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After Obergefell v. Hodges: The Continuing Battle Over Equal Rights for Sexual Minorities in the United States

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Simone Chriss*, Danaya C. Wright**

After *Obergefell v. Hodges*: the continuing battle over equal rights for sexual minorities in the United States

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Abstract

L'articolo esamina la rivoluzionaria sentenza della Corte Suprema degli Stati Uniti nel caso *Obergefell v. Hodges* che ha riconosciuto la natura di diritto fondamentale del diritto al matrimonio ed ha affermato che esso non può essere negato da alcuno degli Stati, neppure da quelli che hanno approvato miriadi di leggi volte a bandire i matrimoni tra persone dello stesso sesso.

Dopo aver illustrato la giurisprudenza costituzionale in tema di giusto processo e sul principio di eguaglianza, l'articolo esamina la storia del movimento per il riconoscimento del diritto al matrimonio e la sentenza *Obergefell*. Lo scritto si conclude con una discussione su come la teoria accolta nel caso — il riconoscimento dei diritti fondamentali sulla base della clausola del giusto processo — restringa il valore di precedente del caso. Sebbene gli attivisti per i diritti degli omosessuali abbiano accolto con grande entusiasmo la pronuncia, essa non si spinge sino al punto da essi sperato nell'affermazione della parità di trattamento per le minoranze sessuali per cui la battaglia degli attivisti continua per l'abolizione di ogni discriminazione nei luoghi di lavoro, nell'accesso agli alloggi, nell'istruzione, nei servizi pubblici, ecc.

*This article examines the pathbreaking U.S. Supreme Court decision in *Obergefell v. Hodges* that held same-sex marriage was a fundamental right that could not be denied by any state, despite the myriad same-sex marriage bans that had been passed in a majority of states. After explaining the constitutional jurisprudence of due process and equal protection, the article then examines the history of the same-sex marriage movement and the *Obergefell* decision. We conclude by discussing how the jurisprudential theory of the case, fundamental rights under the due process clause, narrows the scope of the case's precedential value. Although gay rights activists were thrilled with the decision, it did not go as far toward mandating equal treatment for sexual minorities as they hoped, and the battle continues as activists now have turned toward abolishing discrimination in employment, housing, education, public accommodations, and the like.*

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1. Introduction

On June 26, 2015, the United States Supreme Court ruled in *Obergefell v. Hodges*¹ that same-sex marriage was a fundamental constitutional right that cannot be infringed. That decision marked the end of a long battle for gay and lesbian activists seeking equal rights to marry and thus to acquire the myriad tangible and intangible benefits of legal marriage. It also marks the beginning of the next stage in the battle for equal treatment for sexual minorities which began with the 1969 Stonewall Riots and has seen the Supreme Court strike down laws prohibiting states from blocking anti-discrimination laws for sexual minorities in *Romer v. Evans*² in 1996 and striking down anti-sodomy laws in 2003 in *Lawrence v. Texas*³. Justice Anthony Kennedy has authored the majority opinions in all four major gay rights cases of the last twenty years, including the decision in *Obergefell*, in which his focus has been on the dignitary harms facing sexual minorities who cannot marry, cannot visit their loved ones in hospitals, can be fired from their jobs or evicted from their homes, can be prohibited from adopting their partner's children, or can be imprisoned simply because they love someone of the same sex⁴.

Like the battles for racial and gender equality, the battle for marriage equality has been neither smooth nor steady. Sexual minorities still have a long way to go before they are treated equally under the law in most states, but the same-sex marriage issue has opened the door toward future cases that are likely to improve equal rights for all. As an astounding 63% of the population approves of same-sex marriage, and disapproves of differential treatment on the basis of sexual orientation, the decision in *Obergefell* provides valuable ammunition for the continuing battle while also falling short in what could have been a decisive blow against bigotry and legally-sanctioned discrimination. The decisive blow came for racial minorities in 1954 when the Supreme Court struck down the system of school segregation in *Brown v. Bd. of Education*⁵, decreeing that all laws mandating or permitting racial discrimination were unconstitutional. That moment also came in 1976 for women, when the Supreme Court held that laws disadvantaging on the basis of sex were subject to heightened scrutiny in *Craig v. Boren*⁶. But the Court has not held that sexual minorities are entitled to widespread protection against discriminatory local, state, or federal laws. Thus, while gays and lesbians celebrated winning the right to marry on June 26th, 2015, they picked up the banner on June 27th and are continuing down the long road toward legal equality.

In this article we briefly explain the complex legal history of the same-sex marriage issue, we explain the constitutional basis for the Court's decision in *Obergefell*, and we discuss where and how the case falls short in being the decisive moment for gay equal rights. To understand exactly what the case accomplishes, and what it fails to accomplish, one must understand the complicated nature of constitutional civil rights jurisprudence, as well as the balance of the U.S. federal/state legal system. While the dissenting justices in *Obergefell* decried the anti-democratic aspects of the decision, they were invoking a long debate between those who believe in a living constitution, that adjusts and evolves to deal with changing times, and those who espouse an originalist interpretation that the constitution is fixed in its eighteenth- or nineteenth-century meaning and context⁷. While the same-sex marriage debate has rekindled the constitutional battle over the nature and content of fundamental rights and liberties, it has also fit squarely within nearly a century's worth of cases affirming the rights of the individual to be protected against morals legislation that, for the disadvantaged, may reflect the tyranny of the majority.

1 135 S.Ct. 2584 (2015).

2 517 U.S. 620 (1996).

3 539 U.S. 558 (2003).

4 See, *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S.Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Each of these opinions, authored by Justice Kennedy, were consistently joined by liberal Justices Ginsburg and Breyer, and each included dissenting opinions by conservative Justices Scalia and Thomas.

5 347 U.S. 483 (1954).

6 429 U.S. 190 (1976).

7 The originalist theory of interpretation is that the Constitution should be interpreted strictly based on the intent of its authors, and thus the Court should find a right to exist in the Constitution *only* if it is explicitly stated in the Constitution or clearly intended by the framers. The non-originalist theory of interpretation goes beyond the text contained within the four corners of the document, thus allowing the Court to protect rights not explicitly stated nor clearly intended by the Framers. The fundamental disagreement is over the evolution of the Constitution, with originalists believing amendments to be the sole method of constitutional evolution, and non-originalists deeming it permissible for the Court to interpret the constitution to protect rights not explicitly mentioned in the text.

2. A Basic Primer on U.S. Constitutional Jurisprudence

The United States Constitution was adopted in 1789, and it sets out the basic procedures for electing members of Congress, the President, and for the appointment of federal judges. Most importantly, however, it establishes our federal system of government, which consists of fifty sovereign states, each with its own jurisdiction to pass laws for the general welfare, and a single federal government of limited powers that is supreme within its limited scope of authority. The federal government receives its powers from the states and is limited by the Constitution to acting only in certain defined areas of national interest, such as immigration, interstate and international commerce, and national defense. The Constitution leaves all remaining powers to the states, including core state interests over domestic relations laws, criminal laws, and real property law within their boundaries.

Ideally, the jurisdiction of the federal and state governments should not conflict, as the federal government is supreme within its limited scope, and the states are supreme over all remaining matters. However, as times have changed and more and more matters have taken on national or even global implications, the federal government's powers have grown at the expense of the states⁸. While marriage, divorce, child custody and other matters of domestic relations laws have continued to rest primarily within the states, the creation of federal programs like social security, Medicare, and even federal income taxes create tension between federal definitions of marriage and state definitions of marriage.

In 1791 the Bill of Rights⁹ was passed, providing protections for individuals against majoritarian legislation in the areas of speech, religious expression, personal liberty, and a wide variety of criminal law protections. Most important for our purposes is the Fifth Amendment's protection against the deprivation of "life, liberty, or property without due process of law". For the first sixty years, however, the Bill of Rights protections were interpreted by the Supreme Court as applying only against the federal government and not against state governments¹⁰. Thus, if a person felt that a state law infringed a personal liberty, one would look to a state constitutional provision rather than the federal constitution.

But in 1868, following the Civil War, the Fourteenth Amendment was ratified which expressly prohibits *states* from depriving a person of life, liberty, or property without due process of law, or for denying a person the equal protection of the laws. These two provisions, the liberty prong of the Due Process clause of the Fifth and Fourteenth Amendments, and the Equal Protection clause of the Fourteenth Amendment are the primary sources of constitutional protections for individual civil rights. But juxtaposed against these individual rights protections is the structural nature of *federalism*, which guarantees that states have a zone of autonomy from federal intrusion, including from certain constitutional claims of individual rights under the federal constitution. Thus, if a matter is properly one for state law, neither Congress nor the Supreme Court has power to alter the state law. On the other hand, if a state law intrudes upon an individual right protected under the Fifth or Fourteenth Amendment, the state law must give way. Determining which jurisdiction, state or federal, will have legal control over a set of rights or entitlements is far from a simple matter, and marriage is one of the hardest to determine.

Because the criteria and qualifications for entering a valid marriage have typically been a matter of state law, there has been much debate whether same-sex marriage remains solely within the province of the states, or whether the right to marry the person of your choice without regard to racial or sexual limitations is a right entitled to protection under the liberty prong of the Due Process clauses of the federal constitution. That debate is at the heart of the constitutional battle for same-sex marriage in the United States. And within that battle is a question over whether the *Equal Protection* or the *Due Process* clause provides the appropriate source for striking down state laws banning same-sex marriage.

