v. Texas*,<sup>25</sup> in which the Supreme Court of the United States overturned its decision in *Bowers v. Hardwick* and held that laws criminalizing sodomy denied people of their liberty interests and thus violated the due process clause of the Fourteenth Amendment.

### 2.1.9. *More Marriage Cases Reach the States with Mixed Outcomes*

Gay couples continued to bring cases to the state courts arguing for marriage equality, with varied but promising results. In 2003, the same year that *Lawrence v. Texas* was decided, the Massachusetts Supreme Judicial Court held that same-sex couples have the right to marry under the state constitution.<sup>26</sup> Just a few years later, same-sex petitioners in New York were less successful, as the New York Court of Appeals rejected similar claims.<sup>27</sup> Also in 2006, an intermediate result was announced by the Supreme Court of New Jersey, which ruled that the state constitution mandated that same-sex and opposite-sex couples were entitled to the same rights and benefits but that they did not necessarily need to be conferred through the institution of marriage.<sup>28</sup> The California courts, however, joined the Massachusetts Supreme Judicial Court in holding that a state statute and initiative limiting marriage to opposite-sex couples violated the state constitution.<sup>29</sup> The Supreme Court of Iowa followed in 2009, finding that refusal to issue marriage licenses to gay couples violated the equal protection clause of the state constitution.<sup>30</sup>

<sup>24</sup> *Baker v. Vermont*, 744 A. 2d 864 (Vt. 1999).

<sup>25</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>26</sup> *Goodridge v. Dept. of Public Health*, 798 N.E. 2d 941 (Mass. 2003).

<sup>27</sup> *Hernandez v. Robles*, 7 N.Y. 338, 855 N.E. 2d 1 (2006).

<sup>28</sup> *Lewis v. Harris*, 188 N. J. 415, 908 A. 2d 196 (2006).

<sup>29</sup> *In re Marriage Cases*, 43 Cal. 4th 757 (2008).

<sup>30</sup> *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009).

### 2.1.10. Federal Defense of Marriage Act Invalidated by Supreme Court

Another seminal moment for gay rights advocates was the Supreme Court's decision in *United States v. Windsor*,<sup>31</sup> in which the Supreme Court declared unconstitutional provisions of DOMA that barred the federal government from recognizing same-sex marriages. In a companion case, the Court declined to rule whether there was a federal constitutional right for same-sex couples to marry, finding that the petitioners lacked standing to bring the appeal.<sup>32</sup>

## 2.2. The Democratic Movement Toward Same-Sex Marriage

An important context to the Supreme Court's decision in *Obergefell* is the strong social movement in favor of same-sex marriage and acceptance of gay people more generally over the preceding decade or so. The impact of the robust public dialogue and social movement in favor of same-sex marriage was a source of disagreement between the Justices in the majority and the dissenters in *Obergefell*.<sup>33</sup> But all agree that the democratic movement was moving in the direction of marriage equality – and moving quickly in that direction. This is perhaps best evidenced by public opinion polls<sup>34</sup> and by legislation in eleven states and the District of Columbia legalizing same-sex marriage.<sup>35</sup>

## 3. THE OBERGEFELL DECISION

The Supreme Court announced its much-awaited decision in *Obergefell* on June 26, 2015, by a narrow vote of 5-4. As is now widely known, the Supreme Court in *Obergefell* held that the due process clause of the Constitution, coupled with the equal protection clause, provides same-sex couples the right to marry. As the Court concluded:

*[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. 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*

<sup>31</sup> *United States v. Windsor*, 133 S.Ct. 2675 (2013).

<sup>32</sup> *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

<sup>33</sup> Compare *Obergefell*, slip op. at 23 – 25 with, e.g., Dissenting Opinion of Chief Justice Roberts at 9.

<sup>34</sup> See, e.g., <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage> (showing, among other things, steady increase in support for gay marriage since 20014).

<sup>35</sup> These states are Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. See *Obergefell*, Appendix B, slip op at 34. See *Obergefell*, dissenting opinion of Chief Justice Roberts, slip op. at 9.



*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.*<sup>36</sup>

The sections that follow explain (A) the constellation of the Justices in *Obergefell*, (B) the facts underlying *Obergefell*, (C) the procedural history of the case, (D) the majority opinion, and (E) the dissenting opinions.

### 3.1. The Constellation of the Justices

The opinion of the Court was delivered by Justice Kennedy and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Chief Justice Roberts and associate Justices Scalia, Thomas, and Alito issued dissenting opinions. For the most part, this alignment was not in the least bit surprising: Justices Ginsburg, Breyer, Sotomayor, and Kagan form the Court's progressive branch and were widely expected to find a constitutional right of same-sex couples to marry, while the Court's most conservative justices – Chief Justice Roberts and Scalia, Thomas, and Alito – were expected to find that there was no such right.

The only open question for most observers<sup>37</sup> was how Justice Kennedy, the Court's swing voter, would come down on the issue. On the one hand, Justice Kennedy is a fundamentally conservative Justice who typically favors states rights in cases involving federalism concerns. On the other hand, Justice Kennedy had proven himself even before *Obergefell* to be a staunch defender of the right to liberty in matters of intimacy and had authored the Court's previous cases extending rights to gay men and lesbian – *Romer v. Evans*,<sup>38</sup> *Lawrence v. Texas*,<sup>39</sup> and *Windsor v. United States*.<sup>40</sup> Ultimately, of course, Justice Kennedy found a constitutional right to same-sex marriage, enhancing even further his stature as a champion of gay rights.

<sup>36</sup> *Obergefell*, slip op. at 22-23.

<sup>37</sup> Some believed that some or even all of the Court's most conservative Justices, including Chief Justice Roberts, would vote in favor of a constitutional right to same-sex marriage. See, e.g., ZORN, Eric. A 9-0 Supreme Court ruling for gay marriage? 10-4. **Chicago Tribune** (May 1, 2015), available at: <<http://www.chicagotribune.com/news/opinion/zorn/ct-gay-marriage-supreme-court-same-sex-perspec-0503-jm-20150501-column.html>>; LANDAU, Joseph. Why Chief Justice John Roberts Might Support Gay Marriage. **The New York Times** (April 27, 2015), available at: <[http://www.nytimes.com/2015/04/28/opinion/why-chief-justice-john-roberts-might-support-gay-marriage.html?\\_r=0](http://www.nytimes.com/2015/04/28/opinion/why-chief-justice-john-roberts-might-support-gay-marriage.html?_r=0)>.

