CHAPTER 1

The Gay Rights Revolution in America: Triumph of Constitutional Justice or Judicial Coup d’État?

On June 26, 2015, the Supreme Court of the United States made history by holding that the Constitution’s guarantees of liberty and equality require that states extend the right to marry to two persons of the same sex. In one sense, the Court’s decision in Obergefell v. Hodges was no surprise. Just two years before, in United States v. Windsor, the Court had held that the federal government must recognize the validity of civil marriages between two women or two men performed in those states that permitted gay and lesbian couples to wed. And in the wake of that decision, a cascade of federal and state court rulings—and law reform in several state legislatures—had extended marriage rights across most of the United States.¹ Thus, while in 2013, the year the Court decided Windsor, approximately 21 percent of all same-sex couples were married, when the Court decided Obergefell that number had grown to 38 percent.² By the time the Obergefell Court reviewed the only federal appeals court ruling to the contrary, only thirteen states still had laws or constitutional amendments that prohibited marriage by same-sex couples or refused to recognize such marriages.

If we take a longer view, however, the speed with which same-sex marriage came to the United States seems astonishing. Fewer than thirty years ago, a majority of justices of the Supreme Court voted to uphold state laws that criminalized same-sex sexual acts, even by consenting adults in the privacy of the home. The case was Bowers v. Hardwick (1986). Seventeen years later, in


Lawrence v. Texas (2003), the Court overturned Bowers. Also in 2003, the Massachusetts Supreme Judicial Court, in Goodridge v. Department of Public Health, drew on Lawrence and ruled that its state constitution protected the right of same-sex couples to marry. After its legislature responded in 2004, Massachusetts became the first state to allow such marriages. The developments in Massachusetts intensified calls by conservative lawmakers for a federal constitutional amendment that would define marriage in every state as between one man and one woman. National opinion polls conducted after Goodridge showed that opponents of same-sex marriage outnumbered supporters by roughly two-to-one. Some scholars also contend that the decision prompted a political backlash that helped elect George W. Bush to a second term as President. Very few observers would have predicted a decade ago that same-sex marriage would be constitutionally mandated across the United States any time soon. And if we look back sixty years, as we will do shortly, the idea of a constitutional right to same-sex marriage would have seemed preposterous. Even those who link judicial rulings like Goodridge to electoral backlash acknowledge that, without such high profile constitutional litigation making the issue salient for Americans, public support for gay marriage would not have grown as it did.

We begin our analysis of gay rights and the Constitution with the case that consummated one important component of the revolution in gay rights in America, the U.S. Supreme Court’s decision in Obergefell v. Hodges. In the chapters that follow, we reprint other cases and furnish additional materials to help readers critically assess and weigh for themselves the conflicting arguments over gay rights and the Constitution. These questions go to the very heart of our constitutional project and concern the very nature of the Constitution, the grounds for constitutional rights, and the kind of democracy that our Constitution establishes. We will see deep and heated disagreements about the nature of liberty and how to distinguish liberties that warrant special judicial protection from those that don’t. We will see disagreements about the respective roles of unelected judges and elected legislatures in protecting personal liberties in a constitutional democracy. We will see profound conflicts over the right approach to constitutional interpretation. The subject of gay rights and the Constitution thus serves as a unique window onto many of the most

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4 See Klarman, Closet to Altar, 208.
fundamental constitutional, political, moral, and religious questions that divide Americans.

Obergefell is “the culmination of a series of opinions that began with the dissents in Bowers in 1986.” The Bowers dissenters insisted that longstanding disapproval of homosexual sexual conduct and moral convictions rooted in religious beliefs were insufficient reasons for depriving people of rights and liberties enjoyed by other Americans, like the right to intimate association. The dissenting side became a majority in Romer v. Evans (1996), and again in Lawrence (2003), Windsor (2013), and Obergefell (2015). In all of the cases from Romer on, Justice Anthony M. Kennedy wrote for the majority. In each of his gay rights opinions, Justice Kennedy emphasized that our understanding of constitutional liberty and equality, human dignity, and the nature and importance of basic institutions of society, such as marriage, change over time. Judges, as much as other constitutional interpreters, learn from and draw upon these evolving insights in understanding and applying constitutional rights. For a capsule statement of both the substance and the spirit of his position, consider the closing lines of his opinion of the Court in Obergefell:

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

In each of the gay rights cases, conservative justices excoriated their colleagues for undemocratic willfulness and, in effect, legislating from the bench. Chief Justice John Roberts, dissenting in Obergefell, acknowledged that same-sex marriage proponents “make strong arguments rooted in social policy and considerations of fairness. . . . But this is a Court, not a legislature.” “Many people will rejoice in this decision, and I begrudge none their celebration,” he

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5 The language of this paragraph is indebted to Stanley Fish, “Justice Scalia Gets it Pretty Much Right,” Huffington Post Politics (Jul. 27, 2015), http://www.huffingtonpost.com/stanley-fish/scalia-gets-it-pretty-muc_b_7880118.html.

6 Obergefell, 135 S.Ct. at 2611 (Roberts, C.J., dissenting).
added, but, “[fi]ve lawyers have closed the debate and offered their own vision of marriage as a matter of constitutional law,” “stealing this issue from the people,” and casting “a cloud over same-sex marriage.” The states are entitled if they wish to “maintain the meaning of marriage that has persisted in every culture throughout human history.”

Marriage has been a relationship between man and woman (or, as we will see, between man and women) since the time of Genesis and even before. In addition, conservative judges and commentators often point out that sexual relations among men and among women have been deeply disapproved of by most cultures and religious traditions for millennia. Such conservatives hold these facts of historical practice to constitute sufficient reasons for judges to turn aside the fairness arguments for marriage equality. A further basis asserted by some conservative justices is the “channeling” or “responsible reproduction” rationale frequently invoked in defense of restrictive state and federal marriage laws (discussed later in this chapter and in Chapter 2). According to the channeling argument, marriage arose as a universal social institution to ensure that men and women who conceive children together stay together and invest in those children.

Central to the controversies around gay rights and the U.S. Constitution has been the question whether longstanding forms of discrimination against homosexuals, like excluding them from the military, governmental employment, and civil marriage, have an adequate justification. Do they reflect old prejudices that are ebbing away and religious convictions that a pluralist democracy rules out as an inadequate basis for public policy?

Before turning to the cases and the debates they have provoked, we should review the political circumstances out of which today’s controversies emerged.

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7 Ibid., 2611–12.
I. AMERICA THEN AND NOW

A. A Brave Few: Gays and Lesbians in the 1950s and 60s

A widespread popular movement in favor of marriage equality for same-sex couples was inconceivable in the U.S. in the 1950s and 60s, when today’s older Americans were coming to maturity. A few individuals were brave enough to publicly identify as homosexual in the 1950s and early 60s, and they founded “homophile” groups: the predominantly male Mattachine Society, founded in 1950, and the lesbian group, Daughters of Bilitis, founded in 1955. These pioneers sought to secure some of the most basic rights of equal citizenship: curbing police harassment, ending the blanket exclusion of “out” homosexuals from public employment, and combating other harsh forms of discrimination.9

An influential amicus curiae (“friend of the court”) brief submitted in Obergefell by the Organization of American Historians, cited by the majority opinion in Obergefell, describes the period from the late nineteenth century into the 1960s as one of widespread and intensifying discrimination, harassment, policing, prosecution, and demonization of those suspected of homosexual inclinations and behavior.10 Persecution “dramatically increased at every level of government after the Second World War,” spurred in part by Senator Joseph McCarthy’s denunciations of the State Department for harboring communist sympathizers and “sexual perverts.”11 A special Senate Committee, set up to investigate “the employment of homosexuals and other sex perverts in government,” reported that, “between January 1, 1947, and August 1, 1950, approximately 1700 applicants for federal positions were denied employment because they had a record of homosexuality or other sex perversions.”12 Homosexuals, said the report, lack “emotional stability,” because “indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that

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he is not suitable for a position of responsibility.” The committee report warned that just one “sex pervert in a Government agency”

tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. . . . One homosexual can pollute a Government office.13

Note the language of “pollution.” Scholars such as William Eskridge, Martha Nussbaum, and Andrew Koppelman have amply documented the extent to which gays have been the objects of others’ feelings of disgust.14

In 1953, President Dwight Eisenhower signed an Executive Order declaring that “the interests of national security require” the exclusion from federal employment of those found to have engaged in “any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion.”15 The order was understood to include homosexuals. Defense contractors and all corporations with federal contracts were required to seek out and discharge homosexual employees, and many private employers with no federal contracts followed suit.16 State governments similarly sought to “ferret out and fire their gay employees; countless state employees, teachers, hospital workers, and others lost their jobs as a result”; local police forces also “sharply escalated” the “policing of gay life,” stepping up enforcement actions against “sexual deviants.”17 Between the late 1930s and 1950s, “police and press campaigns” promoting “vicious stereotypes of homosexuals as child molesters” prompted a “public hysteria” and wave of state laws “empowering the police or courts to force people convicted of certain sexual offenses”—or, in some states, even people “merely suspected of being ‘sexual deviants’”—to undergo psychiatric examinations.