8 See e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (where the Court upheld the National Labor Relations Act of 1935 permitting federal oversight of state labor relations); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (resulting in the application of the Fair Labor Standards Act to state governments, and thus rejecting a rule of state immunity from federal regulation).

9 The Bill of Rights consists of the first ten amendments to the Constitution, providing protections for speech and religious expression (Amendment I), arms (Amendment II), housing soldiers (Amendment III), search and seizure (Amendment IV), due process for the accused (Amendment V), fair and speedy trials (Amendment VI), jury trial (Amendment VII), and reserved powers of citizens and states (Amendments IX, X).

10 *Barron v. Mayor & City Council of Baltimore*, 32 U.S. 243 (1833).

3. Equal Protection vs. Due Process in the United States

3.1. The Equal Protection Clause

The Equal Protection clause of the Fourteenth Amendment to the United States Constitution provides that “No State shall deny to any person within its jurisdiction the equal protection of the laws¹¹”. Laws that classify persons, and treat one group worse than another, raise concerns under the Equal Protection clause, which requires that persons be treated equally with one another to the extent they are similarly situated¹². Thus, minors can be prohibited from voting because of their nonage because they are held to be not similarly situated to adults in terms of their education and ability to reason. But blacks and whites, men and women, the disabled and the able-bodied are all similarly situated in their ability to exercise their right to vote and therefore cannot be treated differently¹³. Laws challenged under the Equal Protection clause focus on the classification between groups of people, and opponents of the laws question whether the classification is justified in light of the state or federal governments’ interest in treating the groups differently. Thus, school policies segregating students by race or gender have been stricken as unconstitutional¹⁴, just as laws requiring that laundries be located in brick, and not wooden, buildings were stricken when the law was applied unequally only to laundries owned or operated by Chinese-Americans¹⁵. Because gender and race is not relevant to the ability to go to school, and race is not relevant to operating a laundry, the Court held that state laws drawing such classifications were unjustified by whatever dubious goals the state tried to articulate for the differential treatment.

Constitutional mandates for equal treatment under the laws went largely unrealized as a civil rights matter until 1954, when *Brown v. Board of Education*¹⁶ became the first case in which the Supreme Court looked behind the face of the law, in this case school segregation laws, to sniff out what it called “invidious discrimination”. States could no longer claim that separate schools for white and African-American students were permissible, even if the schools had been equal in quality and opportunities, which they certainly were not. Equal protection requirements, that expressly applied only to states under the Fourteenth Amendment, were subsequently held to apply to the federal government under the Fifth Amendment in the same way they apply to state governments under the Fourteenth¹⁷. Equal protection analysis requires the government, whether state or federal, to show a sufficiently important objective to justify a law or government practice that discriminates against a group of people, especially if that group has faced discrimination in the past or is politically unpopular.

Since *Brown v. Bd. of Education*, the Supreme Court has developed a three-tier paradigm under the Equal Protection clause for analyzing laws that classify groups of people¹⁸. Laws that classify people

11 U.S. Const. Amend XIV, § 1.

12 The famous “footnote four” in the Supreme Court case *United States v. Carolene Products Co.* famously established that Courts should generally presume a law is constitutional, unless it interferes with individual rights or discriminates against a “discrete and insular minority,” in which case it should be subject to heightened scrutiny. 394 U.S. 144, 152 n.4 (1938). It is the discrete and insular minority aspect of the Court’s famous footnote that leads to the tiers of scrutiny for disadvantaged classes of people.

13 See, U.S. Const. Amend XV, § 1 (1870) (stating that the right to vote shall not be denied on the basis of race; U.S. Const. Amend XIX (1920) (stating that the right to vote shall not be denied on the basis of sex). See also, *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969); *Harper v. Virginia St. Bd. of Elections*, 383 U.S. 663, 666 (1996) (in both cases, the Supreme Court declared the right to vote as a fundamental right protected under the Equal Protection Clause).

14 *Brown v. Bd. of Education*, 347 U.S. 483 (1954); *U.S. v. Virginia*, 518 U.S. 515 (1996).

15 *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

16 347 U.S. 483 (1954).

17 *Bolling v. Sharpe*, 347 U.S. 497 (1954).

18 Under the equal protection clause, the Court has asserted that certain types of differences between people are likely to lead to elevated scrutiny while other differences are not. The first of these criteria is whether the law classifies individuals based on an immutable characteristic, meaning a characteristic the individual cannot choose or change, such as race. The second factor is the ability of the group to protect itself through the political process. The third factor routinely analyzed is the history of discrimination the group has faced, as this is often enlightening in determining whether the classification under the law is based upon stereotypes, prejudice, or bias, rather than on a legitimate government interest. *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

based on race or national origin are deemed inherently suspicious and are subject to *strict scrutiny*¹⁹. Strict scrutiny requires that the government show that the law is a *necessary* means to accomplish a *compelling* state end, and requires proof that the law be the least restrictive and least discriminatory alternative available²⁰. Laws that classify people on the basis of gender and illegitimacy are subject to what has been termed *intermediate scrutiny*. Under intermediate scrutiny the government must show that the law is *substantially* related to an *important* government interest²¹. Under both strict and intermediate scrutiny, the burden is on the government to show that its law, treating people differently in some manner, is justified to serve an important or a compelling purpose.

Where a law classifies people on the basis of non-immutable characteristics or abilities, and the law does not seem to further some form of invidious discrimination, the Court applies a *rational basis* test to determine the constitutionality of the law. Under rational basis, the government need merely prove that the law is *rationally* related to a *legitimate* government end. Thus, laws that require people drive on the right side of the road, while disadvantaging those who want to drive on the left side, are not based on invidious discrimination against a politically unpopular group and are therefore constitutional. Most regulations involving businesses, or laws requiring marriage licenses or business licenses, are subject to rational basis review because they impose modest, reasonable restrictions in order to promote orderly social goals and are not tied to invidious forms of discrimination.

Unlike the two more stringent standards of review, strict and intermediate scrutiny, the rational basis test puts the burden of proof on the challenger rather than on the government²². Rational basis review is quite deferential to the government and the legislative process, and it is highly uncommon for a law to be deemed unconstitutional under this minimum level of scrutiny. Essentially, in order for a law to fail the rational basis test, the challenger of the law must demonstrate that the classification is completely arbitrary and entirely irrelevant to any reasonable state objective. But despite claims that rational basis is a pass for the government, a few laws have been stricken as being completely arbitrary or based on unreasonable animus against an unpopular group²³.

Determining which level of scrutiny to apply to laws that classify individuals, and are therefore at risk of disadvantaging an already disadvantaged group, is a highly contested issue. While the selection of a standard of review often seems to lead to a predetermined outcome, in reality the court has significant discretion in determining the standard, and the three tiers of review are often seen as more of a sliding scale rather than three distinct standards. Some have called strict scrutiny, “strict in theory but fatal in fact”²⁴ and others have referred to the rational basis test as toothless, but empirical analysis shows that a significant percentage of challenges to laws under strict scrutiny fail²⁵.

3.2. The Due Process Clause

The Due Process clause of the Fourteenth Amendment provides that “no State shall deprive any person of life, liberty, or property, without due process of law²⁶,” therefore protecting individuals against arbitrary government intrusion into their fundamental *liberties*. *Due process* under this amendment refers to both procedural requirements of fairness when legal rights are restrained²⁷, and substantive matters, which consist of certain fundamental rights that cannot be infringed without substantially affecting an

19 See *Graham v. Richardson*, 403 U.S. 365 (1971); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

20 See, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

21 See, *Craig v. Boren*, 429 U.S. 190 (1976) (articulating the standard of intermediate scrutiny for gender classifications); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding intermediate scrutiny to be the standard appropriate for discriminatory classifications based on illegitimacy); *Matthews v. Lucas*, 427 U.S. 495, 505 (1976).

22 E.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

23 See *Romer v. Evans*, 517 U.S. 620, 631-34 (1996) (holding a state law unconstitutional as an irrational denial of equal protection using only rational basis review, as the law had no legitimate purpose and was born of animosity toward gays and lesbians).

24 Justice Brennan, concurring, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 362 (1978).

25 Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, in *Vanderbilt Law Review*, 793 (2006).

26 U.S. Const Amend XIV, § 1.

27 Procedural due process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. Issues commonly arising under procedural due process include the type of notice and the form of hearing required by the government in certain actions.

individual's right to liberty and autonomy. The substantive side of the due process protection for liberty and property requires that there be a sufficient justification for the state's action if it is going to infringe one's rights. Some liberties are so important that they are deemed *fundamental*, and when legislation burdens the exercise of a *fundamental* right, the law is subjected to strict scrutiny analysis²⁸. If analyzed under strict scrutiny, the government must meet the same standard as under equal protection — that the law is necessary to further a compelling state interest. Examples of rights that have been deemed fundamental include, but are not limited to, the right to vote, the freedom to travel, the rights of parents to have custody of their children, the right to privacy and personal autonomy, the right to marry, rights protecting procreation and contraceptives, and rights protecting sexual activity and medical care decision-making²⁹. Though some of these rights are not expressly mentioned in the text of the Constitution, they are nevertheless protected by the Court because the Due Process clause protects both enumerated rights and other derivative rights that are deemed necessary in a free and civil society³⁰. The determination of whether a right not enumerated in the text of the Constitution is fundamental often turns on whether the right is rooted in our Nation's history, legal traditions, and practices³¹.