<sup>38</sup> 188 N. J. 415, 908 A. 2d 196 (2006).

<sup>39</sup> 539 U.S. 558 (2003).

<sup>40</sup> 133 S.Ct. 2675 (2013).

### 3.2. Facts in *Obergefell*

The decision in *Obergefell* was based on a number of consolidated cases that included the following petitioners:

*Obergefell*, who wanted to marry his longtime partner, Arthur, after Arthur fell ill with a debilitating, progressive illness. Same-sex marriage was not permitted in their home state of Ohio, so they traveled to Maryland in a medical transport plane. Because it was difficult for Arthur to move, they married on the plane as it remained on the tarmac in Baltimore. Arthur died three months later. Ohio law did not permit Obergefell to be listed as the surviving spouse on the death certificate.<sup>41</sup>

*DeBoer and Rowse* are two women with three children, two with special needs. Each child can have only one legal parent because their home state of Michigan permits only opposite-sex married couples or single individuals to adopt. Among other things, if one were to die, the surviving partner would have no legal rights over the child(ren) she had not been permitted to adopt. "This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives."<sup>42</sup>

*DeKoe and Kostura*, two men, married in New York one week before DeKoe was deployed for military service in Afghanistan. Their marriage was not recognized 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."<sup>43</sup>

These and other cases formed the factual background for the decision in *Obergefell*.

### 3.3. Procedural History

The consolidated cases in *Obergefell* came from the states of Kentucky, Michigan, Ohio, and Tennessee, all of which did not permit same-sex couples to marry. Petitioners claimed that the respondent states "violated the Fourteenth Amendment by denying them the right to marry or have their marriages, lawfully performed in another State, given full recognition."<sup>44</sup>

The district courts all ruled in favors of petitioners.<sup>45</sup> Respondents appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals consolidated the cases and reversed the district courts, finding no constitutional right to

<sup>41</sup> *Obergefell*, slip op. at 4-5.

<sup>42</sup> *Obergefell*, slip op. at 5.

<sup>43</sup> *Obergefell*, slip op. at 6.

<sup>44</sup> *Obergefell*, slip op. at 2.

<sup>45</sup> *Id.*

license same-sex marriages or recognize such marriages lawfully performed in other states.<sup>46</sup> Petitioners filed a petition for a writ of *certiorari*.

In granting the writ of *certiorari*,<sup>47</sup> the Supreme Court agreed to decide the following issues:

1. “[Whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex.”
2. “[W]hether the Fourteenth Amendment requires a State to recognize a same-sex marriage license performed in a State which does grant that right.”<sup>48</sup>

### 3.4. The Majority Opinion

#### 3.4.1. History and Background of Marriage and the Struggle for Equality

The majority opinion begins with the recognition of the importance of marriage as an institution:

*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 religion 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.<sup>49</sup>*

From this the Court concluded that “[n]o union is more profound than marriage, for it embodies the highest ideal of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.”<sup>50</sup>

The Court discussed at some length the history and evolution of the institution of marriage, observing that “[t]he centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.”<sup>51</sup> Despite its longevity, the Court recognized that “[t]he history of marriage is one of both

<sup>46</sup> *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014)

<sup>47</sup> The writ of *certiorari* is the procedural device used by the Supreme Court to exercise its discretionary appellate jurisdiction. See 28 U.S.C.A. §§ 1254 and 1257.

<sup>48</sup> *Obergefell*, slip op. at 2-3.

<sup>49</sup> *Id.*, slip op. at 3.

<sup>50</sup> *Id.*, slip op. at 28.

<sup>51</sup> *Id.*, slip op. at 3.

continuity and change.”<sup>52</sup> The Court then chronicled some of the changes that have marked the history of the institution. Noting that marriage was once viewed as an arrangement made by a couple’s parents based on political, religious, and financial considerations,<sup>53</sup> marriage later came to be understood as a voluntary contract between a man and a woman.<sup>54</sup> And while women once remained non-legal persons upon marriage, they later gained legal, political, and property rights, both in and outside of marriage.<sup>55</sup> Such changes, the Court observed, have “worked deep transformations in the structure, affecting aspects of marriage long viewed by many as essential.”<sup>56</sup>

These changes to our common understanding of marriage, the Court concluded, were typical of movements for greater freedoms that mark U.S. history:

*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 became 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.*<sup>57</sup>

The Court also summarized the history of the movement for equality by the gay and lesbian community in the United States – a movement that had made remarkable progress in recent years. Until relatively recently, “same-sex intimacy had long been condemned as immoral by the state itself in most Western nations,” a belief that was codified in the criminal laws of many states.<sup>58</sup> Discrimination abounded well beyond the criminal law context; homosexuals in the U.S. were “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”<sup>59</sup> Indeed, homosexuality was treated as an illness for most of the 20<sup>th</sup> century, and classified as a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders (1952).<sup>60</sup>

It was only late in the 20<sup>th</sup> Century that gay individuals began to lead more open and public lives and to establish families. “This development was followed by a quite

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<sup>52</sup> *Id.*, slip op. at 6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 7.

extensive discussion of the issue on both governmental and private sectors and by a shift in public attitudes toward greater tolerance.”<sup>61</sup>

### 3.4.2. *Marriage as a Protected Right under the Due Process Clause*

The Supreme Court began its legal analysis by reaffirming the judicial role in defining and protecting liberty interests under the due process clause of the Fourteenth Amendment, which provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>62</sup> The liberty interests protected by the Fourteenth Amendment are nowhere defined but, the Court affirmed, “extend[] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identify and beliefs.”<sup>63</sup>

And it remains an important judicial obligation to determine and protect those liberty interests: “The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”<sup>64</sup> This duty

*requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisos that set forth broad principles rather than specific requirements. History and tradition guide this inquiry but do not set its outer boundaries.*<sup>65</sup>

The Court also invoked the notion of the Constitution as a living document, whose meaning evolves over time as we as a society mature:

*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.*<sup>66</sup>

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<sup>61</sup> *Id.* at 8.