The latter could lead to “indeterminate civilian confinements” if people were “deemed in need of a ‘cure’ for their homosexual ‘pathology.’”

The case of Dr. Franklin Kameny is instructive and proved consequential. A veteran of World War II, Kameny was fired from his job with the Army map service in 1957 because he was gay. He did not go quietly. At a time when same-sex sexual relations were criminalized in all fifty states, and “even the American Civil Liberties Union declared it had no interest in challenging laws ‘aimed at the suppression or elimination of homosexuals,’” Kameny called his treatment “an affront to human dignity.” He helped found a Washington, DC chapter of the Mattachine Society and, in 1961, prepared his own appeal petition to the Supreme Court, the first for a violation of civil rights based on sexual orientation. An astonishing document for its forward-looking eloquence, Kameny invoked America’s founding principles:

Not only are the government’s present policies on homosexuality irrational in themselves, but they are unreasonable in that they are grossly inconsistent with the fundamental precepts upon which this government is based. . . . [W]e may commence with the Declaration of Independence, and its affirmation, as an “inalienable right,” that of the “pursuit of happiness.” Surely a most fundamental, unobjectionable, and unexceptionable element in human happiness is the right to bestow affection upon and to receive affection from whom one wishes. Yet, upon pain of severe penalty, the government itself would abridge this right for the homosexual.

After the Supreme Court refused to take his case, Kameny and a handful of other brave souls began picketing the White House and the Pentagon in 1965 to protest the federal government’s exclusion of gays from employment.

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In 1966, the Johnson Administration rejected a request from Mattachine to modify the ban on federal employment. John W. Macy, Jr., Chairman of the Civil Service Commission, issued a “landmark policy statement on homosexuals”:

Pertinent considerations here [for maintaining the ban on homosexuals in government] are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees by homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on the job use of common toilet, shower and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate.

President Lyndon Johnson, whose special assistant and chief of staff, Walter Jenkins, had been arrested on morals charges not long before in the men’s restroom of the local YMCA, ordered renewed investigations of executive branch appointees for suspected homosexuality. In a “curious exchange” with the man who led that investigation, J. Edgar Hoover, Johnson confided: “I swear I can’t recognize them. I don’t know anything about them.” To which Hoover replied, in part, “It’s a thing you just can’t tell sometimes. . . . There are some people who walk kind of funny. That you might think a little bit off or queer.” But Jenkins exhibited no such obvious signs, said the FBI Director. And nor, apparently, did Hoover himself.

Medical science reinforced the hostility toward gays. In 1952, the Diagnostic and Statistical Manual of the American Psychiatric Association (APA) listed homosexuality as a sociopathic personality disorder. Ten years later, the Manual pronounced that this disorder resulted “from a pathological hidden fear of the opposite sex caused by traumatic parent-child relationships.” Kameny lobbied the APA for a change in its policies, joined by lesbian rights pioneer Barbara Gittings and others. The APA eventually removed homosexuality from its list of mental disorders in 1973, followed in 1975 by a similar stance taken by the American Psychological Association, which also urged “all mental health

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22 David Boies and Theodore B. Olson, Redeeming the Dream: The Case for Marriage Equality (New York: Penguin, 2014), 36. But see Cole v. Young, 351 U.S. 536 (1955), in which the Supreme Court narrowed the application of the order for an FDA employee thought to have associates with Communist sympathies.


24 Ibid.

25 Boies and Olson, Redeeming the Dream, 33.
professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation.”

Other major medical and psychological professional associations eventually did the same, and all have issued further statements condemning discrimination against gay and lesbian people. Notably, the APA, the American Psychological Association, and other major health organizations have filed friend of the court briefs in support of gay men and lesbians in the Court’s major cases involving discrimination, most recently arguing, in Obergefell, that there is “no scientific justification for excluding same-sex couples from marriage.”

With growing understanding of sexual orientation as a basic—even immutable—feature of human personality, some states have now banned licensed professionals from offering “sexual orientation change effort” therapy (also called conversion therapy) to minors. However, the labeling of gays as psychologically disordered or as amenable to conversion or reparative therapy continues to this day, at least on the fringes of psychology.

“In the face of government, religious, and academic condemnations” of homosexuals as “criminal, deviant, and dangerous,” attorneys David Boies and Theodore B. Olson point out that violence against them was inevitable, though of course no statistics were compiled until much later. One study in the early 1990s found that 89 percent of American males aged 15–19 thought that homosexual sexual activity was “disgusting,” and only 12 percent were sure they would befriend an openly gay male. Even today, reported hate crimes number

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27 D’Emilio and Freedman, Intimate Matters, 320.
29 Some parents, minor children, and therapists, for example, have brought unsuccessful challenges to California’s and New Jersey’s bans on “sexual orientation change effort” therapy, asserting infringement of their First Amendment rights to free speech and free exercise of religion. See King v. Christie, 981 F. Supp. 2d 296 (D. N.J. 2013), aff’d, 767 F. 3d 216 (3d Cir. 2014); Pickup v. Brown, 42 F. Supp. 3d 1347 (E.D. Cal. 2012), aff’d, 740 F.3d 1208 (9th Cir. 2013).
30 The idea that same-sex attraction is a psychological disorder that can be “cured” or successfully treated by “reparative therapy” continues to be defended by a dwindling number of fringe characters. See the moving account in Gabriel Arana, “My So-Called Ex-Gay Life: A deep look at the fringe movement that just lost its only shred of scientific support,” http://prospect.org/article/my-so-called-ex-gay-life. Reparative therapy has been advocated by religious communities and figures, including Mormonism, http://www.lds-mormon.com/hldss.shtml. Leading organizations such as Exodus have now abandoned it.
31 Boies and Olson, Redeeming the Dream, 34.
in the thousands every year, according to the FBI, though there is no requirement that they be reported.\textsuperscript{33} And hate crimes against gays are frequently extremely brutal, involving torture and mutilation.\textsuperscript{34}

General social surveys in the 1990s found hostility toward gay men and lesbians to be widespread and intensely felt. Americans participating in a national “Feelings Thermometer,” repeated four times by the American National Election Study over a ten-year period, consistently assigned the lowest score, zero, to gays and lesbians; next in order were illegal immigrants, people on welfare, and Christian fundamentalists. (In 1994, 28.2 percent assigned gays the very coldest zero ranking, as compared with 24.2 percent for the next most unpopular group, illegal immigrants, and 9.1 percent for the third most unpopular group, people on welfare. The figure for blacks was 2.0 percent.) As Kenneth Sherrill observes, “only lesbians and gay men were the objects of cold feelings from a majority of Americans.”\textsuperscript{35}

All of these factors led the great majority of gay, lesbian, and bisexual people to conceal their sexual identities, making them invisible to the rest of society, and facilitating “the persistence of antigay prejudice.”\textsuperscript{36} Federal judge Richard Posner observes that when he grew up in the 1950s, “I knew . . . that there were homosexuals,” but, “if asked I would have truthfully said that as far as I knew I had never met one, or expected ever to meet one, any more than I had ever met or expected to meet an Eskimo.”\textsuperscript{37} No doubt most Americans would have said the same thing until recently.

Given such widespread and frequently expressed hostility toward homosexuality issuing from the government, churches, family, and friends, one must also consider the toll of the anxiety and self-doubt among those with same-sex attractions. One study found that lesbian, gay, and bisexual young people are more than twice as likely as their heterosexual peers to have attempted suicide.\textsuperscript{38}

\textsuperscript{34} \textit{See} Koppelman, “Boy Scouts.”
\textsuperscript{35} Kenneth Sherrill, “The Political Power of Lesbians, Gays, and Bisexuals,” \textit{PS: Political Science and Politics} (1996), 469–73, 470; \textit{see also} Koppelman, “Boy Scouts,” 370 & 381 n. 45.
\textsuperscript{36} Boies and Olson, \textit{Redeeming the Dream}, 35.
B. The Early Push for Marriage Rights

In the 1970s, the “gay rights” agenda was to secure basic protections from harassment by the police, decriminalization of gay sex, hate crimes legislation, and anti-discrimination rights in employment and housing. Though marriage was rarely discussed, it was pushed briefly to the fore by a few activists emboldened by the revolutionary advances of the Civil Rights Movement and the Women’s Movement of the 1960s and 70s. Significant developments in constitutional law limiting the state’s ability to regulate sex in marriage also encouraged gay activists. In 1965, in Griswold v. Connecticut, the Supreme Court struck down a Connecticut law prohibiting use of contraception by married couples, in an opinion with rhetorical flourishes not only about keeping police out of the “sacred precincts” of the marital bedroom but also about the “noble” purposes of the marital union. Two years later, in Loving v. Virginia (1967), a case in which police literally did invade the marital bedroom to challenge an interracial marriage that violated Virginia’s antimiscegenation law, the Court relied on both Due Process liberty and Equal Protection to strike down the law. Although both Griswold and Loving would prove to play central roles in the many judicial opinions ruling in favor of same-sex couples, including Obergefell, those precedents did not help Jack Baker and Michael McConnell in their early challenge to Minnesota’s marriage law.