If a right is deemed to be non-fundamental, such as the right to run a business or the right to shop for liquor on Sundays, the state may infringe the right so long as it meets the highly deferential rational basis test; i.e., that the law is rationally related to a legitimate government purpose. If the right is non-fundamental, it can be entirely prohibited if the state meets its deferential standard. Thus, the right to donate blood or the right to be free of property taxes can be prohibited or merely infringed, in the legislature's discretion. But if the right is fundamental, it usually cannot be entirely prohibited, and infringements on the right must be narrowly drawn to further the state's compelling interest. Thus, although access to an abortion is deemed a fundamental right that cannot be entirely prohibited, states can infringe the right through reasonable regulations so long as the right is not unduly burdened³².

The freedom to marry has been recognized as a fundamental right protected by the Due Process clause, a holding that has been reaffirmed by our nation's highest court myriad times³³. But regulations infringing the right to marry have also been upheld, such as the requirement of civil registration, prohibitions on polygamy or bigamy, prohibitions on marriages of minors or coerced marriages, restrictions on the basis of consanguinity, and even the requirement that the parties submit to a blood test³⁴. Thus, although the right to marry was affirmed when the Court struck down interracial marriage bans in *Loving v. Virginia* in 1967³⁵, it treated the prohibition against same-sex marriage in Minnesota as a mere regulation entirely within the purview of state domestic relations law five years later in *Baker v. Nelson*³⁶. Even though the Court has identified a right as fundamental, the Court is not bound to find that all expressions of that right are so important as to be entitled to constitutional protection, or that all restraints on the right are unconstitutional.

28 *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

29 Voting: *Reynolds v. Sims*, 377 U.S. 533 (1964); *Bush v. Gore*, 531 U.S. 98 (2000); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Travel: *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Saenz v. Roe*, 526 U.S. 489 (1999). Custody: *Santosky v. Kramer*, 455 U.S. 745 (1982); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972). Privacy and personal autonomy: *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973). Marriage: *Zablocki v. Redhail*, 434 U.S. 374 (1978). Procreation and contraceptives: *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Sexual activity: *Lawrence v. Texas*, 539 U.S. 558 (2003). Medical care decision-making: *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

30 *Roth v. Board of Regents*, 408 U.S. 564, 572 (1972) (holding that liberty means those rights expressly stated in the constitutional text and those not specifically enumerated in the text, such as the right to marry).

31 *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

32 *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

33 See e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (2010).

34 See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding the constitutionality of a law forbidding polygamy, even though Mormons claimed that it was required by their religion); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (explaining that blood tests have become procedure for those going into military service as well as those applying for marriage licenses).

35 *Loving v. Virginia*, 388 U.S. 1 (1967).

36 *Baker v. Nelson*, 409 U.S. 810 (1972).

3.3. Hybrid Equal Protection and Due Process

As if these two clauses were not complicated enough, the Supreme Court has identified a hybrid theory of equal protection and due process. This complicated situation arises when a relatively small group of people are denied the right to exercise a fundamental liberty interest, or when their fundamental rights are infringed, but they are not recognized as a suspect class. For instance, imagine a state were to decree that people who drive red cars can only vote if they show four forms of identification and everyone else can vote by showing only one form of identification. In such an instance, people who drive red cars are not a suspect class, which racial minorities or non-marital children are. But the right to vote is a fundamental right. In this example the right to vote is not entirely prohibited to drivers of red cars, but their right to vote is significantly infringed. In such a case, the Court would elevate scrutiny to strict scrutiny *because of* the infringement of a fundamental right, but the Court would look at the *classification* to see if classifying people by what color car they drive is related to the exercise of the right. In this hybrid situation the Court focuses on the classification like it would do under equal protection, rather than on the infringement of the right which it would do under a pure due process analysis, even though what causes the elevation in scrutiny is the importance of the right. In this instance, driving a red car has nothing to do with the ability to vote capably, and thus the classification cannot meet the appropriate level of scrutiny and the law would be stricken.

On the other hand, a law that prohibits minors from voting would be upheld because, although the prohibition of voting by minors is a great burden on their fundamental right, the age classification makes sense in light of their general maturity and educational levels. Under this hybrid theory, therefore, laws infringing fundamental rights of non-suspect classes will receive heightened scrutiny into whether the classification (some people get to exercise the right and others do not) furthers a compelling government interest³⁷.

And this is precisely the situation raised by bans on same-sex marriage. States argue that no one is denied the fundamental right to marry; they are simply prohibited from marrying a person of the same sex. This means that opposite-sex couples may exercise their fundamental right to marry, but same-sex couples cannot. Because sexual minorities are not recognized as a suspect or quasi-suspect class under the Court's equal protection jurisprudence, they are very much in the same situation as the drivers of red cars. Their right to marry is severely infringed but it is not prohibited, as they can always choose to marry someone of the opposite sex. And so long as the classification between opposite-sex and same-sex couples in the exercise of the right to marry does not impose an undue burden on them, the law would be a permissible regulation.

This hybrid theory illustrates how complex the Supreme Court's constitutional civil rights jurisprudence has become. If one argues that a homosexual person is entirely prohibited from exercising the right to marry, and the right is a fundamental right, then the appropriate theory is the straightforward Due Process clause. If one argues that same-sex marriage bans classify between heterosexual and homosexual persons, and that the classification deserves heightened scrutiny because sexual minorities meet the recognized criteria of a suspect class, then the appropriate source is the Equal Protection clause. Under equal protection, one would only need to determine what level of scrutiny is appropriate based on whether the class is a suspect class entitled to strict scrutiny or only a quasi-suspect class, like gender, that is entitled to intermediate scrutiny. But if one acknowledges that sexual minorities are not a suspect class at all, and therefore entitled only to rational basis review of laws that disadvantage them, then one can argue the hybrid equal protection/due process claim if the right being infringed is deemed a fundamental right (and not a mere regulation) and the classification between heterosexual and homosexual marriage applicants does not further the state's interest in regulating marriage.

One can think of the issue a bit differently by considering whether the same-sex marriage bans are aimed at disadvantaging particular persons because they are gay, or whether the bans are aimed at regulating the act of getting married. In the former, the issue is equal protection and in the latter it is due process. If the marriage ban is like the requirement of civil registration, then it is a mere regulation generally left to state domestic relations laws. If the marriage ban is like the prohibition on coerced marriages, then it clearly furthers a compelling state end of maintaining morals and good behavior. If the marriage ban is really an attempt to disadvantage a group of people, in this case gay people, then it looks an awful lot like the interracial marriage bans that were aimed at disadvantaging racial minorities and would be an unconstitutional infringement of the fundamental right to marry.

37 *Loving v. Virginia*, 388 U.S. 1 (1967); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Bearden v. Georgia*, 461 U.S. 660 (1983); *M.L.B. v. S.L.J.*, 519 U.S. 102 (2012).

Even after the Supreme Court's decision in *Obergefell* holding that same-sex marriage bans were aimed at disadvantaging gay people, countless questions remain about the legitimacy of other types of marriage regulations. But that issue is addressed below. In order to fully understand the Court's decision and its impact for the future, we next need to place the case in its historical context.

4. History of Same-Sex Marriage Regulations and Litigation

As noted earlier, the Supreme Court struck down all interracial marriage bans in 1967 in *Loving v. Virginia*, stating that marriage is a *fundamental* right, and also holding that the race-based classification of the laws violated the Equal Protection clause, thus elevating the analysis to strict scrutiny. In response to this case, two men in Minneapolis applied for a marriage license in 1970 but were turned away, even though the state did not have a law explicitly mandating that marriage was only between a man and a woman. Relying on *Loving*, they sued the state and ultimately lost at every level, including at the Minnesota Supreme Court, which held that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex³⁸". On October 10, 1972, the U.S. Supreme Court rejected their appeal with a one-sentence order stating "The appeal is dismissed for want of a substantial federal question³⁹". In other words, the Court held that same-sex marriage regulations were, for all intents and purposes, simple matters of domestic relations laws solely within the purview of the states, and did not raise a federal constitutional question.

Although only seven states had laws defining marriage as between a man and a woman in 1973, that year Maryland became the first state to pass a statute specifically banning same-sex marriage, doing so in the context of its Family Law Code⁴⁰. Kentucky and Washington followed suit, and judges in each state held that the marriage bans were constitutional⁴¹. These swift defeats pushed the advocates of same-sex marriage back into silence.

For the next twenty years, the issue lay essentially dormant, until in 1990 three couples sought marriage licenses in Hawaii. When the licenses were denied because the parties were of the same sex, they sued, arguing that the requirement of a man and a woman violated both their equal protection and their due process rights. In 1991, the trial court dismissed the case and the couples appealed to the Hawaii Supreme Court, which held that denying same-sex couples the right to marry was a violation of the state constitution barring sex discrimination⁴². The court found that the restriction of marriage to opposite-sex couples constituted sex discrimination, as it prohibited same-sex couples from marriage based solely on the sex of the individual they sought to marry⁴³. The Hawaii Court rejected the due process claim that marriage was a fundamental right because same-sex marriages were not "so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions⁴⁴".

The case was remanded from the Hawaii Supreme Court to see if the state could meet strict scrutiny under equal protection and thus show that the marriage restriction furthered a compelling state interest. On remand, in 1996, the trial judge held that Hawaii's limitation of marriage to opposite sex couples could not withstand strict scrutiny and that it violated the petitioners' rights to equal protection of the laws⁴⁵. But while that decision was on appeal again, the voters of Hawaii approved a constitutional amendment banning same-sex marriages, and the Supreme Court of Hawaii held that the constitutional amendment removed the issue altogether from the courts⁴⁶.