<sup>62</sup> Constitution of the United States, Amendment 14.

<sup>63</sup> Obergefell, slip op. at 10.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 10-11, citations omitted.

<sup>66</sup> *Id.* at 11.

The Court, citing its decision in *Loving v. Virginia*,<sup>67</sup> noted its longstanding determination that “the right to marry is protected by the Constitution.”<sup>68</sup> In *Loving*, a unanimous Supreme Court held that marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>69</sup> This principle, the Court stated, had been reaffirmed in numerous cases: “Over time and in [several] contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.”<sup>70</sup>

The Court acknowledged that the right to marry had always been recognized in cases involving opposite-sex partners but found that this was simply a reflection of the times: “The Court, like many institutions, has made assumptions defined by the world and time of which it is a part.”<sup>71</sup> The Court noted that in its precedents the Court “expressed constitutional principles of broader reach.”<sup>72</sup> The Court continued by observing that “in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.”<sup>73</sup>

The Court’s analysis thus led it to the conclusion that same-sex couples have the constitutional right to marry, identifying four principles and traditions which “demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”<sup>74</sup> These four principles and traditions, each of which is discussed below, are the following:

- a. Notions of individual autonomy
- b. The importance and uniqueness of marriage
- c. The need to protect children and families
- d. Marriage as a bedrock of society

#### 3.4.2.1. *Notions of Individual Autonomy*

The first principle on which the Court based its finding that the Constitution requires marriage equality was founded on notions of individual autonomy, drawn from the Court’s conclusion that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>75</sup> “Like choices concerning contraception, family relationships, procreation, and childbearing, all of which are protected by the Consti-

<sup>67</sup> *Loving v. Virginia*, 388 U.S. 1 (1967); see Part 2.1.2., *supra*.

<sup>68</sup> Obergefell, slip op. at 11.

<sup>69</sup> *Loving*, 388 U.S. at 12, quoted in slip op. at 11, 12.

<sup>70</sup> Obergefell, slip op. at 11.

<sup>71</sup> *Id.* at 11-12.

<sup>72</sup> *Id.* at 12.

<sup>73</sup> *Id.* at 12.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

tution, decisions concerning marriage are among the most intimate that an individual can make.”<sup>76</sup>

*Choices about marriage shape an individual's destiny. ... The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.... 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.*<sup>77</sup>

### 3.4.2.2. *The Importance and Uniqueness of Marriage*

The second principle upon which the Court premised its finding that there is a fundamental right to marriage that extends to gay couples is the extraordinary importance and uniqueness of the institution of marriage. Marriage, the Court said, supports a “two-person union unlike any other in its importance to committed individuals.”<sup>78</sup> The Court recalled its language in *Griswold* about the significance of this institution:

*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; a bilateral loyalty, not commercial or social project. Yet it is an association for as noble a purpose as any involved in our prior decisions.*<sup>79</sup>

In expanding the right of marriage to the *Obergefell* petitioners, the Court also evoked its holding in *Lawrence* extending the right of intimate association to same-sex couples.<sup>80</sup>

### 3.4.2.3. *The Need to Protect Children and Families*

Third, the Court held that marriage protects children and families and for that reason

should be extended to gay couples. In safeguarding children and families, marriage “thus draws meaning from related rights of childrearing, procreation, and education.”<sup>81</sup> These protections involve both material benefits associated with marriage but also the integrity of the family unit.<sup>82</sup> Justice Kennedy took note of the

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 13.

<sup>79</sup> *Id.* at 13-14, quoting *Griswold* at 486.

<sup>80</sup> *Id.* at 14.

<sup>81</sup> *Id.* at 14.

<sup>82</sup> *Id.* at 15.

modern reality that many gay couples have children and that these families and their children would benefit from the stability that marriage offers:

*[M]any 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. This provides powerful confirmation from the law itself that gays and lesbians can create living, supportive families.*

\* \* \* \*

*Excluding same-sex couples from marriage thus conflicts with the 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.<sup>83</sup>*

At the same time, the Court was careful to debunk the notion that the right to marry is

tied too closely to procreation – one of the principle arguments of the opponents of a constitutional right for same-sex couples to marry:

*This 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 that 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.<sup>84</sup>*

#### 3.4.2.4. Marriage as a Bedrock of Society

Finally, the Court relied on the notion that “the Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”<sup>85</sup> Indeed, the Court in earlier cases had described marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress,”<sup>86</sup> and as “a great public

<sup>83</sup> *Id.* (citations omitted).

<sup>84</sup> *Id.* 15-16.

<sup>85</sup> *Id.* at 16.

<sup>86</sup> *Maynard v. Hill*, 125 U.S. 190, 211 (1888), quoted in *Obergefell*, slip op. at 16.



institution, giving character to our whole civil polity.”<sup>87</sup> “Marriage,” the Court said in *Obergefell*, today “remains a building block of our national community.”<sup>88</sup> When gay couples are excluded from marriage, they are “denied the constellation of benefits that the States have lined to marriage,”<sup>89</sup> and “consigns [such couples] to an instability many opposite-sex couples would deem intolerable in their own lives.”<sup>90</sup>

The exclusion of gay couples from the institution of marriage is also demeaning to those couples.

*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.*<sup>91</sup>

Again evoking the notion of a living Constitution, the Court said as follows:

*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.*<sup>92</sup>

The majority rejected the argument raised by respondents that precedent compelled the Court to consider liberty interests under the due process clause in a more circumscribed manner consistent with specific historical purposes. Respondents made the argument that petitioners were not seeking to enter the existing institution of marriage but to create a new, dramatically different, institution. The Court demurred noting that such an argument

*is inconsistent with the approach this court has used in discussing other fundamental rights, including marriage and intimacy. Loving did not ask about a right to “inter-racial marriage”; Turner did not ask about a “right of inmates to marry”; and Zablocki did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each*

<sup>87</sup> 125 U.S. at 213, quoted in *Obergefell* at slip op. at 16.