Jack Baker and Michael McConnell met at a party in 1966, and they soon fell in love. They were both convinced that gay people deserved equal rights, including marriage rights. Not long after, Baker, a veteran, was fired from a job at Tinker Air Force Base for being gay. They moved to Minnesota so Baker could attend the state’s flagship university to study law and McConnell could take up a job as a university librarian. When university officials learned McConnell was gay, he was fired from his library job, and the men began a lawsuit. Baker also ran for student body president as an openly gay man: He was pictured in a campaign ad in the student newspaper sitting on the floor, arms curled around his knees, looking— with long hair and sideburns—like the typical early 70s college student, except for his high-heels.

Noticing that Minnesota law did not explicitly prohibit same-sex marriage, Baker and McConnell applied for a marriage license in Hennepin County,

39 Eskridge, Gaylaw; Clendinen and Nagourney, Out for Good.
Minnesota, in 1970. The clerk asked, “Who’s going to be the wife?” “We don’t play those kinds of roles,” the men replied.\textsuperscript{42} This reported exchange is telling because it hints at how central gender-differentiated roles were to marriage. Without what has come to be called the gender revolution both in constitutional law and family law, marriage between two men or two women would be unimaginable.

In 1971, however, as Mary Anne Case observes, “legally enforced sex-role differentiation” was “firmly entrenched in law and not yet seen as constitutionally problematic.”\textsuperscript{43} Although states had moved away from the legal model of marriage articulated by William Blackstone, under which women’s very civil existence was suspended in marriage as husband and wife become one person—namely, the husband—vestiges of coverture and of the ideology of men’s and women’s separate spheres remained. Legal rules reinforced husbands’ roles as breadwinners/heads of households and wives’ roles as dependents/homemakers. As recently as 1961, for example, the Supreme Court upheld the exclusion of women from jury rolls in Florida (unless they expressly put their names on the list) on the premise that, despite some social change in recent years, “Woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State ... to conclude that a woman should be relieved from the civil duty of jury service unless she determines that such service is consistent with her own special responsibilities.”\textsuperscript{44} It was only in 1971 that the Supreme Court for the first time struck down a sex-based classification, a Florida law giving men priority over women as administrators of an estate.\textsuperscript{45}

In 1973, Frontiero v. Richardson, the Court came within one vote of ruling that sex-based classifications must be subject to “strict scrutiny” to determine whether the state had a compelling interest that could be served in no less restrictive ways. The four justices emphasized the parallels between race discrimination and the nation’s “long and unfortunate history of sex discrimination.” They noted parallels between slave codes and rules regulating the status of wives.\textsuperscript{46} In a series of cases, several of which were orchestrated by law professor—and future Supreme Court justice—Ruth Bader Ginsburg at the ACLU Women’s Rights Project, the Court began to dismantle the unequal

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\textsuperscript{43} Case, “Marriage Licenses,” 1785.

\textsuperscript{44} Hoyt v. Florida, 368 U.S. 57, 62 (1961).

\textsuperscript{45} Reed v. Reed, 404 U.S. 71 (1971).

entitlements of husbands and wives, and fathers and mothers.\textsuperscript{47} In 1976, the Court finally settled on an “intermediate scrutiny” standard for evaluating sex-based classifications—a standard more exacting than the “rational basis scrutiny” applied to laws in general but less demanding than the “strict scrutiny” applied to race-based classifications.\textsuperscript{48} Under such a heightened standard, the Court struck down, in 1977, a state law that child support should be paid for boys until age 21, but for girls, only until 18, and, in 1979, a state law that only wives could receive alimony upon divorce and only husbands must pay it, regardless of the actual financial needs or resources of the spouses.\textsuperscript{49} It was only in 1981 that the Court ruled that Louisiana’s “head and master” law, which granted husbands exclusive control over the couple’s community property, violated the Equal Protection Clause.\textsuperscript{50}

A basic premise of this gender revolution was that notions of sex roles within marriage—and in the broader society—that once seemed natural and just were now seen to reflect outmoded and ancient stereotypes that denied men’s and women’s actual capacities to participate in society. Although the effort to ratify the federal Equal Rights Amendment, long a feminist goal, narrowly failed, a number of states enacted ERAs, often requiring strict scrutiny for laws that classified on the basis of sex.

These developments, which would transform the law of marriage in subsequent decades and pave the way for considering the one-man-one-woman definition of marriage, were all in the future when the intrepid duo of Baker and McConnell sued for marriage rights in 1971. At that time, “The fear . . . wasn’t that you’d be discriminated against, that was a given,” according to Jean Tretter, another Minnesota activist. “You were a lot more afraid that someone might come after you with a shotgun.”\textsuperscript{51} Other gay rights activists in Minnesota reportedly regarded the two as “lunatics” for pressing the marriage issue at the time, and some opposed monogamous marriage as “a trap.”\textsuperscript{52} In the

\textsuperscript{47} For an entertaining account of Ginsburg’s efforts and the social climate in which she brought these cases, see Irin Carmon and Shana Knizhnik, \textit{Notorious RBG: The Life and Times of Ruth Bader Ginsburg} (New York: Dey Street Books, 2015), 43–73.


\textsuperscript{50} 450 U.S. 455, 460 (1981). We draw here on Case, “Marriage Licenses,” 1786.


\textsuperscript{52} Kraemer, “Lunatics or Geniuses.”
course of the litigation the couple was featured in *Look* magazine and appeared on the Phil Donohue Show, but they eventually moved on with their lives.\(^{53}\)

Hennepin County Attorney George M. Scott observed that, “The distinction between a husband and wife, a man and a woman, and the rights and duties which are placed upon each . . . are too numerous to set forth.” The law, he said, “is replete with references to the distinction of husband and wife as being male and female with different rights, duties and obligations accorded to each.” He warned that, “if one were to permit the marriage of two male persons, it would result in a complete confusion as to the rights and duties of husband and wife, man and woman, in the numerous other sections of our law which govern the rights and duties of married persons.” The result would be no less than the “destruction of the entire legal concept of our family structure in all areas of law.”\(^{54}\)

The Minnesota Supreme Court eventually agreed with Scott, ruling that “The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis.”\(^{55}\) The court concluded that the U.S. Supreme Court’s precedents establishing the fundamental right to marry simply did not apply because such cases involved marriage between husband and wife. Further, the Minnesota court read *Loving* as confined solely to the “patent racial discrimination” in that case, and reasoned that “in common sense and in a constitutional sense, there is a clear distinction between a marital distinction based merely upon race and one based on the fundamental difference of sex.”\(^{56}\) In 1972 the U.S. Supreme Court declined to hear arguments in Baker v. Nelson, “for want of a substantial federal question.”\(^{57}\)

In 1975, Clela Rorex, a county clerk in Colorado, noticed that the law was silent on the question of whether a same-sex couple could file for a marriage license, and issued six marriage licenses to gay and lesbian couples on her own discretion.\(^{58}\) The Colorado Attorney General quickly stepped in to prevent the clerk’s office from issuing further licenses to same-sex couples and voided the

\(^{53}\) Condon, “Four Decades Ago.”


\(^{55}\) *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

\(^{56}\) Ibid., 187.

\(^{57}\) 410 U.S. 810 (1972).

unions, though at least one license was never legally voided. Similar scenarios played out elsewhere.

What happened to Jack Baker and Michael McConnell? They remain together after 45 years of marriage. Wait, marriage? How so? A Methodist minister performed a marriage ceremony for them in 1971 and, after being turned down in Hennepin County, they traveled to Minnesota’s Blue Earth County “where they obtained a marriage license on which Baker was listed with an altered, gender-neutral name.” Though challenged in court, says Baker, the license was never actually invalidated by a judge.

C. The Beginnings of a Wider Movement: From Stonewall Through the 1980s

In June 1969 the New York City police raided the Stonewall Inn, a hangout for the gay community of the city’s Greenwich Village. The community reacted with a series of violent demonstrations. The Stonewall riots helped radicalize an emerging gay activism on college campuses and in cities like New York and San Francisco. Gay pride parades began in June 1970 on the first anniversary of Stonewall. Thousands came out of the closet and hundreds of gay rights and gay liberation groups were formed in cities and on college campuses across the country, often in the face of considerable hostility. In 1973, the Lambda Legal Defense and Education Fund filed an application for non-profit status in New York State. A panel of judges ruled its mission was “neither benevolent nor charitable,” a decision later overturned by New York’s highest court. Similarly, the IRS turned down San Francisco’s Pride Foundation’s application for charitable status in 1974, on the ground that promoting “the alleged normalcy of homosexuality” was offensive and contrary to public policy.