Fearing a similar fate, the people of Alaska voted in 1998 to amend its constitution to ban same-sex marriage after a court ruling in *Brause v. Bureau of Vital Statistics*, in which the Superior Court of Alaska

38 *Baker v. Nelson*, 291 Minn. 310 (1971).

39 *Baker v. Nelson*, 409 U.S. 810 (1972).

40 M.S.A. §§ 517.01 et. seq., 517.08.

41 *Jones v. Hallahan*, 501 S.W.2d 588 (1973); *Singer v. Hara*, 11 Wash. App. 247 (1974).

42 *Baehr v. Lewin*, 852 P. 2d 44, 68 (Haw. 1993).

43 *Id.* at 57.

44 *Id.*

45 *Baehr v. Miike*, Circuit Court of Hawaii, First Circuit, Civil No. 91-1394 (1996).

46 Haw. Const. art. I, § 23, amended by Haw. Const. amend. II (1998).

agreed with the Hawaii ruling that the same-sex marriage ban constituted discrimination on the basis of sex⁴⁷. Both *Brause* and *Baehr* imposed heightened scrutiny by deeming same-sex marriage bans to discriminate on the basis of sex, rather than on the fundamental right to marry or on sexual orientation as a suspect or quasi-suspect classification.

After the Hawaii Supreme Court decision *Baehr* in 1993, thirty-two state legislatures altered their statutes to reflect marriage as a relationship between a man and a woman and two states adopted constitutional provisions limiting marriage to opposite sex couples only⁴⁸. By 2004, a mere nine years after the Hawaii decision, forty out of fifty-one states and territories had adopted such measures to prevent same-sex marriage from becoming a possibility in their states⁴⁹.

Adding fuel to this anti-gay wildfire, President Clinton signed the Defense of Marriage Act (DOMA) into law in 1996, federal legislation that defined marriage for federal purposes as between a man and a woman only, thus depriving them of over 1,138 protections and responsibilities that accompany marriage under federal law⁵⁰. DOMA also provided that no state had to recognize same-sex marriages performed in other states or countries, even though there was no state in 1996 that permitted same-sex marriage⁵¹. In many respects, Congress correctly saw the writing on the wall, that same-sex marriage was inevitable, but DOMA was aimed at postponing that date as long as possible.

During those first seven years following the historic Hawaii decision, the pendulum swung with force in the direction of anti-gay sentiment, and there wasn't enough support for gay rights among the general populace to create any significant challenge in response. However, in late 2000, the pendulum began to slowly swing back in the direction of respect for and recognition of same-sex relationships, as public support and awareness for gay and lesbian rights began to see an upward trend. This movement began with several states recognizing same-sex relationships through the granting of civil unions or domestic partnerships. The first of the states to create an "alternative system of marriage" was Vermont, as a result of the Supreme Court of Vermont's ruling in *Baker v. State*⁵², which held that same-sex couples were entitled to the same legal benefits and protections as heterosexual couples. Several states followed this trend, wherein they preserved the definition of marriage as being between one man and one woman, but created a parallel institution in which same-sex couples could gain some or all of the benefits and protections of marriage, even as they were prevented from using the title of marriage. Of course, without marriage and with DOMA in effect, couples in those few states with civil unions or domestic partnerships could not gain access to the over-1100 legal rights and responsibilities attaching to heterosexual marriage under federal law. During those years, civil unions and domestic partnerships were seen as a kind of *marriage lite*⁵³ — gay and lesbian couples had some of the benefits of marriage under state law, but without the title or the majority of the rights accorded married couples under federal law.

It is difficult not to compare the parallel institution of domestic partnerships and civil unions to the outdated "separate but equal" facilities provided to African Americans following the Supreme Court case *Plessy v. Ferguson*⁵⁴. Similar to the separate schools, drinking fountains, and public bathrooms that black people were required to use under Jim Crow laws, the separate institutions for gay and lesbian relationships were stamped with a badge of inferiority. One of the core elements of any fundamental right is the idea that it is fundamental to all people, not just to certain groups. Arguably, limiting the right to marry for same-sex couples denies their official family relationships the same dignity, respect,

47 1998 WL 88743 (Alaska Super. Ct. 1998).

48 Statutes: North Carolina, Utah (1995); Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee (1996); Arkansas, Indiana, Maine, Minnesota, Mississippi, Missouri, Montana, North Dakota, and Virginia (1997); Alabama, Iowa, Kentucky, and Washington (1998); California, Colorado, Texas, and West Virginia (2000). Constitutional Amendments: Alaska Const. art. I, § 25; Neb. Const. art. I, § 29.

49 Hawaii, North Carolina, Arkansas, Arizona, Alaska, Delaware, Georgia, Indiana, Illinois, Kansas, Missouri, Mississippi, Oklahoma, Pennsylvania, South Carolina, Tennessee, South Dakota, Florida, Idaho, Maine, Minnesota, Michigan, Montana, North Dakota, Texas, Utah, Virginia, Alabama, Kentucky, Louisiana, Colorado, Nebraska, West Virginia, Nevada, Wyoming, Ohio, Oregon.

50 Federal Defense of Marriage Act. 1 U.S.C.A. § 7 (1996) added Pub.L. 104-199, § 3(a).

51 1 U.S.C.A. § 7, Sec. 3. Definition of Marriage.

52 170 Vt. 194, 224 (1999).

53 See generally Hillel Y. Levin, *Resolving Interstate Conflicts Over Same-Sex Non-Marriage*, in 63 *Florida Law Review* 47 (2011) (discussing "marriage-lite" alternatives, such as civil unions, domestic partnerships, and reciprocal benefit agreements, and the myriad conflicts of laws that occur when, for instance, a same-sex couple married in a state where marriage is legal moves to a marriage-lite state).

54 163 U.S. 537 (1896).

and stature as that accorded to all other officially recognized family relationships⁵⁵. Even in states where the domestic partnership registry provides all of the *legal* benefits of marriage and a civil union or domestic partnership is equal to marriage in all but name, marriage lite denies the *social* benefits of marriage. This inequality arguably violates the fundamental rights guarantees of the Due Process clause because domestic partnerships were created specifically for the purpose of withholding real marriage from same-sex couples⁵⁶.

The first major shift in the legal status of same-sex marriage came a decade after the aborted Hawaii decision, when the Massachusetts Supreme Court ruled, in 2003, that the state's proposal to create a parallel system for same-sex relationships was unconstitutional under the Massachusetts state constitution. Deeming such segregation based on the gender composition of the couple to be irrational and out of step with the goal of encouraging adults to enter stable, loving relationships, the court in *Goodridge v. Department of Public Health*⁵⁷, mandated that marriage, in all its social and legal meaning, could not be denied to same-sex couples. In the very same year, the Supreme Court decided *Lawrence v. Texas*⁵⁸, which decriminalized intimate sexual acts between persons of the same sex and moved gays and lesbians out of the shadow of being labeled criminal deviants. Relying on the Due Process clauses of the Fifth and Fourteenth Amendments, Justice Kennedy, writing for the majority, stated that constitutional protections afforded straight persons regarding personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education apply equally to gays and lesbians⁵⁹.

These two rulings provided sexual minorities and their advocates the courage to begin a major effort to secure same-sex marriage through state-by-state strategic litigation. Utilizing the concept of *forum shopping*⁶⁰, advocates began litigating in states where same-sex marriage claims were most likely to succeed based on the political climate of the state and the composition of the state judiciary⁶¹. The major gay rights organizations that were implementing this state-by-state strategy wanted to avoid federal litigation on same-sex marriage, as they feared that the Supreme Court's conservative make-up did not auger well for a sweeping decision on marriage equality of the sort handed down in 1967 in *Loving*⁶². Moreover, bad precedent from an unfavorable federal ruling could quash the movement, leaving progressive states vulnerable to claims that their recognition of same-sex marriage was inconsistent with conservative constitutional rights jurisprudence or state prerogatives.

The state-by-state strategy was risky, however, because of how easily a victory in the courts or the state legislature could be overturned by a state constitutional amendment, as was the case in Hawaii. This painfully slow process of two steps forward, one step back, continued for the next five years, until the California Supreme Court ruled that marriage equality was required under the California State Constitution⁶³. For about six months, marriages were performed in California, only to be abruptly halted when Proposition 8 was passed by the voters, amending the California Constitution to prohibit same-sex marriages. California was the first state to actually have marriages be performed and then be stopped because of the state constitutional amendment. This anomaly, especially for the roughly 18,000

55 *In re Marriage Cases*, 43 Cal. 4th 757 (Cal 2008).

56 *Brown v. Education* stands for the proposition that even if the separate facilities for black and white persons were equalized in terms of all measurable factors, equality demands not just a comparison of tangible factors, but it takes into account the social and emotional impact of segregation. 347 U.S. 483, 489-93 (1954). Separating black and white children stamped black children as inferior, generating "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone". *Id.* at 494. Similarly, even if domestic partnerships provide the same tangible benefits as marriage, (which of course they didn't because of DOMA), the effect of a parallel institution with its stamp of inferiority is devastating for the families being denied the powerful social meaning that comes with being able to say they are married. See *Perry*, 704 F. Supp. 2d at 994.

57 440 Mass. 309, 344 (2003).

58 539 U.S. 558, 574 (2003).