<sup>88</sup> *Obergefell*, slip op. at 16.

<sup>89</sup> *Id.* at 1.

<sup>90</sup> *Id.* at 17.

<sup>91</sup> *Id.* at 17.

<sup>92</sup> *Id.* at 17-18. “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.” *Id.* at 18-19.

*case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.*

\* \* \* \*

*That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.<sup>93</sup>*

### 3.4.3. *The Right to Marriage Under the Equal Protection Clause*

Although the centerpiece of the Court's legal analysis was premised on a due process analysis, the Supreme Court found that equal protection considerations also supported its ruling that same-sex partners be permitted to marry: "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."<sup>94</sup> Noting that earlier marriage cases, including *Loving* and *Zablocki*, had recognized the "synergistic influence" of due process on equal protection,<sup>95</sup> the Court found that equal protection provided an additional ground for the right to marry in his case:

*Rights implicit in liberty and rights secured by equal protection may rest on different precedents and are not always co-extensive, yet in some instance each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.<sup>96</sup>*

As it did in its due process analysis, the Supreme Court again summoned a living approach to constitutional analysis: "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."<sup>97</sup> In exposing the marriage laws under review to equal protection

<sup>93</sup> *Id.* at 18, citations omitted.

<sup>94</sup> *Id.* at 19.

<sup>95</sup> *Id.* at 20. See also *id.* at 22, noting that the Court in *Lawrence* "acknowledged the interlocking nature of these constitutional safeguards in the context of a legal treatment of gays and lesbians."

<sup>96</sup> *Id.* at 19.

<sup>97</sup> *Id.*

scrutiny, the Court concluded that refusing to allow same-sex marriage did not pass muster:

*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.<sup>98</sup>*

#### 3.4.4. Refutation of Arguments by Respondents

The respondent states made the following arguments, each of which were rejected by the Court:

- a. Petitioners should wait for the social movement in favor of gay marriage to take its course;
- b. Allowing gay marriage would harm the institution; and
- c. Finding a constitutional right to gay marriage would conflict with the right to free exercise of religion.

Each of these arguments and the Court's responses is discussed below.

##### 3.4.4.1. Petitioners should wait for the social movement in favor of gay marriage to take its course

Respondents argued that the Court should refrain from finding a constitutional right to same-sex marriage and instead let the social movement in favor of gay marriage run its course through normal democratic processes. This was one of the bases of the underlying court of appeals decisions.<sup>99</sup> The argument contended that there had been "insufficient democratic discourse" to justify a full and final resolution of the issue; the Supreme Court countered that the issue of a right to same-sex marriage has received more deliberation than opponents acknowledge, and thus that the issue is ripe for judicial resolution.<sup>100</sup>

<sup>98</sup> *Id.* at 22.

<sup>99</sup> *Id.* at 23.

<sup>100</sup> *Id.* As the Court stated:

There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts.... [Many] of the central institutions in American life – state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civil groups, professional organizations and universities – have devoted substantial attention to the question. This has led to an enhanced

The Court did acknowledge that political change is often more productive than decisions involving judicial fiat, recognizing that “the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.”<sup>101</sup> The Court cited a recent case in which it noted that the “right of citizens to debate so that they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.”<sup>102</sup> But in that case the Court also acknowledged that when the democratic process impinges individual rights, the courts have a legitimate and critical role. “Thus, when the rights of persons are violated, ‘the Constitution requires redress by the courts,’ notwithstanding the more general value of democratic decisionmaking.”<sup>103</sup> “This holds true,” the Court continued, “even when protecting individual rights affects issues of the utmost importance and sensitivity.”<sup>104</sup>

*The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.... 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.” West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943). .... “It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process.”<sup>105</sup>*

The Court further noted the harm that can emerge from a more restrained, cautious approach, as the Court took in *Bowers*, which was ultimately repudiated by the Court in *Lawrence v. Texas*:

*A ruling against same-sex couples would have the same effect – and, like Bowers, would be unjustified under the Fourteenth Amendment. The petitioners’ stories make clear the urgency of the issue they present to the Court. ... [T]he Court has a duty to address these claims and answer these questions.... Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to*

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understanding of the issue – an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

*Id.* at 23-24.

<sup>101</sup> *Id.* at 24.

<sup>102</sup> *Id.*, quoting *Schuette v. BAMN*, 572 U.S. \_\_\_\_ (2014), slip op. 15-16.

<sup>103</sup> *Id.*, quoting *Schuette* at slip op. 17.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 24-25.

*same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.*<sup>106</sup>

#### 3.4.4.2. *Allowing gay marriage would harm the institution*

A longstanding argument against allowing same-sex couples to marry is that doing so would undermine the sanctity of the institution. In particular, the argument was advanced that marriage exists to foster the “natural connection between natural procreation and marriage”<sup>107</sup> and thus is not suited to gay couples. The Court rejected this argument because it “rests on a counterintuitive view of opposite-sex couple’s decision-making process regarding marriage and parenthood,” with the desire to have children being only one of “many personal, romantic, and practical considerations.”<sup>108</sup>

An additional argument has been made that allowing same-sex couples to marry would deter heterosexual couples from marrying because it would taint the institution. The Court also rejected this argument, finding that “it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so.”<sup>109</sup>

#### 3.4.4.3. *Finding a constitutional right to gay marriage would conflict with the right to free exercise of religion*

Respondents and others argued that finding a constitutional right of same-sex couples to marry would conflict with the right to the free exercise of religion guaranteed by the First Amendment to the U.S. Constitution. The Court rejected this argument, insisting 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.”<sup>110</sup>

#### 3.4.5. *Full Faith and Credit Applies to Same-Sex Marriages*

The so-called full faith and credit clause of the Constitution provides as follows:

*Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the*

<sup>106</sup> *Id.* at 25-26. As the Solicitor General said during oral argument, a cautious approach would be “a validation” of the constitutionality of marriage discrimination laws. See Transcript of Oral Argument, page 29, line 7, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-556q1\\_15gm.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_15gm.pdf).