After Stonewall, many gay and lesbian activists adopted the kind of radical agenda embraced by many in the civil rights and women’s movements of the early 1970s. The traditional family and its gendered roles of husband and wife was a central target. Complaining of insufficient militancy, a committee spilt off from the Mattachine Society and the parallel women’s homophile group, the Daughters of Bilitis. The Gay Liberation Front “adopted much of the

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60 Condon, “Four Decades Ago.”


62 Eskridge, Gaylaw, 115; Boies and Olson, Redeeming the Dream, 38.
revolutionary rhetoric of the New Left," opposing capitalism as well as patriarchy, with slogans like: “Smash phallic tyranny,” and “We oppose the family and support the living collective.” The National Coalition of Gay Organizations published a list of legal reforms in 1972: “Repeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit and extension of legal benefits of marriage to all persons who cohabit regardless of sex or numbers.”

In the wake of Stonewall and for decades after, many activists saw marriage equality as an unimaginably distant goal, and some regarded it with profound ambivalence. Many considered marriage the enemy, a patriarchal bastion of male supremacy and sexual repression, and certainly not a cause to be fought for. Radicals called “husband-wife marriage with children . . . ‘the microcosm of oppression.’” An early gay tract denounced the “‘rotten, oppressive institution’” of traditional marriage. “Marriage is a great institution,” quipped Paula Ettelbrick (riffing on Mae West), “if you like living in institutions.” For two decades she argued against placing marriage equality high on the LGBT agenda. Marriage rights “would force our assimilation into the mainstream” and sap efforts to transform society more radically. Along with other marriage opponents, such as Nancy Polikoff, Ettelbrick worried that gay marriage would further stigmatize those who chose not to marry, diminish a distinctive gay and lesbian identity, and privilege the concerns of middle class gays over the needs of the most vulnerable in the movement. Why, they argued, should basic benefits like health insurance depend on one’s marital status rather than be a universal entitlement?

Making marriage equality a central aim of the LGBT agenda would, it was feared, sell out the broader and more radical goals of early 1970s gay and feminist activism: ending “heterosexual supremacy and oppression” and “sex-determined gender and familial roles.” “It is white gay men who seem to be

most vociferous in promoting the same-sex marriage philosophy,” Ettelbrick observed in 1997, and “these activists ignore the history of women’s experience with marriage.” Nonetheless, some feminist theorists within the LGBT movement contended that same-sex marriage had the potential to further erode gendered marriage by denaturalizing and calling into question the “spousal roles of husband and wife.”

In the 1980s, things got worse, not better, in many respects, as gay and lesbian Americans confronted AIDS along with the rise of the Religious Right and the Moral Majority. From the late 1970s to the late 1980s, the percentage of Americans who thought that homosexual sexual relations were always wrong rose from around 70 percent to nearly 80 percent. And whereas 40 percent of Americans “opposed legalization of consensual sodomy” in 1982, it was 55 percent in 1986 (the year the Court decided Bowers). In a Kansas telephone survey in the late 1980s, it took 1650 calls—or “55 hours of random dialing—before pollsters found the first person willing to admit being lesbian or gay.”

Progress toward anti-discrimination laws was halted or reversed.

Fear of contagion with AIDS by gay men using the same water fountain or public telephone or toilet seat led some to call for the quarantine of AIDS carriers. Republican Congressman William Dannemeyer, running for a California Senate seat, charged that “AIDS carriers emitted deadly spores and that they might be engaged in ‘blood terrorism.’” National Review editor William F. Buckley, Jr., proposed: “Everyone detected with AIDS should be tattooed in the upper forearm, to protect common-needle users, and on the buttocks, to prevent the victimization of other homosexuals.”

A more lasting consequence of AIDS was that it encouraged many gays to come out of the closet, and forced out others. As coming out spread beyond the hard core of urban activists, openly gay people came to include a wider cross-section of society. The percentage of Americans who reported knowing someone gay doubled between 1985 and 1992. Moreover, the example of gay

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69 Ibid.
71 Klarman, Closet to Altar, 35–41 (explaining that the wording of the question changed).
73 See Klarman, Closet to Altar, 34; Eskridge, Equality Practice, 66.
men caring for each other and forming various types of family ties and support networks in the face of crisis also likely helped counteract some of the stigma associated with the disease.\textsuperscript{75} The Americans with Disabilities Act, which took effect in 1992, was interpreted by courts to require employers to accommodate those with AIDS and to bar discrimination against those who were HIV positive, unless they posed a clear risk to others.\textsuperscript{76}

It was in the inauspicious climate of the mid 1980s that Lambda Legal sought to overturn existing state anti-sodomy laws. In 1986, the Supreme Court granted review in Bowers v. Hardwick. In the justices’ conference, after oral argument, Justice Lewis Powell, who was widely seen as the swing vote, at first sided with the four liberal justices in favor of decriminalizing gay sex. After further deliberation, however, including discussions with a closeted gay law clerk in which Powell volunteered that he had never known anyone who was gay, the Justice switched sides and joined the conservatives in upholding the criminal statute, noting only that actual incarceration for private, consensual sodomy might amount to cruel and unusual punishment.\textsuperscript{77}

\textit{Bowers} was a sobering defeat, yet many reacted against it. A Gallup poll conducted shortly after the decision found that more people opposed it than supported it.\textsuperscript{78} The language and reasoning employed by the conservative majority was condemned by a number of major newspapers. Justice Byron White’s opinion of the Court termed the attempt to locate support for a “fundamental right to engage in homosexual sodomy” in the Constitution’s guarantees of liberty and equality as “at best, facetious.”\textsuperscript{79} Chief Justice Warren Burger summoned what he called the “millennia of moral teaching” that homosexuality was wrong. Burger’s citations of authority included William Blackstone’s judgment that homosexual sodomy was a crime of “deeper malignity” than rape.\textsuperscript{80} \textit{Bowers} energized gay rights activists and produced a mini-backlash in public opinion.

Beginning in the 1980s, a significant advance was that some municipalities created new legal statuses, such as domestic partnerships, that accorded some recognition to nonmarital (including same-sex) adult relationships. The San Francisco Board of Supervisors passed the first major domestic partnership bill

\textsuperscript{75} Klarman, \textit{Closet to Altar}, 39–40.
\textsuperscript{76} Ibid., 40.
\textsuperscript{77} Ibid., 37; Eskridge, \textit{Gaylaw}, 150, 166–67.
\textsuperscript{78} Klarman, \textit{Closet to Altar}, 37.
\textsuperscript{80} Bowers, 478 U.S. at 197 (Burger, C.J., dissenting).
in 1982, but Mayor Diane Feinstein vetoed it on the ground that it too closely “mimics a marriage license.”\(^81\) In 1984, Berkeley, California became the first city in the United States to enact a domestic partnership law, in the late 80s, West Hollywood and Madison, Wisconsin followed, and San Francisco and New York, in 1990 and 1993, by which time around 25 cities had enacted such laws, though they remained unpopular with most Americans.\(^82\) Such ordinances typically recited a governmental interest in “strengthening and supporting all caring, committed, and responsible family forms.”\(^83\) California established the first statewide domestic partnership in 1999. Just one year later, California voters approved a “defense of marriage act,” limiting marriage to the union of one man and one woman, but the legislature worked around that law to expand the domestic partnership law to afford domestic partners more of the rights, protections, and duties of married couples. Some other states also enacted domestic partnership laws, allowing some formal recognition of and protection for the intimate relationships of same-sex couples. And in 1992, the first American universities—Iowa, Stanford, and the University of Chicago—provided partnership benefits to same-sex employees.\(^84\)

Another positive development was the turn, by some state courts, toward a more functional definition of family. For example, in 1989, the New York state court of appeals ruled that same-sex partners could qualify as “family members” “for purposes of inheriting a rent-controlled apartment.”\(^85\) In the 1990s and early 21st century, other state courts adopted a more functional definition of “family,” beyond biology and marriage.

On the other hand, same-sex relationships remained unrecognized and unprotected in law. In 1983, Sharon Kowalski was in a serious auto accident that left her paralyzed, with brain injuries, and unable to speak. Kowalski and her partner, Sharon Thompson, had lived together for four years. They jointly owned “a home, had exchanged rings, and considered themselves married, but had not yet come out to their families, friends, or colleagues.”\(^86\)

After the accident, Sharon Kowalski’s parents denied that she was a lesbian and, when her father was appointed guardian by a court, he denied even visitation rights to her daughter’s partner. The court battle dragged on until 1991,


\(^{82}\) Klarman, *Close to Altar*, 45.