59 *Id.*

60 'Forum shopping' refers to a parties' attempt to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict. See *Black's Law Dictionary* 590 (5th ed. 1979).

61 See *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2007) (holding that the Connecticut law that restricted marriage to heterosexual couples violated same-sex couples' state constitutional equal protection rights).

62 Chief Justice Earl Warren (1953-1969), who authored the *Loving* opinion, was a very liberal Chief Justice, much unlike subsequent Chief Justices Rehnquist (who filed dissenting opinions in *Romer v. Evans* and *Lawrence v. Texas*) and Roberts (who filed dissenting opinions in *U.S. v. Windsor* and *Obergefell v. Hodges*).

63 *In re Marriage Cases*, 43 Cal.4th 757 (2008).

couples married between the June, 2008 decision by the California Supreme Court, and the November 4, 2008 election which saw Proposition 8 succeed by a 52.5% to 47.5% vote, created a classic equal protection problem. Some same-sex couples who married during the 2008 window were entitled to all the legal and social benefits of marriage, but any same-sex couple who came after November 4th would be entitled only to a domestic partnership.

Litigation on Proposition 8 was fast and furious, with cases challenging the amendment being filed the day after the election, on November 5th. However, the California Supreme Court ruled that the constitutional amendment was valid, and that same-sex marriage was no longer a part of California state law⁶⁴. That same day, the *American Foundation for Equal Rights* (AFER) filed suit in the *U.S. District Court for the Northern District of California* to challenge the validity of Proposition 8 under the U.S. Constitution. Judge Vaughn Walker was assigned to hear the case and he took the unusual step of setting the case for a trial on the merits in order to litigate the state's claims that Proposition 8's marriage ban furthered a legitimate state purpose.

The federal case against Proposition 8⁶⁵ changed the course of same-sex marriage litigation by bringing it in federal court and, for the first time, putting fear and discrimination on trial. It is important to note that, at the time this federal lawsuit was filed, only two states in the entire country allowed same-sex marriage⁶⁶, and both "Don't Ask Don't Tell"⁶⁷ and DOMA existed as strong affirmations that our government viewed gay and lesbian people as unequal. However, during the trial in January, 2010, each purported rationale for restricting marriage to opposite-sex couples was put on the stand and subjected to cross-examination and, one by one, each crumbled before the withering logic of Judge Walker. Rather than decide the case on summary judgment or a preliminary motion, as had almost every other judge who heard a same-sex marriage case, Judge Walker insisted on deciding the case on its merits through a trial, so that a record could be created, the parties could cross-examine each other, and the experts and claims of each side could be properly vetted. This record would come to reflect that absolutely no rationale existed for denying same-sex couples the right to marry, and the record exposed that bans on same-sex marriage were based on nothing more than animus toward gays and lesbians and served no legitimate government interest other than expressing a moral disapproval of homosexuality⁶⁸. Although Judge Walker ruled Proposition 8 to be unconstitutional under both the Due Process and the Equal Protection clauses of the U.S. Constitution, elevating scrutiny because marriage is a fundamental right and there was no rational state interest in denying the right on the basis of sex, a quasi-suspect category, the Judge also found that the state could not meet even the most deferential rational basis test⁶⁹. That decision, which referenced the individual rights protections of the federal constitution, and not state constitutional protections that could be easily amended by ballot initiatives, marked the sea change in marriage equality litigation.

Although the Supreme Court of the United States was not ready to affirm Judge Walker's decision on the merits when the case was appealed in 2013, it was ready to recognize same-sex marriages as entitled to constitutional protections. The Court side-stepped the issue of a national right to marriage equality under the federal constitution by deciding the appeal to the Proposition 8 case on a technical standing matter in *Hollingsworth v. Perry*⁷⁰. But that same day, the Court ruled that the federal marriage ban, DOMA, was unconstitutional. In *United States v. Windsor*⁷¹, the Supreme Court concluded that sec-

64 *Strauss v. Horton*, 297 P.3d 48 (2009).

65 *Perry v. Schwarzenegger*, 704 F.Supp. 2d 921 (Cal. 2010).

66 *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008) (Connecticut Supreme Court ruled that same-sex couples are entitled to the freedom to marry); *Varnum v. Brien*, 763 N.W.2d 862 (2009) (Iowa Supreme Court hands down a unanimous decision in favor of marriage equality).

67 "Don't ask, don't tell," a discriminatory ban on gay and lesbian service members, was the official United States policy on military service by gay and lesbians signed into law by Bill Clinton on February 28, 1994. For seventeen years, this policy prohibited qualified Americans from serving their country and enshrined discrimination into law.

68 One of the most important moments that occurred during the trial of *Perry v. Schwarzenegger* was when Judge Vaughn Walker asked the defendant-intervener's attorney Charles Cooper what harm would come to "traditional" opposite-sex marriage as a result of permitting same-sex couples to marry, and his answer, in federal court, was "Your honor...my answer is...I don't know...I don't know". Transcript of *Perry v. Schwarzenegger*. Cooper later claimed that what he meant was, as same-sex marriage is a novel phenomenon and the effects on traditional marriage have not become apparent yet, that we need to wait and see what those effects will be.

69 *Perry*, 704 F.Supp. 2d at 997 (Cal. 2010).

70 133 S. Ct. 2652 (2013).

71 133 S. Ct. 2675 (2013).

tion 3 of DOMA, which defined marriage for federal law purposes as between a man and a woman only, could not withstand constitutional scrutiny because “the principal purpose and the necessary effect of [section 3] are to demean those persons who are in a lawful same-sex marriage” who — like the unmarried same-sex couple in *Lawrence* — have a constitutional right to make “moral and sexual choices⁷²”. By 2013, when the Court decided *Windsor*, seven states, plus Washington, D.C., had adopted laws permitting same-sex marriages, and for couples in those states, who were deemed married under state law, the federal marriage ban put them in an untenable box. Their states had decided to recognize and validate their relationships, but the federal government, which had heretofore deferred to state definitions of marriage, had suddenly decided not to recognize the state’s right to confer the legal status of marriage on its own citizens. So they were married for state purposes and not married for federal purposes.

Ironically, the decision in *Windsor* put other same-sex couples into another untenable box. For couples married in a state or country that recognized same-sex marriages, but residing in a state that did not, they were deemed married under federal law after *Windsor*, but unmarried in their states of domicile. This required filing separate income tax returns and dealing with complicated issues around traditional marital rights, like social security, pensions, elective shares, and other entitlements. Thus, in many respects, life was easier when same-sex marriage was prohibited in the vast majority of states and by the federal government. But once the federal government began to recognize them, those states that continued to deny same-sex marriages imposed tremendous burdens on their residents.

The Supreme Court’s decisions in *Windsor* and its tacit approval of the decision in *Perry* led to a flood of litigation in federal courts across the country, arguing that the U.S. Constitution prohibited states from banning same-sex marriages. Within two years, 60 district courts and 5 federal courts of appeals had ruled that marriage equality was a fundamental right, or that marriage bans were violations of the equal protection rights of same-sex couples⁷³. Only one court, the Sixth Circuit Court of Appeals, upheld a state marriage ban on the grounds that marriage is traditionally a matter of state law and, following the 1972 decision in *Baker v. Nelson*, does not raise federal constitutional questions⁷⁴. That conflict between the circuit courts forced the issue once again to the Supreme Court. And the rest, they say, is history.

5. Obergefell v. Hodges

Despite unanimity among each of the other Circuit Courts of the United States on the unconstitutionality of same-sex marriage bans, the Sixth Circuit Court of Appeals broke with the trend of holding that such marriage bans violate the U.S. Constitution, allowing Michigan, Kentucky, Ohio, and Tennessee to continue prohibiting same-sex couples from marrying⁷⁵. Because those states continued to define marriage as a union between one man and one woman, and also refused to recognize the marriages of same-sex couples performed in other states, fourteen same-sex couples, and two men whose same-sex partners were deceased but who sought survivor benefits as legal spouses, sought certiorari from the United States Supreme Court⁷⁶. Petitioner James Obergefell traveled from his home in Ohio to Maryland, where same-sex marriage was legal, in order to marry his long-time partner John Arthur before he died, as Arthur was suffering from the debilitating disease ALS. Arthur’s condition was so poor that they had to wed inside a medical transport plane as it remained on the tarmac in Baltimore, but they were firmly committed to dignifying their loving, committed relationship with the respectable title of marriage. Three months later, when Arthur died, the State of Ohio did not allow Obergefell to be listed as Arthur’s surviving spouse on his death certificate, forcing them to remain strangers even in death. Each of the other sets of petitioners had equally heart-wrenching stories, and their pleas for equal recognition, dignity, and treatment in the eyes of the law were able to land on the desks of the nine U.S. Supreme Court Justices.

72 133 S. Ct. at 2694-95.

73 The federal appellate court rulings include the 9th Circuit ruling, *Latta v. Otter*, in October of 2014; the 7th Circuit ruling, *Baskin v. Bogan*, in September of 2014; the 4th Circuit ruling, *Bostic v. Schaefer*, in July of 2014; the 10th Circuit ruling, *Bishop v. Smith*, in June of 2014; and the 10th Circuit ruling, *Kitchen v. Herbert*, in June of 2014.

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

75 *Id.*

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

The Supreme Court agreed to review two questions: the first was whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex; the second was whether the Fourteenth Amendment requires a state to recognize a same-sex marriage licensed and performed in a state which does grant that right. Because the petitioners claimed that they did not seek a *new* right, but rather the exercise of the age-old fundamental right to marriage, while the respondents adamantly argued that the right to marriage did not, and could not, include same-sex marriage, the Court had to look at the history of marriage in our country.