<sup>107</sup> Obergefell, slip op. at 26.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 27.

*manner in which such acts, records, and proceedings shall be proved, and the effect thereof.*<sup>111</sup>

Pursuant to the full faith and credit clause, states typically recognize marriages performed in other states. Thus, if Man (M) and Woman (W) marry in Las Vegas, Nevada, and return to their home in New York City, the State of New York will recognize the marriage even though the marriage requirements in each of those states are different.

Before *Obergefell*, the question was this: If Man (M) and Man (M) married in New York, a state that permitted same-sex marriage, and returned to Texas, a state that did not recognize gay marriages, would Texas need to recognize the marriage under the full faith and credit clause? Before *Obergefell*, some states in which same-sex marriages were not permitted refused to recognize gay marriages lawfully performed in other states by invoking a narrow public policy exception to the full faith and credit clause.<sup>112</sup>

The Supreme Court described the notion of “[b]eing 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,”<sup>113</sup> finding that such a system would promote “instability and uncertainty.”<sup>114</sup>

The question of whether a state would need to recognize same-sex marriages performed elsewhere would have been far more significant had the Court not ruled, as it did in *Obergefell*, that there was a right to marriage equality. The Court recognized, as did the respondents, that “if States are required by the Constitution to issue marriage license to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined.”<sup>115</sup> Accordingly, the Court held “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.”<sup>116</sup>

<sup>111</sup> Constitution of the United States. Article IV, section 1.

<sup>112</sup> See, e.g., *DeBoer v. Snyder*, 772 F. 3d 388, 418-19 (2014).

<sup>113</sup> *Obergefell*, slip op. at 27, quoting *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (internal quotation marks omitted).

<sup>114</sup> *Obergefell*, slip op. at 28.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

### 3.5. The Dissenting Opinions

The four most conservative Justices on the Court – Chief Justice Roberts and Justices Scalia, Thomas, and Alito – each filed his own dissenting opinion.<sup>117</sup> And each of these dissents was fierce in its own right.<sup>118</sup>

The dissents focused on a number of interrelated themes, most prominent among them (1) the Court's flawed due process and equal protection analyses; (2) the proper role of the Court in our democratic system; (3) the nature of the institution of marriage; and (4) the proper role of the states in our federal system.

#### 3.5.1. *The Majority's Flawed Due Process and Equal Protection Analysis*

The dissenters heavily criticized the majority for its legal analysis. As described above,<sup>119</sup> the Court's decision was based largely on a due process analysis, an analysis that the Chief Justice criticized as having “no basis in principle or tradition.”<sup>120</sup>

*Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.*<sup>121</sup>

Comparing the majority opinion to long-discredited decisions of the Supreme Court, the Chief Justice accuses the majority of embracing an “aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.”<sup>122</sup>

The dissenters also critiqued the majority's equal protection discussion. The principal dissent accuses the majority of “not seriously engag[ing]”<sup>123</sup> the equal protection claim and attacking the Court's treatment of the equal protection issue as

<sup>117</sup> Chief Justice Robert's dissent was joined by Justices Scalia and Thomas; Justice Scalia's dissent was joined by Justice Thomas; Justice Thomas's dissent was joined by Justice Scalia; and Justice Alito's dissent was joined by Justices Scalia and Thomas.

<sup>118</sup> The dissent of the Chief Justice has been described as “undoubtedly the fieriest opinion the chief justice has written on the court.” ROSEN, Jeffrey. John Roberts, the Umpire in Chief, Sunday Review. **The New York Times** (June 27, 2015), available at: <<http://www.nytimes.com/2015/06/28/opinion/john-roberts-the-umpire-in-chief.html>>.

<sup>119</sup> See Part 3.4.2., *supra*.

<sup>120</sup> *Obergefell*, dissenting opinion of Roberts, C.J., slip op. at 10.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 15.

<sup>123</sup> *Id.* at 23.

“conclusory”<sup>124</sup> and “difficult to follow.”<sup>125</sup> The Chief Justice further assails the majority for ignoring the Court’s established framework for analyzing equal protection claims,<sup>126</sup> relying instead on the vague notion of a “synergy between”<sup>127</sup> the due process and equal protection clauses. The majority, he claims, “fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions.”<sup>128</sup>

As summarized by Justice Scalia in his separate dissent:

*[T]he opinion’s showy profundities are often profoundly incoherent. ...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. ... The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.*<sup>129</sup>

And Justice Thomas said this:

*The Court’s decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a “liberty” that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.*<sup>130</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 24.

<sup>129</sup> *Obergefell*, dissenting opinion of Justice Scalia, slip op. at 9.

<sup>130</sup> *Obergefell*, dissenting opinion of Justice Thomas, slip op. at 2.



### 3.5.2. *The Court's Role in our Democratic System*

The dissenters made a potent charge that the Court usurped its proper role in the political process and did serious damage to its institutional integrity. Taking pains to note that his dissent was not based on opposition to same-sex marriage as a matter of social policy (stating that notions of “social policy and considerations of fairness” lent “undeniable appeal” to legislative decisions to allow marriage equality<sup>131</sup>), Chief Justice Roberts stressed that the decision was one for the democratic branches rather than the judicial branch:

*[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.....*

*Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. ....<sup>132</sup>*

Reiterating that he holds no animus toward gays and lesbians, the Chief Justice emphasized that his position was informed by the proper position of the Court in our constitutional system:

*Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.<sup>133</sup>*

And he continued:

*In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded*

<sup>131</sup> *Obergefell*, dissenting opinion of Chief Justice Roberts, slip op.at 1.

<sup>132</sup> *Id.* at 2.

<sup>133</sup> *Id.* at 3.