\(^{84}\) Klarman, *Close to Altar*, 46, 59, 77.


when a Minnesota court of appeals described the two women as a “family of affinity, which ought to be accorded respect,” and ruled that Sharon Kowalski had been “competent to make her own choice of a guardian,” and had chosen Thompson.87

Many gay and lesbian baby boomers wanted rights beyond visitation and care, especially the right to become parents. Their control over their own children was quite vulnerable to the discretion of judges. Consider, for example, the Sharon Bottoms case from Virginia in 1993. When a judge decided that it was not in her son’s best interests to be raised by an open lesbian, Bottoms lost custody of the child to her mother.88 At that time, Virginia, like many other states, viewed homosexuality as evidence of immorality and, therefore, of parental unfitness. However, a growing number of states began to move away from such an approach and to require a showing that a parent’s sexual orientation had a concrete harmful impact on a child. Since many gay men and lesbians of an earlier era had married straight partners, had children, and divorced, this move away from an assumption of parental unfitness was critically important.

Adoption also became an important pathway to parenthood, both when a gay or lesbian partner was permitted, under state law, to adopt a partner’s child and when a gay or lesbian couple was allowed to adopt children. As Michael Klarman puts it, “once same-sex couples were permitted to adopt children, explaining why those couples should not be permitted to marry became much harder.”89 States were hard pressed to justify excluding same-sex couples from marriage—lauded as a child-protective institution—when other state laws facilitated such couples becoming parents. These sorts of considerations would later resonate powerfully with Justice Anthony M. Kennedy of the U.S. Supreme Court.90

D. Toward Marriage Rights: The 1990s Through Obergefell

In the early 1990s, serious discussion of same-sex marriage was still a long way off, with opinion polls showing support for gay marriage between 11 and 23 percent. Same-sex marriage was not on the agenda of major gay rights organizations, and the gay community itself “remained deeply divided over

87 Klarman, Closet to Altar; 50; see also Eskridge, Same-Sex Marriage, 69–70.
88 Klarman, Closet to Altar, 51.
89 Ibid.
whether to pursue gay marriage.” Polls showed that gay Americans were much more interested in “securing equal rights in employment, housing, and health care,” not to mention AIDS research, sodomy law reform, and hate crimes legislation. Nevertheless, younger gays were much more supportive of gay marriage than older gays and lesbians: “One opinion poll showed that 18-year old gays were 31 percentage points more likely to support gay marriage than were 65-year old gays.”

Despite the fact that same-sex marriage remained extremely unpopular with the general public in the early 1990s, same-sex marriage was thrust onto the national agenda when, in 1993, the Hawaii Supreme Court held that bans on same-sex marriage discriminated on the basis of sex in violation of the state constitution’s Equal Rights Amendment. In the political contest that followed this decision, an amendment to Hawaii’s constitution took the issue away from state courts and derailed same-sex marriage in Hawaii. Nevertheless, a panic gripped much of the country, based on the fear that the U.S. Constitution’s “Full Faith and Credit” Clause would force other states to recognize Hawaiian gay marriages.

A backlash ensued and it resulted in passage—by overwhelming majorities in the U.S. House and Senate—of the federal Defense of Marriage Act (DOMA), signed by President Bill Clinton in 1996. DOMA had two key provisions: Section 2 provided that no state “shall be required to give effect” to any marriage between a same-sex couple permitted in another state and Section 3 (at issue in Windsor) declared that, for purposes of all federal laws, marriage would mean “only a legal union between one man and one woman as husband and wife” and “spouse” would refer “only to a person of the opposite sex who is a husband or a wife.” In support of DOMA, lawmakers and witnesses invoked many considerations, ranging from Judeo-Christian morality and the procreative functions of the human body to the need to stop “an orchestrated legal assault . . . against traditional marriage by gay rights groups and their lawyers” and the need to stop judges in Hawaii from “foist[ing] the newly-coined institution of homosexual ‘marriage’ upon an unwilling Hawaiian public” and, ultimately, on other states. Many state legislatures passed “mini-DOMAs,”

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91 Klarman, Closet to Altar, 45, 48, 50–51, and see his discussion of the debate within the gay community over pressing for marriage equality at that time, 5–55; see also Eskridge, Equality Practice, 15–17.


93 Article IV, Section 1: “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 manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”


defining marriage in state law as the relation of one man and one woman and barring recognition of out-of-state marriages contrary to that definition.\textsuperscript{96}

As the gay rights movement made halting gains in the late 1990s and 2000s, it frequently precipitated popular backlash. When the Vermont legislature enacted legislation creating same-sex civil unions in 1999, in response to the Vermont Supreme Court’s ruling in Baker v. State that same-sex couples are entitled to “the same benefits and protections afforded by Vermont law to married opposite-sex couples,” many supporters of the bill lost their seats in the state legislature.\textsuperscript{97} The Massachusetts Supreme Judicial Court decision, in 2003, requiring same-sex marriage under that state’s constitution, unleashed a more ferocious nationwide response that (as noted above) may well have tipped the 2004 presidential election in favor of George W. Bush over John Kerry, the U.S. Senator from Massachusetts. Although Democratic presidential candidates opposed a federal constitutional amendment supported by Bush and many Republicans, Al Gore, in 2004, and Barack Obama and many other Democrats, in 2008, declined to support same-sex marriage, preferring civil unions instead and letting states decide for themselves.\textsuperscript{98} It was only in 2012 that the Democratic party for the first time embraced marriage by same-sex couples as part of their platform and that President Obama declared his support for such marriage, drawing analogies among Seneca Falls, Selma, and Stonewall.\textsuperscript{99}

It is against this background that we should weigh the significance of Obergefell. Public attitudes toward and moral judgments about gay and lesbian Americans have changed with astonishing speed. We know of no similar issue on which public opinion has shifted so strikingly and speedily. An obvious comparison is with the question of abortion, which is the other issue that has done most to energize and mobilize the Religious Right. American public opinion has seen no comparable shift on abortion and, in fact, Americans (including younger Americans) have become somewhat more “pro-life” on the abortion issue since the late 1970s.\textsuperscript{100}

\textsuperscript{96} Eskridge, \textit{Equality Practice}, 17–85; Klarman, \textit{Closet to Altar}, ch. 3.

\textsuperscript{97} Baker v. State, 744 A.2d 864 (Vt. 1999); Klarman, \textit{Closet to Altar} 82, 78–83.


The nine justices of the Supreme Court who decided *Obergefell* in June 2015 lived through the episodes just described. The questions they faced were whether the Constitution, fairly interpreted, requires states to grant equal marriage rights to same-sex couples seeking to marry and to recognize such couples’ valid out-of-state marriages. Constitutional requirements range from the very specific to the very abstract, and the latter raise special interpretive challenges. At the specific end of the spectrum are many of the constitutional provisions setting out the terms and structures of the three branches of the federal government. Thus, the President must be at least thirty-five years old, with no judgment required as to her or his maturity. At the other end of the spectrum, provisions guaranteeing basic liberties are set out in abstract terms that often require judges and other interpreters to make controversial value judgments. The Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishments,” without specifying which punishments are cruel. The Fourth Amendment prohibits “unreasonable searches and seizures,” setting out an even more abstract principle that appears to require interpreters to consider the sorts of searches and seizures that should be judged unreasonable, given the competing imperatives of law enforcement and the value of personal privacy.

Of central importance are two provisions of the Fourteenth Amendment, ratified in the wake of the Civil War, which declare that “no state shall . . . deprive any person of life, liberty or property, without due process of law,” “nor deny to any person within its jurisdiction the equal protection of the laws.” The guarantee of liberty in the Due Process Clause has long been held to have “substantive” as well as procedural implications. The reasons for this will be explored at greater length in Chapter 3, and we only note here that the language of other provisions of the Fourteenth Amendment suggest even more clearly that certain basic rights and liberties require more than merely procedural protections (“[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”).

Interpreters of the U.S. Constitution, including the justices, are deeply divided on the question whether those abstractly worded constitutional provisions furnish a warrant for, and indeed require, judges to decide which punishments really are cruel, which searches are properly regarded as unreasonable, which liberties are important enough to be protected, and which forms of unequal treatment are genuinely invidious—or morally objectionable. The individual authors of this book have argued in other works that interpreters can’t avoid making moral judgments when applying constitutional provisions of
these kinds. But many scholars and jurists argue that inviting unelected judges to make such judgments is inconsistent with their proper role in our constitutional democracy, and that it involves judges usurping the role of legislators.

Many politically conservative jurists and scholars, and some progressive ones as well, argue that judges ought to avoid making moral judgments, and instead should give meaning to abstractly worded constitutional guarantees by looking to the past: to history and past authoritative court decisions (understood narrowly as confined to their facts rather than as expressing general principles). These mainly conservative (and typically “originalist”) constitutional commentators oppose the idea of a “living constitution,” which gains fresh meaning from the moral and practical insights of rising generations. More generally, they oppose the idea of a moral reading of the Constitution, which conceives the Constitution’s commitments to liberty and equality to be abstract moral principles to be elaborated or built out over time on the basis of experience and moral learning about the best understanding of those principles. There are many varieties of originalism, but originalists typically argue that the Constitution’s meaning is to be determined from the relatively specific understandings and expectations of the historical framers and ratifiers at the time the provision in question was adopted.