Justice Kennedy, writing for the majority, spent several pages discussing the transcendent importance of marriage and its centrality to the human condition, while also detailing the evolution of the institution of marriage over time. Developments in law and society have resulted in a continually changing definition of marriage, a concept demonstrated by Justice Kennedy through a reference to the outdated use of arranged marriages and the doctrine of coverture⁷⁷. The trend toward inclusivity and freedom, Justice Kennedy noted, has strengthened, not weakened, the institution of marriage, thus undermining the respondents' argument that permitting same-sex couples to marry would demean the timeless institution.

Justice Kennedy went on to eloquently document the history of discrimination against gays and lesbians in this country, including the legal and moral condemnation of same-sex intimacy until the late-20th century. Even after World War II, when gays and lesbians began to earn some semblance of dignity in their identities, same-sex intimacy remained a crime in many states. Gays and lesbians were not only discriminated against in their personal relationships, but were also prohibited from government employment, barred from military service, excluded under immigration laws, routinely targeted by police, and burdened in their rights to associate⁷⁸. These dignitary harms and injustices seemed justified at a time when homosexuality was treated as an illness, having been deemed a "mental disorder" by the American Psychiatric Association in 1952, and remaining classified as such until 1973. Justice Kennedy went through the history of the Court's treatment of the legal status of homosexuals, much like the historical discussion we have provided in the previous sections, from *Bowers v. Hardwick*⁷⁹ in 1986 which upheld the criminality of same-sex intimate relations through *Windsor* in 2013. As evidence of the nationwide change in opinion regarding the value of same-sex relationships, Justice Kennedy stated that, with the exception of the Sixth Circuit, all of the Courts of Appeal, and most of the District Courts that have considered the issue, have held that excluding same-sex couples from marriage violates the U.S. Constitution.

The Due Process clause's protection of fundamental liberties was the ultimate basis relied upon by the Supreme Court in concluding that marriage is a fundamental right that same-sex couples have the right to exercise. Unlike the originalist interpretations present in the dissents, the majority in *Obergefell* believed it is an enduring part of the judicial duty in interpreting the Constitution to continuously identify and protect fundamental rights, even newly emerging rights. This idea of a "living constitution," one that evolves and adjusts to deal with changing times, is at the heart of Justice Kennedy's claim that the nature of injustice is that we may not see it in our own times, but later generations have the right and the power to increase protections and provide greater security for groups and individuals than were recognized in 1789 or 1868. The Due Process clause, he wrote, protects and guarantees the right to marry; it guaranteed that right for interracial couples in *Loving*, for prison inmates in *Turner*, for fathers with unpaid child support duties in *Zablocki*, and finally, with *Obergefell*, it guarantees that right for same-sex couples.

Justice Kennedy relied on four principles and traditions to demonstrate that the reasons marriage is fundamental under the Constitution support its application to same-sex couples. First, the right to personal choice regarding marriage is inherent in the concept of individual autonomy; second, the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals; third, marriage safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education; and finally, the Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order⁸⁰. Because there is no difference between same-sex and opposite-sex couples with respect to the quality of their relationships or their ability to raise children, the result of the exclusion of same-sex couples from the institution was

77 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 W. Blackstone, *Commentaries on the Laws of England* 430 (1765).

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

79 478 U.S. 186 (1986).

80 *Obergefell*, 135 S.Ct. at 2599-2602.

viewed as a denial of the constellation of benefits that the states have linked to marriage and a resulting instability and lack of dignity for their families.

While deciding *Obergefell* on the basis of due process, the majority gave some credence to the claim of equal protection. In *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Court discussed that, under the Equal Protection clause, heightened scrutiny is warranted when, among other factors, a group is discriminated against based on an immutable characteristic. Several times throughout the majority opinion, Justice Kennedy mentioned sexual orientation as being immutable, opening the door to the possibility of challenging laws that discriminate against gays and lesbians under a higher level of scrutiny. *Loving*, *Zablocki*, and the myriad cases in which the Court invalidated laws that imposed sex-based inequality on marriage⁸¹, all demonstrate how the Equal Protection clause can help to identify and correct inequalities in the institution of marriage. Following a discussion on the profound relationship between the Due Process and Equal Protection clauses, Justice Kennedy held that the denial of marriage to same-sex couples works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians, was an infringement on their rights that cannot stand under the Equal Protection clause. This reference to the Equal Protection clause is a first in Justice Kennedy's gay rights jurisprudence and marks a potential opening salvo in the continuing battle for equal rights for sexual minorities.

In resolution of the second issue before the court, Justice Kennedy quite logically held that all states must recognize same-sex marriages validly performed in other states. Failing to do so would promote instability, uncertainty, and a national patchwork of inconsistency in the laws concerning domestic relations.

The respondents, as have many opponents of same-sex marriage, urged the court to proceed with caution, to allow further litigation, legislation, and debate on the issue; also known as the *wait and see* argument. Justice Kennedy addressed this concern, acknowledging that the democratic process is the typical vehicle for such important and controversial societal changes. He swiftly concluded, however, that our constitution does not require individuals to "wait and see" when it is a fundamental right they are being denied. As Martin Luther King stated in 1963, on the steps of the Lincoln Memorial, "this is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism," expounding that full equality could only happen at the federal level. In his *Letter from Birmingham Jail*, Dr. King famously said: "Freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. For years now, I have heard the word 'Wait!' It rings in the ear of every Negro with a piercing familiarity. This 'Wait' has always meant 'Never.'" This sentiment rings as true with regard to the fight for marriage equality as it did to the fight for racial equality.

The dissenters in *Obergefell*, unsurprisingly, adhered to an originalist interpretation of the Constitution, one that does not change over time with society's evolving concept of freedom and equality. They argued it is not for the Supreme Court to determine what should fall within the definition of marriage, and disagreed with the notion that the Constitution can compel a state to change its definition of marriage. The dissenters clearly articulated their disdain for the majority decision in many regards, but focused particularly on the majority's failure to comprehend the history of marriage as between a man and a woman, and the purpose of marriage as the preservation of our race through procreation.

The dissent by Chief Justice Roberts expressed weariness of the judicial role in selecting which unenumerated rights rank as fundamental under substantive due process, comparing the devastating lack of restraint exercised by the majorities in *Dred Scott v. Sandford*⁸² and *Lochner v. New York*⁸³ to the majority holding in the instant case. Comparing the majority opinion here to that in *Lochner* on several occasions, Chief Justice Roberts criticized the majority's rejection of the democratic process and outright repudiation of this country's entire constitutional history and tradition, replacing such with five justices' own personal beliefs. By ending the public debate regarding same-sex marriage, he accused the majority of removing the issue from the democratic decision-making process and thus demeaning the idea of democracy.

While that argument resonated with social conservatives, it reeked of hypocrisy. Every time the Court strikes down a law as a violation of a fundamental right, it acts in a counter-majoritarian manner. The references to *Lochner*-era judicial activism is used by judges on both sides of the political divi-

81 See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Wengler v. Druggist Mut. Ins. Co.*, 466 U.S. 142 (1980); *Califano v. Westcott*, 433 U.S. 76 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

82 *Dred Scott v. Sandford*, 19 How. 393 (1857) (holding the Missouri Compromise, which restricted the institution of slavery, to be invalid as an impermissible restriction on the implied rights of slaveholders).

83 *Lochner v. New York*, 25 S.Ct. 539 (1905) (invalidating state statutes that interfered with the right of the individual and the freedom to contract, thus striking down a state law setting maximum hours for bakery employees).

de whenever a law is stricken⁸⁴. Thus, while the conservative justices rail when conservative laws are stricken for being a violation of civil rights protections, the liberal justices rail when liberal campaign finance restrictions or environmental protection laws are stricken for being a violation of speech rights or property rights. The allusion to Lochnerism is merely a shibboleth that both sides routinely resort to when they are in the minority.

Justice Scalia provided an expected scathing dissent, with a focus on the threat to American democracy posed by the majority opinion. Though to his credit he did not predict that the U.S. would be destroyed as a modern-day Sodom or Gomorrah, which was the gist of his dissent in *Lawrence v. Texas*. Justice Scalia marked the majority opinion as the furthest extension imaginable of the Court's claimed power to create liberties that the Constitution does not expressly mention, robbing the American people of the freedom to govern themselves. True to his originalist interpretation of the Constitution, Justice Scalia argued that because marriage was between one man and one woman when the Fourteenth Amendment was ratified in 1868, that alone should have resolved these cases against the petitioners.

Chief Justice Roberts' dissent presented the oft posed slippery-slope question of whether plural marriage will be the next piece of the civil rights puzzle because, in his belief, the leap from opposite-sex to same-sex marriage defies our nation's history and traditions far more than do plural unions. But because the majority was careful to specify, on several occasions, that the fundamental right to marriage being discussed was that between *two* consenting individuals, this possibility seems unlikely. The dissenters additionally deconstructed the Equal Protection clause claim made by the majority, ultimately deeming it void of any logical explanation, and pointing out its failure to follow the common framework used to decide equal protection cases. The dissenters argued that there exists no Equal Protection clause issue in the instant case, as it is well within the rights of the states to distinguish between same-sex and opposite-sex couples in their "legitimate interest" in "preserving the institution of marriage". By denying that same-sex marriage is a fundamental right, the dissenters acted as though the hybrid equal protection/ due process theory simply did not exist. Their duplicitous and sanctimonious objections to the equal protection claim revealed a willful disregard of well-established Constitutional jurisprudence that can only be explained as a product of their conservative political and social views.