*their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.*<sup>134</sup>

The dissenters were particularly troubled by the lack of restraint of the majority:

*The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.”*<sup>135</sup>

The dissent also criticized the Court’s decision for thwarting the democratic process that was moving, and moving quickly, in support of permitting same-sex marriage and predicted that negative consequences for the acceptance of gay people and gay marriage would result:

*Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.*<sup>136</sup>

And this:

*By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. 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.... Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.*<sup>137</sup>

<sup>134</sup> *Id.* at 29.

<sup>135</sup> *Id.* at 3.

<sup>136</sup> *Id.* at 2.

<sup>137</sup> *Id.* at 26-27. Justice Thomas agreed, claiming that the majority “wip[es] out with a stroke of the keyboard the results of the political process in over 30 States.” *Obergefell*, dissenting opinion of Justice Thomas, at 3.

The dissent also condemns the majority opinion for compromising the Court's legitimacy. Respect for the Court, Chief Justice Roberts said, "flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained."<sup>138</sup>

As Justice Scalia added:

*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.*

\* \* \* \*

*[T]o 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.<sup>139</sup>*

Justice Alito also expressed concern about the institutional role of the Court and what the decision portends for future cases:

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

*Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial*

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<sup>138</sup> *Obergefell*, dissenting opinion of Chief Justice Roberts, slip op. at 24.

<sup>139</sup> *Obergefell*, dissenting opinion of Justice Scalia, slip op. at 6. Justice Alito agreed: 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 this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights.

\* \* \* \*

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental. *Obergefell*, dissenting opinion of Justice Alito, slip op. at 2-3.

*self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.*<sup>140</sup>

### 3.5.3. *The Nature of the Institution of Marriage*

One of the central differences between arguments made by petitioners and respondents in *Obergefell* – and between those on opposite sides of the marriage debate more generally – is whether same-sex marriage is simply an extension of the well-recognized institution or fundamentally changes long-held notions of marriage. This debate was recognized by the majority, which characterized same-sex marriage as an extension of traditional marriage.<sup>141</sup>

The dissenters, however, strenuously assert that same-sex marriage fundamentally alters the institution of marriage. Marriage, which has existed for millennia and across civilizations, has “referred to only one relationship: the union of a man and a woman.”<sup>142</sup> This historical understanding of marriage, the Chief Justice, continued, “is no historical coincidence” but “arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.... This singular understanding of marriage has prevailed in the United States throughout our history.”<sup>143</sup>

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage.<sup>144</sup>

The Court itself in its cases has described marriage as the union of one man and one woman and, despite the rapid pace of societal change, most states had retained that traditional understanding of marriage. And, as Justice Alito stated:

<sup>140</sup> *Obergefell*, dissenting opinion of Justice Alito, slip op. at 8.

<sup>141</sup> *Obergefell*, slip op. at 18.

<sup>142</sup> *Obergefell*, dissenting opinion of Roberts, C.J., slip op. at 4.

<sup>143</sup> *Id.* at 5.

<sup>144</sup> *Id.* at 5.

*For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.*

\* \* \* \*

*It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.<sup>145</sup>*

### 3.5.4. *The Proper Role of the States in our Federal System*

The dissenters attack the Court's opinion for making federal what in their view is properly an issue for the states. Marriage, the dissenters said, had historically been the province of the states, citing Justice Kennedy's opinion in *Windsor* from just two years prior: "[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."<sup>146</sup> As Justice Alito stated in his dissent:

*The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible.<sup>147</sup>*

Chief Justice Roberts' dissent ended with a strongly worded rebuke to the institutional integrity of the majority's decision:

*If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.<sup>148</sup>*

<sup>145</sup> *Obergefell*, dissenting opinion of Justice Alito, slip op. 4, 5.

<sup>146</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013), quoted in *Obergefell*, dissenting opinion of Justice Scalia, slip op. 4.

<sup>147</sup> *Obergefell*, dissenting opinion of Justice Alito, slip op. at 7.

<sup>148</sup> *Obergefell*, dissenting opinion of Chief Justice Roberts, slip op. at 29.

## 4. REFLECTIONS ON OBERGEFELL

So what does it all mean? In creating a right to same-sex marriage thought the nation, the Court's decision in *Obergefell* has set off a spate of discussion and anticipation about the future of gay rights and marriage in the United States. This part makes some modest reflections on the decision.

### 4.1. The Court's Missed Opportunity to Solidify its Equal Protection Jurisprudence

Many commentators have argued that the Court lost what could have been a valuable opportunity to clarify its equal protection jurisprudence and provide even greater protection to homosexuals.<sup>149</sup> As Professor Clare Huntington argued, an equal protection analysis would have provided gay men and lesbians with a greater panoply of protections.<sup>150</sup> This "squandered" opportunity of failing to declare sexual orientation a suspect or quasi-suspect classification for purposes of an equal protection analysis potentially limits the reach of *Obergefell*. An opinion based more directly on equal protection grounds "would secure an enduring precedent that would bind lower courts – and within the bounds of *stare decisis*, Justice Kennedy's successors – when future laws targeting gays and lesbians are challenged."<sup>151</sup> A few of these potential ramifications are described below:

*[T]he failure to declare sexual orientation a suspect classification creates future harm – in the form of continued legal uncertainty for gays and lesbians. Consider first current or future laws restricting the ability of gays and lesbians to legally adopt children. Because Obergefell was laser focused on the fundamental right to marry and not the nature of the classification, and because the Court noted, without casting doubt on its constitutionality, that some states do not permit gays and lesbians to adopt children, future courts can easily distinguish Obergefell. Consider, as a second example, the use of peremptory challenges to strike jurors. Where a peremptory challenge implicates a suspect or quasi-suspect classification, such as race or sex, the Equal Protection Clause prohibits the exercise of that challenge on that ground. Such a protection does not apply*

<sup>149</sup> "Many commentators ... expressed significant frustration that the Court did not use *Obergefell* to clarify the Court's equal protection jurisprudence, particularly regarding the tiers of scrutiny." Elizabeth B. Cooper, *The Power of Dignity*, 84 *Fordham L. Rev.* 3, 5 n. 15 (2015). See also *id.* at 13 ("Many commentators have criticized the *Obergefell* Court for failing to address directly the claimant's equal protection arguments, with much of this criticism focusing on the Court's sidestepping the question of whether gay men and lesbians should be treated as a protected class").