On the other side, many mainly liberal jurists and scholars argue that it altogether proper for interpreters to draw on improved understandings of liberty, equality, and justice based upon new insights into the human condition, including sexual orientation. This impulse is amply on display in the opinion for the Court in Obergefell penned by Justice Kennedy. Though a lifelong Republican and an appointee of one of America’s most celebrated conservative Presidents, Ronald Reagan, Kennedy (because he has been the “swing vote”) has consistently proven to be the most important judicial voice in the landmark opinions vindicating the basic rights of gay and lesbian Americans.

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II. THE CULMINATION FOR MARRIAGE EQUALITY

“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.”—JUSTICE KENNEDY

“The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. . . . [T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?”—CHIEF JUSTICE ROBERTS

“When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases.”—JUSTICE SCALIA

“As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower . . . , encompassing only freedom from physical restraint and imprisonment. . . .”—JUSTICE THOMAS

“Today’s decision . . . will be used to vilify Americans who are unwilling to assent to the new orthodoxy. [T]he majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.”—JUSTICE ALITO
OBERGEFELL v. HODGES

J ustice Kennedy delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners . . . seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition. . . .

II . . .

A

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

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. . . . There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.
That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners’ claims would be of a different order. . . . To the contrary, it is the enduring importance of marriage that underlies the petitioners’ contentions. . . . Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

. . . Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, . . . Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. . . . Two years ago, Obergefell and Arthur . . . resolv[ed] to marry before Arthur died. [T]hey traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur’s death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems “hurtful for the rest of time.” He brought suit to be shown as the surviving spouse on Arthur’s death certificate.

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

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

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

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution . . . has evolved over time.

For example, marriage was once viewed as an arrangement by the couple’s parents based on political, religious, and financial concerns; but by the time of the Nation’s founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage . . . were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H. Hartog, Man & Wife in America: A History (2000).

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

This dynamic can be seen in the Nation’s experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. . . . A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. . . . Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. . . .

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. . . .

This Court first gave detailed consideration to the legal status of homosexuals in Bowers v. Hardwick (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in Romer v. Evans (1996), the Court invalidated an amendment to Colorado’s Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled Bowers, holding that laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” Lawrence v. Texas.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii’s law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. Baehr v. Lewin. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in
1996, Congress passed the Defense of Marriage Act (DOMA), defining marriage for all federal-law purposes as “only a legal union between one man and one woman as husband and wife.”

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State’s Constitution guaranteed same-sex couples the right to marry. See Goodridge v. Department of Public Health. After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. [I]n United States v. Windsor (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. . . .

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see Citizens for Equal Protection v. Bruning (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. . . .

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., Eisenstadt v. Baird (1972); Griswold v. Connecticut (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” Poe v. Ullman (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in
identifying interests of the person so fundamental that the State must accord them its respect. See ibid. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See Lawrence. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed. Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In Loving v. Virginia (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” The Court reaffirmed that holding in Zablocki v. Redhail (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in Turner v. Safley (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry.

Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. It cannot be denied that this Court’s cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in Baker v. Nelson, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court’s cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, e.g., Lawrence; Turner; Zablocki; Loving; Griswold. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court
must respect the basic reasons why the right to marry has been long protected. See, e.g., Poe (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. [F]our principles and traditions ... demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving invalidated interracial marriage bans under the Due Process Clause. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See Lawrence. ... Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” Goodridge. ... A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. ... Suggesting that marriage is a right “older than the Bill of Rights,” Griswold described marriage this way:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; 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.

... Marriage ... offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in Lawrence, same-sex couples have the same right as opposite-sex couples to enjoy intimate association.... But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.
A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See Pierce v. Society of Sisters (1925); Meyer v. Nebraska (1923). The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” Zablocki (quoting Meyer). . . . By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” Windsor. Marriage also affords the permanency and stability important to children’s best interests. . . .

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See Windsor.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. . . .

Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago. . . . 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In Maynard v. Hill (1888), the Court echoed de Tocqueville, explaining that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.” Marriage . . . has long been “‘a great public institution, giving character to our whole civil polity.’” Id. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have
throughout our history made marriage the basis for an expanding list of
governmental rights, benefits, and responsibilities. . . . Valid marriage under state
law is also a significant status for over a thousand provisions of federal law. See
Windsor. The States have contributed to the fundamental character of the
marriage right by placing that institution at the center of so many facets of the
legal and social order.

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

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

Objecting that this does not reflect an appropriate framing of the issue, the
respondents refer to Washington v. Glucksberg (1997), which called for a
“‘careful description’” of fundamental rights. They assert the petitioners do not
seek to exercise the right to marry but rather a new and nonexistent “right to
same-sex marriage.” Glucksberg did insist that liberty under the Due Process
Clause must be defined in a most circumscribed manner, with central reference
to specific historical practices. Yet while that approach may have been
appropriate for the asserted right there involved (physician-assisted suicide), it is
inconsistent with the approach this Court has used in discussing other
fundamental rights, including marriage and intimacy. Loving did not ask about a
“right to interracial marriage”; Turner did not ask about a “right of inmates to
marry”; and Zablocki did not ask about a “right of fathers with unpaid child
support duties to marry.” Rather, each case inquired about the right to marry in
its comprehensive sense, asking if there was a sufficient justification for
excluding the relevant class from the right. See also Glucksberg (Souter, J.,
concurring in judgment); id. (Breyer, J., concurring in judgments).
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. See *Loving*; *Lawrence*.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon dehumanizes or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right . . .

The Court’s cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. . . . [T]he Court proceeded to hold . . .: “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 Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions. . . .
Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. [T]his occurred with respect to marriage in the 1970s and 1980s. Notwithstanding the gradual erosion of the doctrine of coverture, invidious sex-based classifications in marriage remained common through the mid-20th century. These classifications denied the equal dignity of men and women. One State’s law, for example, provided in 1971 that “the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit.” Ga. Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, e.g., Frontiero v. Richardson (1973). Like Loving . . ., these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution. . . .

In Lawrence the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. Although Lawrence elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime. . . . Lawrence therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians. . . .

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality . . .: 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. See, e.g., Zablocki; Skinner v. Oklahoma (1942).

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of
the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. . . . Baker . . . is overruled, and the State laws challenged by Petitioners in these cases are . . . invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. . . .

Yet there has been far more deliberation than this argument acknowledges. 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. . . . As more than 100 amici make clear in their filings, many of the central institutions in American life . . . have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” West Virginia Bd. of Ed. v. Barnette (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” Ibid. . . .

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In Bowers, a bare majority upheld a law criminalizing same-sex intimacy. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, Bowers upheld state action that denied gays and lesbians a fundamental right and
caused them pain and humiliation. . . . Although Bowers was eventually repudiated in Lawrence, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after Bowers was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like Bowers, would be unjustified under the Fourteenth Amendment. The petitioners’ stories make clear the urgency of the issue they present to the Court. . . . Properly presented with the petitioners’ cases, the 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 same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple’s decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, . . . these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the
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State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

. . . The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold . . . that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

***

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

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

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

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

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

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening. 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.

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. . . . [T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution “is made for people of fundamentally differing views.” Lochner v. New York (1905) (Holmes, J., dissenting). Accordingly, “courts are not concerned with the wisdom or policy of legislation.” Id. (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.” . . .

I

Petitioners and their amici base their arguments on the “right to marry” and the imperative of “marriage equality.” There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes “marriage,” or—more precisely—who decides what constitutes “marriage”? . . .
Th[e] universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage . . . 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.

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. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, “Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.” J. Q. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. . . . To those who drafted and ratified the Constitution, this conception of marriage and family “was a given: its structure, its stability, roles, and values accepted by all.” Forte, “The Framers’ Idea of Marriage and Family,” in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with “[t]he whole subject of the domestic relations of husband and wife.” Windsor. There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. . . . This Court’s precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. . . .

As the majority notes, some aspects of marriage have changed over time. . . . [It] observes that these developments “were not mere superficial changes” in marriage, but rather “worked deep transformations in its structure.” They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. . . .
The majority purports to identify four “principles and traditions” in this Court’s due process precedents that support a fundamental right for same-sex couples to marry. In reality, however, the majority’s approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner*.

A

Petitioners do not contend that their States’ marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment’s requirement that “liberty” may not be deprived without “due process of law.”