Each of the four individual dissents warned of the dangers inherent in the majority's blatant abuse of authority, with Justice Alito focusing on the consequences of the majority's invention of a new right and imposition of said right on the rest of the country. Justice Alito opined that all Americans, regardless of their stance on the issue of same-sex marriage, have cause to fear for the future of judicial impartiality and fairness in constitutional interpretation by the Supreme Court⁸⁵. But that same prognosis was espoused when racial segregation was struck down and when privacy and abortion rights were protected against state infringement.

The dissenters' focus on democratic processes invoked a federalism argument, that the federal government should stay out of the business of the states. The Constitution has never granted the federal government authority in the realm of domestic relations, thus the states have historically had the freedom to regulate marriage, including the right to define marriage⁸⁶. States may not, however, regulate or define marital relations in a manner that violates the federal Constitution⁸⁷. When the voters of a state have spoken, especially through ballot initiatives amending their state constitutions, same-sex marriage opponents and their four conservative justices argue that the Court would be demeaning the democratic process and usurping the citizens of the states' clear policy choice. However, the Constitution exists for the precise purpose of shielding certain matters from irrational or discriminatory change by political majorities, as famously expressed by Justice Jackson:

The purpose of a Bill of Rights 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. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections⁸⁸.

84 See *Johnson v. U.S.*, 135 S.Ct. 2551 (2015); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007); *U.S. v. Lopez*, 514 U.S. 549 (1995).

85 *Obergefell*, 135 S.Ct. at 2640-2643

86 See *Windsor*, 133 S.Ct. at 2691-92.

87 *Id.* at 2691 (citing *Loving*, 388 U.S. 1).

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

The most important effect from the Court's predictable decision in *Obergefell* is that, on June 26th, 2015, the highest authority in the U.S. effectively told gay and lesbian people all across the country that their relationships were equal in the eyes of the law, that their relationships deserve dignity and respect, and that their relationships were no longer relegated to second class status. The impact of this sentiment on the hearts and minds of young people all over the country, that the most meaningful decision they will make in their adult life is equal to that of their heterosexual family and friends, cannot be overstated.

6. After Obergefell: What to Expect

For at least the first twenty-four hours, gay rights activists and their allies celebrated the landmark decision that made marriage equality a constitutional right for all Americans. But the next day they went back to work to fight for broader protection of rights for all sexual minorities in the countless other areas of life that matter, perhaps even more than marriage, such as employment, housing, and education. The Civil Rights Act of 1964, and its amendments and other protective legislation⁸⁹, provide broad protections against discrimination on the basis of race, color, religion, sex, national origin, and disability in employment, housing, education, voting, and public accommodations. But there is no federal legislation prohibiting discrimination on the basis of sexual orientation, gender expression, or gender identity. Not surprisingly, sexual minorities face widespread discrimination in many areas of life. Now that marriage equality has arrived, the real question is what effect the *Obergefell* precedent will have on the next round of civil rights litigation. And the answer to that depends, in large part, on what *Obergefell* did, and what it didn't do.

There is no question that *Obergefell* joins Justice Kennedy's other path-breaking gay rights opinions where he focuses on the dignitary harms of anti-gay sentiment and legislation. In *Romer v. Evans* he stated that the majority cannot impose a broad, undifferentiated disability on a politically unpopular group⁹⁰. In *Lawrence v. Texas* he affirmed the right of sexual minorities to engage in intimate sexual behavior without fear of criminalization, noting that their intimate behavior was just as important and fulfilling as the intimate behavior of heterosexual couples⁹¹. In *U.S. v. Windsor* he noted that the Constitution does not permit laws that refuse dignity and protection to same-sex relationships⁹². And in *Obergefell* he again stressed that the majority cannot denigrate the dignity of gay relationships without denigrating the dignity of gay individuals who have just as much right to liberty and autonomy as those in the majority population. In repudiation of the pain and humiliation caused by the Court in *Bowers v. Hardwick*, Justice Kennedy, in *Obergefell*, profoundly stated "dignitary wounds cannot always be healed with the stroke of a pen"⁹³.

Justice Kennedy's insistence that the liberty prong of the Due Process clause protects gay persons in their political activities, in their intimate relationships, and in their marriages fits squarely within a long tradition of due process protections for intimate family decision-making. Since 1888, marriage has been discussed by the Supreme Court as one of the most important relations in life, one of vital importance to our society, essential to the orderly happiness by free men, "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect"⁹⁴, and the Supreme Court has reaffirmed and strengthened this notion time and time again⁹⁵.

89 A landmark piece of civil rights legislation, the Civil Rights Act of 1964 prohibited discrimination based on race, color, religion, sex, and national origin. Though the powers to enforce the Civil Rights Act were initially weak, they were enhanced subsequently by Congress's authority to regulate interstate commerce, its duty to provide equal protection of the laws, and its duty to ensure voting rights. In 1972, with the passage of the Equal Employment Opportunity Act, the Equal Employment Opportunity Commission was given the authority to enforce the Civil Rights Act.

90 *Romer v. Evans*, 517 U.S. at 632.

91 *Lawrence*, 539 U.S. at 578-79.

92 *Windsor*, 133 S.Ct. at 2681.

93 *Obergefell*, 135 S.Ct. 2606.

94 *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

95 See also *Maynard v. Hill*, 125 U.S. 190, 205 (1888), *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), *Loving v. Virginia*, 388 U.S. 1, 12 (1967), *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Roe v. Wade*, 410 U.S. 113 (1973), *Cleveland Bd. Of Educ. V. LaFleur*, 414 U.S. 632, 639 (1974); *Carey v. Popu-*

But the real question is whether the precedent set in *Obergefell*, with its reliance on the Due Process clause, will have profound implications for the future or will be narrowly limited to the discrete area of same-sex marriage. And although crystal-ball gazing is not our strength, there are some likely implications from the case that deserve some further discussion.

6.1. Fundamental Rights under the Due Process Clause

As noted above, the fundamental rights prong of the Due Process clause protects individuals from arbitrary government intrusion into their *life, liberty, or property*, and laws that burden the exercise of a right deemed “fundamental” require strict scrutiny analysis. In order for a right to be fundamental, it must be “deeply rooted in this Nation’s history and tradition⁹⁶”. Justice Kennedy stated that marriage is a fundamental right and cannot be infringed by states seeking to deny marriage to same-sex couples. He did not state that there is a fundamental right to same-sex marriage. Consequently, he has potentially opened the door to further litigation on other types of regulations affecting marriage. The one most often cited by commentators are the laws prohibiting polygamy, or plural marriages. If marriage is a fundamental right, it is often suggested, then laws limiting marriage to two persons also will have to meet strict scrutiny to survive.

In many respects this argument is a red-herring. Justice Kennedy announced in the majority opinion that the precedent was limited to marriages between two persons, and does not open the door to marriages between three or more persons. But also, polygamy is so far removed from mainstream views on marriage, and so fundamentally would change the rights and entitlements associated with marriage, that it is not likely to be a successful claim anytime soon. The logistics of plural marriages in a social welfare state are difficult to imagine. For instance, a spouse is entitled to survivor benefits from a decedent spouse’s social security⁹⁷. If polygamy were recognized, it would be very difficult to provide criteria for equitably allocating such benefits. And spouses have common rights to be the executor of a decedent spouse’s estate, but those laws would run into turmoil as multiple spouses would lay claim to the entitlement⁹⁸. Although the details are not impossible to work out, it is unlikely that legislatures or courts are interested into wading into that quagmire anytime soon.

The more likely result of the case is going to be a closer analysis of other types of regulations on marriages, like prohibitions on consanguineous marriages, coerced marriages, marriages with minors, and certain registration or other restrictions on who can perform marriages. Domicile or residency restrictions may also come under attack. Although the state has a strong interest in keeping track of who is married to whom, so that the respective benefits and legal rights can attach, the state probably has a less strong interest in denying marriage to first cousins or insisting that marriages be performed only by licensed clergy or state court clerks. While coerced marriages are certainly to be prohibited, certain age restrictions might appear arbitrary if challenged. After all, betrothals were common among children as young as two or three, and marriages frequently occurred among children as young as ten and twelve in the not too distant past all over Europe⁹⁹.

But in the scale of possibilities, the Court’s use of a fundamental right to validate same-sex marriage does not open the door to widespread use of the precedent as a mandate for civil rights for sexual minorities. In that respect, it is somewhat disappointing. However, there are at least two promising aspects of the case that could lead to wider implications.

6.2. Suspect Class Status under the Equal Protection Clause

As noted above, the Equal Protection clause prohibits discriminatory treatment of groups of people who have been given suspect class, or quasi-suspect class, status because of their history of discrimination. If gay rights activists had written the opinion, the Court would have held that sexual minorities are a

lation Servs. Int’l, 431 U.S. 678, 685 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 96 (1987); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

96 *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

97 See ssa.gov.

98 R.C. Paddock, *Doctor Led Three Lives with Three Wives*, in *Los Angeles Times*, Oct. 14, 1991, http://articles.latimes.com/191-10-14/news/mn-436_1_stanford-professor; M.A. Shields, *Validity of Bigamy and Polygamy Statutes and Constitutional Provisions*, 22 A.L.R.6th 1 (2007).