<sup>150</sup> HUNTINGTON, Clare. *Obergefell's Conservatism: Reifying Familial Fronts*. **Fordham Law Review**, New York City, vol. 84, n. 1, p. 23-31, oct. 2015. p. 23.

<sup>151</sup> NICOLAS, Peter. *Obergefell's Squandered Potential*. **California Law Review Circuit**, Berkeley, vol. 6, p. 137-144, nov. 2015. p. 138.

to non-suspect grounds. Thus, it is only if heightened scrutiny applies to sexual orientation that litigants may prevent opposing counsel from striking people from juries solely on the basis of their sexual orientation.<sup>152</sup>

Other potential issues that may arise beyond adoption<sup>153</sup> and the use of peremptory strikes to exclude gay individuals from a jury include those relating to real property, child custody, spousal support, employment, housing, and public accommodations.<sup>154</sup>

One noted commentator summarized criticism of the Court's decision as being "heavy on rhetoric and light on legal reasoning – a political masterstroke but a doctrinal dud."<sup>155</sup>

## 4.2. *Obergefell's* Fundamentally Conservative Vision of Marriage

In some respects, of course, the *Obergefell* decision reflects a dramatic departure from the past and a progressive response to societal transformations. In other ways, however, the Court's decision has been viewed as fundamentally conservative, having been described as a "paean to a very traditional picture of marriage."<sup>156</sup> Indeed, as many marriage-equality proponents had warned, "the price of admission to marriage for same-sex couples was the further reinforcement of a very traditional understanding of marriage and its role in society."<sup>157</sup> As another scholar noted, the decision has the "lamentable consequence[]" of "unnecessarily disrespect[ing] people who in good faith have a different view of the social front of marriage. And it reifies marriage as a key element in the social front of family, further marginalizing nonmarital families"<sup>158</sup> and single individuals. The Court's emphasis on the notion of dignity in marriage celebrates the union over the notion of individual dignity that has characterized much of the Court's earlier rulings. This characterization has been said to "obscure[] the dignity

<sup>152</sup> *Id.* at 142 (citations omitted).

<sup>153</sup> See also LEWIN, Tamar. Mississippi Ban on Adoptions by Same-Sex Couples Is Challenged. **The New York Times** (August 12, 2015), available at: <<http://www.nytimes.com/2015/08/13/us/mississippi-ban-on-adoptions-same-sex-couples-challenged.html>>.

<sup>154</sup> See, e.g., Cooper, *supra* note 149 at 18-19, 20-21; Huntington, *supra* note 150 at 23 n. 4.

<sup>155</sup> TRIBE, Laurence H. Equal Dignity: Speaking its Name. **Harvard Law Review**, New Haven, vol. 129, n. 1, p. 16-32. nov. 2015. p. 16. An even more caustic response, somewhat predictably, came from Justice Scalia, who said this:

If ... I ever joined an opinion for the Court that began: "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," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie. *Obergefell*, dissenting opinion of Justice Scalia, slip op. at 7-8 n. 22.

<sup>156</sup> LEIB, Ethan J. Hail Marriage and Farewell. **Fordham Law Review**, New York City, vol. 84, n. 1, p. 41-52, oct. 2015. p. 41.

<sup>157</sup> *Id.* (footnote omitted).

<sup>158</sup> Huntington, *supra* note 150 at 23 (footnote omitted).

of the individual, whether married or not.... It overlooks – and even implicitly undermines – the importance of individual autonomy and the importance of solitude in defining and refining individual autonomy.”<sup>159</sup>

### 4.3. The Open Question of Religious Accommodation

The majority recognized that there is an inherent tension between the constitutional right to marriage equality recognized in *Obergefell* and the First Amendment’s protection of free exercise of religion.<sup>160</sup> As Justice Kennedy acknowledged, “[t]he 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.”<sup>161</sup> The majority decision, consistent with its general approach to deal with constitutional issues only when they arise in concrete cases,<sup>162</sup> did not outline the specific ways in which the inevitable conflicts between the free exercise clause and the right to marry would be resolved.

The Chief Justice in his dissent anticipated some of the many thorny issues involving this conflict:

*Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage – when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same sex married couples.*<sup>163</sup>

And he further projected that those hoping to preserve their right to free exercise of religion in such cases would not be received favorably when these cases reach the Court: “There is little doubt that these and similar questions will soon be before the Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.”<sup>164</sup>

These cases surely will arise in the coming years and it will remain to be seen how the Court will resolve the tension between these two important rights.

<sup>159</sup> POWELL, Catherine. Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality. *Fordham Law Review*, New York City, vol. 84, n. 1, p. 69-78, oct. 2015. p. 71-72.

<sup>160</sup> Congress shall make no law... prohibiting the free exercise [of religion].” Constitution of the United States, Amendment 1.

<sup>161</sup> *Obergefell*, slip op. at 27.

<sup>162</sup> See, e.g., *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57-68 (1993).

<sup>163</sup> *Obergefell*, dissenting opinion of Chief Justice Roberts, slip op. at 28.

<sup>164</sup> *Id.* See also *Obergefell*, dissenting opinion of Justice Thomas, slip op. at 14-16.



#### 4.4. Moderate Backlash

Although the *Obergefell* decision has received “widespread acceptance,”<sup>165</sup> there has been a moderate backlash, as predicted by the dissenters, with at least one poll suggesting that support for gay marriage has fallen since the Court’s ruling.<sup>166</sup>

Implementation of the *Obergefell* decision has been robust; in the vast majority of states impacted by the Court’s decision, there has been full compliance with *Obergefell*.<sup>167</sup>

Nevertheless, some county clerks and others have refused to issue marriage licenses to same-sex couples or altogether.<sup>168</sup> In one particularly notorious case, a Kentucky clerk was jailed for her refusal to issue marriage licenses to gay couples.<sup>169</sup> All in all, there is no serious concern about full implementation of *Obergefell* at the state and local level.