This Court has interpreted the Due Process Clause to include a “substantive” component that protects certain liberty interests against state deprivation “no matter what process is provided.” *Reno v. Flores* (1993). The theory is that some liberties are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” and therefore cannot be deprived without compelling justification. *Snyder v. Massachusetts* (1934).

Our precedents have insisted that judges “exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Glucksberg*.

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford* (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.”

*Dred Scott*’s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner*, this Court invalidated state statutes that presented
“meddlesome interferences with the rights of the individual,” and “undue interference with liberty of person and freedom of contract.” In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was “in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law.”

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least “room for debate and for an honest difference of opinion.” *Id.* (opinion of Harlan, J.). The majority’s contrary conclusion required adopting as constitutional law “an economic theory which a large part of the country does not entertain.” *Id.* (opinion of Holmes, J.). As Justice Holmes memorably put it, “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics,*” a leading work on the philosophy of Social Darwinism. The Constitution “is not intended to embody a particular economic theory... It is made for people of fundamentally differing views....”

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents.... Eventually, the Court recognized its error and vowed not to repeat it.... Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them “unwise, improvident, or out of harmony with a particular school of thought.” Williamson v. Lee Optical of Okla., Inc. (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner’s* error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for “judicial self-restraint.” Collins v. Harker Heights (1992). Our precedents have required that implied fundamental rights be “objectively, deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Glucksberg.*

[G]iven the few “guideposts for responsible decisionmaking in this unchartered area,” *Collins,* “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula,” Moore v. East Cleveland (1977) (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of “discipline” in identifying fundamental rights does not provide a meaningful constraint on a judge, for “what he is really likely to be ‘discovering,’ whether or not he is fully aware of it, are his own values,” J. Ely, *Democracy and*
Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is “continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers.” Griswold (Harlan, J., concurring in judgment).

B

The majority[’s] aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of Lochner.

1

The majority[ ] ... relies primarily on precedents discussing the fundamental “right to marry.” These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In Loving, the Court held that racial restrictions on the right to marry lacked a compelling justification. In Zablocki, restrictions based on child support debts did not suffice. In Turner, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. ... In short, the “right to marry” cases stand for the important but limited proposition that particular restrictions on access to marriage as traditionally defined violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. . . .

2

The majority suggests that “there are other, more instructive precedents” informing the right to marry. [T]his reference seems to correspond to a line of cases discussing an implied fundamental “right of privacy.” In Griswold, the Court invalidated a criminal law that banned the use of contraceptives. The Court stressed the invasive nature of the ban, which threatened the intrusion of “the police to search the sacred precincts of marital bedrooms.” In the Court’s view, such laws infringed the right to privacy in its most basic sense: the “right to be let alone.” [S]ee Olmstead v. United States (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in Lawrence, which ... relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting “unwarranted government intrusions” that “touch[ed] upon the
most private human conduct, sexual behavior . . . in the most private of places, the home.”

. . . Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is “condemned to live in loneliness” by the laws. . . . [T]he laws in no way interfere with the “right to be let alone.” . . .

In sum, the privacy cases provide no support for the majority’s position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See DeShaney v. Winnebago County Dept. of Social Servs. (1989); San Antonio Independent School Dist. v. Rodriguez (1973); post (Thomas, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

[T]he majority . . . jettison[s] the “careful” approach to implied fundamental rights taken by this Court in Glucksberg. It[s] position requires it to effectively overrule Glucksberg, the leading modern case setting the bounds of substantive due process. . . .

Ultimately, only one precedent offers any support for the majority’s methodology: Lochner . . . [Its] freewheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be free in his person and in his power to contract in relation to his own labor.” Lochner (emphasis added).

. . . The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that “it would disparage their choices and diminish their personhood to deny them this right.” Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in Lochner.
... Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority’s position is whether States may retain the definition of marriage as a union of two people. Cf. Brown v. Buhman, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14–4117 (CA10). [The majority] offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

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 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,” 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,” serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Otter, “Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage,” 64 Emory L. J. 1977 (2015). ...  

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would “pose no risk of harm to themselves or third parties.” This argument again echoes Lochner, which relied on its assessment that “we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.”

Then and now, this assertion of the “harm principle” sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of “due process.” There is indeed a process due the people on issues of this sort—the democratic process. ... As

### III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. . . . Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. . . .

The majority . . . fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position. . . . In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ “legitimate state interest” in “preserving the traditional institution of marriage.” *Lawrence* (O’Connor, J., concurring in judgment).

### IV

. . . Over and over, the majority exalts the role of the judiciary in delivering social change. . . . The Court’s accumulation of power . . . comes at the expense of the people. . . . Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before. . . .

But today the Court puts a stop to all that. 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. As a thoughtful
commentator observed about another issue, “The political process was moving . . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.” Ginsburg, “Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade,” 63 N. C. L. Rev. 375, 385–386 (1985). 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.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today’s decision, for example, creates serious questions about religious liberty.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority’s decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to “advocate” and “teach” their views of marriage. The First Amendment guarantees, however, the freedom to “exercise” religion. Ominously, that is not a word the majority uses.

The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that “the necessary consequence” of laws codifying the traditional definition of marriage is to “demean[n] or stigmatiz[e]” same-sex couples. These apparent assaults on the character of fairminded people will have an effect, in society and in court. Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s “better informed understanding” as bigoted.

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

* * *

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

I respectfully dissent.

■ JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join THE CHIEF JUSTICE’s opinion in full. I write separately to call attention to this Court’s threat to American democracy.

The substance of today’s decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. . . . It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied . . . 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.
The Constitution places some constraints on self-rule—constraints adopted by the People themselves when they ratified the Constitution and its Amendments. ... Aside from these limitations, those powers “reserved to the States respectively, or to the people” can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove that issue from the political process?

Of course not. ... When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its “reasoned judgment,” thinks the Fourteenth Amendment ought to protect. ... [R]ather than focusing on the People’s understanding of “liberty”—at the time of ratification or even today—the majority focuses on four “principles and traditions” that, in the majority’s view, prohibit States from defining marriage as an institution consisting of one man and one woman.

This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices’ “reasoned judgment.” A system of government that makes the People
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subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

... The strikingly unrepresentative character of the body voting on today’s social upheaval would be irrelevant if they were functioning as judges, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today’s majority are not voting on that basis; they say they are not. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today’s judicial Putsch. The five Justices who compose today’s majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment’s ratification and Massachusetts’ permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a “fundamental right” overlooked by every person alive at the time of ratification, and almost everyone else in the time since. ... They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their “reasoned judgment.” These Justices know that limiting marriage to one man and one woman is contrary to reason; they know that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances... of thought and expression; it is something else for the official opinion of the Court to do so. Of course the opinion’s showy profundities are often profoundly incoherent. “The nature of marriage is that,

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22 If, even as the price to be paid for a fifth vote, 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. [Footnote by Justice Scalia.]
through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.” (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie.) . . . The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.

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. . . With each decision of ours that takes from the People a question properly left to them—with each decision that is unashamedly based not on law, but on the “reasoned judgment” of a bare majority of this Court—we move one step closer to being reminded of our impotence.

■ JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting. . . .

I

The majority’s decision today [is] largely based on a constitutional provision guaranteeing “due process” before a person is deprived of his “life, liberty, or property.” I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. McDonald v. Chicago (2010) (Thomas, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever “process” is “due” before a person is deprived of life, liberty, and property. . . .

II . . .

A

1

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

Both of the Constitution’s Due Process Clauses reach back to Magna Carta. . . .

If the Fifth Amendment uses “liberty” in this narrow sense [of “freedom from physical restraint”], then the Fourteenth Amendment likely does as well.
See Hurtado v. California (1884). ... That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

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

Whether we define “liberty” as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

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

... Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of “liberty,” they are entitled to access privileges and benefits that exist solely because of the government. ... But receiving governmental recognition and benefits has nothing to do with any understanding of “liberty” that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. ... Petitioners
misunderstand the institution of marriage when they say that it would “mean little” absent governmental recognition.

Petitioners’ misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of “liberty” beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. . . .

In none of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

. . . As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower . . . , encompassing only freedom from physical restraint and imprisonment. . . .

III . . .

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

Numerous amici . . . have cautioned the Court that its decision here will “have unavoidable and wide-ranging implications for religious liberty.” In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today’s decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty. . . . And even that gesture indicates a misunderstanding of religious liberty in our Nation’s tradition. Religious liberty is about more than just the protection for “religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their

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5 The suggestion . . . that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. “America’s earliest laws against interracial sex and marriage were spawned by slavery.” P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). . . .

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire “to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.” And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as Amicus Curiae 11–12. [Footnote by Justice Thomas.]
lives and faiths.” Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.