#### 4.5. Is Polygamy Next?

The Chief Justice in his dissent predicted that the Court’s affirmation of a constitutional right to same-sex marriage will be used to argue that there is also a constitutional right to polygamous marriages:

*It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” ante, at 2599, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise “suffer the stigma of knowing their families are somehow lesser,” ante, at 2600, why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” ante, at 2604, serve to disrespect and subordinate people who find fulfillment in polyamorous*

<sup>165</sup> GOLDBERG, Suzanne B. *Obergefell* at the Intersection of Civil Rights and Social Movements. **California Law Review Circuit**, Berkeley, vol. 6, p. 157-165, nov. 2015. p. 157.

<sup>166</sup> See <http://www.breitbart.com/big-government/2015/07/19/poll-support-for-gay-marriage-has-fallen-after-obergefell/>.

<sup>167</sup> LANDAU, Joseph. Roberts, Kennedy, and the Subtle Differences that Matter in *Obergefell*. **Fordham Law Review**, New York City, vol. 84, n. 1, p. 33-40, oct. 2015. p. 39 note 46.

<sup>168</sup> See *Illegal Defiance on Same-Sex Marriage*, The Opinion Page, *New York Times*, July 10, 2015, available at [http://www.nytimes.com/2015/07/10/opinion/illegal-defiance-on-same-sex-marriage.html?\\_r=0](http://www.nytimes.com/2015/07/10/opinion/illegal-defiance-on-same-sex-marriage.html?_r=0).

<sup>169</sup> See BLINDER, Alan; PEREZ-PENA, Richard. Kim Davis, Released from Kentucky Jail, Won’t Say if She Will Keep Defying Court. **New York Times** (September 8, 2015), available at: <<http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html>>.

relationships? See Bennett, *Polyamory: The Next Sexual Revolution?* Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, *Married Lesbian "Throuple" Expecting First Child*, N.Y. Post, Apr. 23, 2014; Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 Emory L.J. 1977 (2015).

*I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.*<sup>170</sup>

The concern that polygamous couples would use *Obergefell* as supporting a right to plural marriage is not merely hypothetical but has already occurred.<sup>171</sup> Although the Supreme Court in the nineteenth century ruled that polygamy could be a crime,<sup>172</sup> a number of commentators have argued that *Obergefell* provides new support for overturning that decision.<sup>173</sup> This is unlikely but the decision does give cause for reflection on the essential nature of our understanding of marriage.

#### 4.6. Is there a Right to Marriage or a Right to Marriage Equality?

It has been argued that in establishing a constitutional right of same-sex couples to marry, the Supreme Court did not really find a constitutional right to *marriage* but instead a constitutional right to *marriage equality*. As Professor Ethan Leib suggested, it may be constitutionally permissible after *Obergefell* for a state to remove itself from the business of marriage:

*Still, there is an important question that remains open after Obergefell. Although no one can doubt that same-sex couples now have a fundamental right to marry if and when the state offers marriage at all, one might wonder whether Justice Kennedy actually created not just a right to marry, but also a right to marriage itself. To wit, is it an outgrowth of the Court's opinion that there is a constitutional requirement that states*

<sup>170</sup> *Obergefell*, dissenting opinion of Chief Justice Roberts, slip op. at 21.

<sup>171</sup> See <http://www.krtv.com/story/30715777/montana-polygamist-family-lawsuit-hits-legal-roadblock>, involving the notorious polygamist Nathan Collier.

<sup>172</sup> *Reynolds v. United States*, 98 U.S. 145 (1878)

<sup>173</sup> See, e.g., BAUDE, William. Is Polygamy Next? **The New York Times**, The Opinion Pages (July 21, 2015), available at: <<http://www.nytimes.com/2015/07/21/opinion/is-polygamy-next.html>>. Asking "[i]f there is no magic power in opposite sexes when it comes to marriage, is there any magic power in the number two?"

*provide marriage and issue licenses? May states look for ways to pull themselves away from endorsing marriage at all?*<sup>174</sup>

Professor Leib takes the position that the Court in *Obergefell* “ultimately comes shy of establishing ... a fundamental right to marriage,”<sup>175</sup> and details arguments made by politicians and efforts in various states to reduce public involvement in conferring marital status.<sup>176</sup>

## 5. CONCLUSION

The Court’s decision in *Obergefell* is a watershed moment for those who favor gay rights and the dignity of gay individuals and other minorities. It has been widely and warmly received by many and vilified by others. It leaves open numerous questions and, while it goes a long way in protecting the rights of gay people in the United States, it does not give them the full range of protections that the gay rights movement has sought.

The *Obergefell* case brings to mind another landmark in the Court’s jurisprudence: *Brown v. Board of Education*,<sup>177</sup> in which the Court overruled longstanding precedent and ruled that the segregation of schoolchildren on the basis of race violated the Equal Protection Clause of the Constitution. That decision, too, set off a firestorm of disapproval from those who favored the position of power that segregation had bestowed upon the white majority. Although *Brown* itself did not end *de facto* discrimination, or the diminished status of African Americans in the minds of many, it was a turning point in the civil rights movement. *Obergefell*, too, has made a bold and progressive statement about the role of homosexuals in our society by finding a constitutional right to one of its most cherished and venerable institutions. *Brown* had the advantage of being decided *per curiam* by a unanimous Court whereas *Obergefell* is the product of a closely and deeply divided Court. Still, *Obergefell* may have much the same impact as *Brown* as a watershed moment in greater acceptance of a historically marginalized group; its legacy promises great things; its full potential remains to be seen.

<sup>174</sup> Leib, *supra* note 156 at 41-42 (2015) (footnote omitted).

<sup>175</sup> *Id.* at 43 (2015) (footnote omitted).

<sup>176</sup> *Id.* at 45-51.

<sup>177</sup> 347 U.S. 483 (1954).

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