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

***

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

■ JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

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

II

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

This understanding of marriage . . . is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

. . . Here, the States defending their adherence to the traditional understanding of marriage [argue] that States formalize and promote marriage . . . in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

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

While, for many, the attributes of marriage in 21st century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage’s further decay. It is far beyond the outer reaches of this Court’s authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in Windsor [dissenting]:

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

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

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

III

Today’s decision . . . will be used to vilify Americans who are unwilling to assent to the new orthodoxy. [T]he majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

[T]he majority attempts . . . to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some
States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today’s decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. . . . 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 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.

EDITORS’ NOTES

(1) Justice Kennedy’s majority opinion grounded its holding on both the Due Process Clause and the Equal Protection Clause. What is his due process/liberty argument? What is his equal protection argument? What is the relationship between the two? Does one of these clauses provide a firmer basis for the holding than the other? Or are both equally persuasive? Put another way, is the denial of the right to marry here fundamentally a denial of a basic liberty, a denial of equal dignity, or both?

(2) What is Justice Kennedy’s conception of history and tradition in constitutional interpretation? How does his conception differ from those of the dissenters? As historian Nancy Cott observes: “more than one version of the history of marriage is operating” in the majority and dissenting opinions in Obergefell. Nancy F. Cott, “Which History in Obergefell v. Hodges?,” Perspectives on History (American Historical Association, July 2015). What is Justice Kennedy’s conception of the institution of marriage and its history and how does it shape his reasoning? What are the conceptions of the dissenting justices? Which is more persuasive?

(3) Justice Kennedy refers to a “substantial body of law” growing out of federal appellate court decisions about same-sex marriage as helping “to explain
and formulate the underlying principles” the Court develops in Obergefell. In emphasizing liberty and the fundamental right to marry, however, Kennedy did not explicitly pursue two constitutional paths taken in some of those appellate court decisions and explored in Chapter 4: (1) a holding that sexual orientation is a “suspect” classification warranting “strict judicial scrutiny” and that the discriminatory marriage bans fail that test, or (2) a holding that the one man-one woman definition of marriage discriminated on the basis of gender and could not survive “intermediate judicial scrutiny.” With respect to the former, one unanswered question is whether the majority’s focus on the significance of exclusion from marriage has implications for “the larger goal of eliminating discrimination” based on sexual orientation “throughout American law and society.” Serena Mayeri, “Marriage (In)equality and the Historical Legacies of Feminism,” 6 Calif. L. Rev. Circuit 126, 131 (2015). With respect to the latter, Justice Ginsburg, an obvious candidate to write a concurring opinion advancing the gender discrimination argument, reportedly believed that it was “more powerful to have the same, single opinion.” Ibid., n. 32 (quoting interview with Neil Siegel).

(4) Some have criticized the United States Supreme Court decisions protecting a right of autonomy for exalting “choice” over the good of what is chosen and for “bracketing” moral arguments about goods or virtues promoted by protecting freedoms. See, e.g., Michael J. Sandel, “Moral Argument and Liberal Toleration: Abortion and Homosexuality,” 77 Cal. L. Rev. 521 (1989). Is Obergefell vulnerable to this criticism? Justice Kennedy’s majority opinion stresses the “transcendent purposes of marriage” and its “highest ideals of love, fidelity, devotion, sacrifice, and family.” Should courts seek to justify protecting rights on the ground that they promote such moral goods? See James E. Fleming and Linda C. McClain, Ordered Liberty: Rights, Responsibilities, and Virtues (Cambridge: Harvard University Press, 2013), ch. 7.

(5) In emphasizing the exalted status of marriage in our society, the dignity and respectability attached to that status, and the harm and humiliation suffered by same-sex couples and their children due to restrictive marriage laws, does the majority opinion suggest that those who choose not to marry and to form nonmarital family relationships lack dignity or are less worthy? See Nan Hunter, “Interpreting Liberty and Equality Through the Lens of Marriage,” 6 Calif. L. Rev. Circuit 107, 111 (2015).

(6) What are we to make of Chief Justice Roberts’s argument in dissent that Justice Kennedy’s majority opinion has “no basis in the Constitution or this Court’s precedent”? Whether it does depends upon our conceptions of (a) the
Constitution and (b) precedent. The clash between Kennedy and the dissenters is between two competing understandings of the Constitution: Is it a basic charter of abstract principles like liberty and equality? Or a code of specific, enumerated rights whose meaning is determined by the deposit of concrete historical practices extant at the time of the adoption of the Fourteenth Amendment in 1868? The clash is also between two competing understandings of how abstractly or concretely we conceive precedents and traditions: do we limit precedents to specific holdings and traditions to concrete historical practices, or do we build upon them through making recourse to the basic reasons underlying precedents and the aspirational principles embodied in traditions? Who holds the more defensible view of the Constitution and precedent?

(7) Does Justice Kennedy’s majority opinion really read John Stuart Mill’s “harm principle” from On Liberty into the Fourteenth Amendment’s protection of liberty, as Chief Justice Roberts charges in dissent? Or is Kennedy simply rebutting the argument that extending marriage to gay men and lesbians will harm the institution of marriage, with the result that straight couples might decide not to marry?

(8) Does Justice Kennedy’s majority opinion repeat the “grave errors” of Lochner v. New York (1905), as Chief Justice Roberts argues in dissent? What was it that the Supreme Court did in Lochner that was so horrible? Did the majority do the same horrible thing in Obergefell, or can we distinguish the two cases? We will examine Lochner in Chapter 3.

(9) Chief Justice Roberts quotes Justice Ruth Bader Ginsburg’s famous critique of the Court in Roe v. Wade (1973) for its “heavy-handed judicial intervention” just as the people through the democratic process were considering whether and how to liberalize abortion laws, and he contends that her critique applies to Obergefell as well. Is his analogy between Obergefell and Roe sound? Is the Supreme Court really in the vanguard of social change with respect to same-sex marriage? Or is it following and consolidating social change that has been occurring through the democratic and judicial processes throughout the nation for more than 40 years (since Baker v. Nelson (1972))?

(10) More generally, Chief Justice Roberts criticizes the majority opinion for being undemocratic (in the sense that its protection of rights puts limits on what the majorities in the states may legislate concerning access to marriage). The majority opinion retorts: “Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.” To what extent is the disagreement between
the majority and the dissenters a disagreement about the basic character of the form of democracy embodied in the Constitution? What are their contrasting understandings of democracy?

(11) Chief Justice Roberts and the other dissenters express worries about *Obergefell* threatening the religious liberty of opponents of same-sex marriage. Are these worries well founded? Roberts acknowledges that every state that has recognized same-sex marriage has created religious exemptions for those who oppose such marriage. Is there any reason to believe that, after *Obergefell*, the political process will not continue to operate as before in creating religious exemptions and accommodations? Is there anything in the majority opinion that would prohibit or preclude state legislatures from creating religious exemptions?

(12) Chief Justice Roberts and the other dissenters accuse the majority opinion of tarring opponents of same-sex marriage with the brush of “bigotry.” Are these accusations well-founded? Justice Kennedy’s opinion avoids holding that discrimination on the basis of sexual orientation is analogous to discrimination on the basis of race (a holding that might imply that discrimination on the basis of sexual orientation is analogous to racial bigotry). Kennedy also stresses that the majority does not doubt the sincerity or the conscientiousness of opponents of same-sex marriage. Does he successfully deflect Roberts’s and the other dissenters’ accusations?

(13) Is Chief Justice Roberts sound in suggesting that protecting the right of gay men and lesbians to marry puts us on the slippery slope toward protecting a right to plural marriage or polygamy? Or are there significant distinctions between the two? In support of the claim that *Obergefell* does put us on such a slippery slope, Roberts cites Ronald C. Den Otter, “Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage,” 64 Emory L. J. 1977 (2015). For a sustained argument to the contrary, see Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage* (Princeton, NJ: Princeton University Press, 2015), 145–203. We discuss this issue further in Chapter 5.

Constitution is not whatever a majority of Supreme Court justices say it is,” the Statement contends that:

The Court’s majority eschewed reliance on the text, logic, structure, or original understanding of the Constitution, as well as the Court’s own interpretive doctrines and precedents, and supplied no compelling reasoning to show why it is unjustified for the laws of the states to sustain marriage as it has been understood for millennia as the union of husband and wife. The opinion for the Court substitutes for traditional—and sound—methods of constitutional interpretation a new and ill-defined jurisprudence of identity—one that abused the moral concept of human dignity.

The Statement quotes extensively (and favorably) from the dissenting opinions and asserts that “the consequences will be grave” if “Obergefell is accepted as binding law.” The signatories to the Statement call upon “all federal and state officeholders” to, among other things, “refuse to accept Obergefell as binding precedent for all but the specific plaintiffs in that case,” “recognize the authority of states to define marriage” and of officeholders “to act in accordance with those definitions,” and “pledge full and mutual legal assistance to anyone who refuses to follow Obergefell for constitutionally protected reasons.” As Chapter 5 will discuss, some state legislatures have considered bills that would, in a similar spirit of resistance, claim to “nullify” Obergefell.