99 See H. Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority*, UNC Press, 2005, 288-337.

suspect class, and that any laws disadvantaging them would be subjected to heightened scrutiny. The Supreme Court has never ruled on what level of scrutiny is appropriate when a law classifies individuals based on sexual orientation, though such classifications share many of the characteristics that are present in other areas where heightened scrutiny is applied. For instance, sexual orientation is arguably an immutable characteristic, one that cannot be changed, similar to gender and race. There is an indisputably extensive history of discrimination against gays and lesbians, having been routinely targeted by the police, demonized, fired from employment, excluded from serving the country through military service, arrested for their private consensual conduct, harassed without opportunity for recourse in the workplace, prohibited by decency standards from being depicted in Hollywood movies, barred from government service, and stripped time and time again of their fundamental rights by popular vote. Gays and lesbians have relatively little political power, as demonstrated by the fact that no group has ever been successfully targeted by ballot initiatives more than gays and lesbians and by the fact that, in recent decades, hate crimes have been most frequently committed against gays and lesbians. Finally, the laws discriminating against this class are, more often than not, based on prejudice, broad stereotypes, and animus¹⁰⁰.

The implications of the Supreme Court utilizing this rationale would be far-reaching and influential for many aspects of life for gays and lesbians, not exclusively in the realm of marriage. If laws discriminating on the basis of sexual orientation became subject to heightened scrutiny, there would be challenges across the country to laws discriminating against gays and lesbians in employment, housing, public accommodations, adoption, and other important areas of everyday life that currently lack protection.

By not utilizing the Equal Protection clause and elevating sexual minorities to a suspect class status, or even quasi-suspect class status as the Court has done in the case of gender-based laws, the Court certainly did not swing wide the door to a stampede of civil rights litigation. But the Court also did not slam the door shut. Justice Kennedy acknowledged that there are equal protection implications behind the same-sex marriage bans, when he explained:

It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry¹⁰¹.

What Justice Kennedy did not say was that gays and lesbians are entitled to suspect class status for all purposes under the equal protection guarantee. Instead, he referenced the complex hybrid due process/equal protection cases where laws disadvantaging a non-suspect class in the exercise of a fundamental right are scrutinized by reference to their effect on the class. This modest reference to equal protection does not elevate the status of sexual minorities to a suspect or quasi-suspect class, but it does provide the first acknowledgement by the Court that the guarantees of equal treatment under the law are not met when fundamental rights are infringed for sexual minorities. This means that the door is open to challenges under equal protection against laws that disadvantage sexual minorities in other areas involving important fundamental rights, like speech, voting, political assembly, family decision-making, adoption, medical care, and the like. It does not mean that laws disadvantaging sexual minorities in areas involving non-fundamental rights are likely to be subjected to heightened scrutiny.

Although Judge Vaughn Walker's decision in *Perry v. Schwarzenegger* rested in part on the fact that the marriage ban restricted Perry's choice of her marital partner because of her sexual orientation, *Perry*, 704 F. Supp 2d at 996, the Supreme Court's reliance on due process, and its very noticeable sidestepping of the issue of suspect class status for gays and lesbians, speaks loudly that the Court is not ready to declare that sexual minorities are a suspect class deserving of heightened scrutiny.

But an alternative equal protection path may be possible: sex discrimination. In 1976, the Court determined that intermediate scrutiny was the appropriate level of review for classifications based on gender, stating that classifications between men and women must serve important governmental objectives

100 *Romer*, 517 U.S. at 644 (stating that the animus behind the Colorado ballot initiative was a moral disapproval of homosexual conduct, the same sort of animus and disapproval that produced the centuries-old criminal law that was held constitutional in *Bowers*).

101 *Obergefell* at 22, citing *Zablocki*, 434 U.S. at 383–388; *Skinner*, 316 U. S., at 541.

and must be substantially related to those objectives¹⁰². To the extent there is already a well-developed jurisprudence on sex discrimination, and laws disadvantaging men or women are subject to intermediate level scrutiny, many cases involving gays and lesbians might fit within that rubric.

For instance, in *Perry v. Schwarzenegger* Proposition 8 was invalidated based, in part, on the fact that Perry, a female plaintiff, was prohibited from marrying her partner based solely on the sex of her partner¹⁰³. However, a male would not be similarly prohibited from marrying a female partner, under Proposition 8. And other civil rights cases have been brought using sex discrimination rather than sexual orientation discrimination¹⁰⁴. Although many advocates feel that subsuming sexual orientation into sex discrimination erases the important unique aspects of discrimination against gays and lesbians, *Obergefell* does not foreclose a continuing reliance on these cases.

The problem of using sex discrimination rather than sexual orientation discrimination, however, is that the focus shifts from the individual being discriminated against to the persons to whom that individual is attracted. Thus, when employment criteria are stricken because they disadvantage women in the workplace, the focus is on the women being discriminated against because of their sex, and the stereotypes surrounding the gender characteristics of women. But striking down laws that disadvantage sexual minorities is not done because of their own characteristics as gays and lesbians, but because of their attraction to or involvement with other persons who happen to be of the same sex. This means that sex discrimination won't always provide a good fit for many of the myriad ways in which sexual minorities are discriminated against, as with their gender expression, which is not related to their sexual attractions.

But that is not to say that sex discrimination won't sometimes prove effective as a way to challenge laws that disadvantage sexual minorities. Until the latter are recognized as entitled to suspect class, or quasi-suspect class status, this may be the best they can do under a pure equal protection jurisprudence.

6.3. Dignitary Harms

If any message comes out of Justice Kennedy's inspirational rhetoric, it is that gays and lesbians have suffered severe dignitary harms by the rampant homophobia that has criminalized their relationships and denigrated their contributions to society¹⁰⁵. Kennedy's eloquence on this subject has the potential to change the debate over gay rights. From Anita Bryant's Save Our Children Campaign, that used slogans and rhetoric of disgust and fear, to the animus expressed in the Colorado amendment campaign and the Prop 8 campaigns analyzed in *Romer v. Evans* and *Perry v. Schwarzenegger*, the Court has clearly spoken that moral opprobrium cannot extend to the restriction of civil rights¹⁰⁶. People who find homosexuality morally offensive do not have to invite gays and lesbians into their homes, do not have to marry them, and may speak out often and strongly against their relationships. But they cannot use the power of the state to deny them their civil rights. This aspect of the decision in *Obergefell*, the most powerful yet of

102 *Craig v. Boren*, 429 U.S. 190, 197.

103 704 F. Supp 2d 921, 996.

104 See, e.g., *Goodridge v. Department of Public Health*, 440 Mass. 309, 344 (2003), *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998), *Baehr v. Lewin*, 852 P. 2d 44, 68 (Haw. 1993). *Oncala v. Sundowner Offshore Services*, 523 U.S. 75 (1998), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

105 For instance, one of the most commonly professed rationales for banning same-sex marriage is the "protect the children" argument, namely that same-sex marriage is harmful to children and that children are better raised by opposite-sex parents. This purported concern is belied by the fact that the same states refusing same-sex couples to marry are simultaneously allowing these very same couples to adopt, to have and raise children naturally, and to use in vitro fertilization to become pregnant. Additionally, evidence overwhelmingly demonstrates that same-sex parents and opposite-sex parents are of equal quality. *Perry*, 704 F. Supp. 2d at 999. The American Psychological Association's (APA) policy statement reads: "There is no scientific basis for concluding that lesbian mothers and gay fathers are unfit parents on the basis of their sexual orientation. On the contrary, results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive, healthy environments for their children". Paige, R. U. (2005). Proceedings of the American Psychological Association, Incorporated, for the legislative year 2004. (To be published in Volume 60, Issue Number 5 of the American Psychologist.)

106 For more information on the works of A. Bryant, see Fla. B. News 2, *Gay Adoption*, Vol. 36. No. 17 (2009); A. Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians are Harmful to Children*, 21 in *Duke Journal of Gender Law & Policy* 125 (2013). *Romer*, 517 S.Ct. at 644 (stating that the animus behind the passage of the Colorado amendment was moral disapproval of homosexuality, which is both un-American and lacking of a rational relationship to a legitimate state interest); *Perry v. Schwarzenegger*, 704 F.Supp. at 931 (discussing Proposition 8's passage as a result of the campaign that asserted the moral superiority of opposite-sex couples).

Justice Kennedy's assertions of the unconstitutionality of the dignitary harms faced by sexual minorities, may be the most important legacy of the battle over marriage equality. For as same-sex couples now move into the mainstream in their relationships as spouses and parents, other laws based on animus and moral disgust that cause such deep dignitary harms may be on the chopping block.

The dissenters in *Obergefell* fear that one of many devastating consequences of the majority's opinion is that all who oppose same-sex marriage will be vilified and labeled as bigots. Justice Alito goes so far as to say that the comparison of traditional marriage laws to those that denied the equal treatment of African Americans and women will be "exploited" by advocates of gay and lesbian equality to "stamp out every vestige of dissent"¹⁰⁷. This, in the dissent's view, degrades our system of federalism, which was established through our Constitution as a means of allowing individuals of differing beliefs to co-exist peacefully. Chief Justice Roberts opined that the most discouraging aspect of the majority decision is the assault on the character of the people who reaffirmed their states' traditional definition of marriage¹⁰⁸.

The dissent elides dissent and discrimination, however. Of course it wasn't all that long ago when it was permissible to discriminate against racial minorities, Jews, Italians, women, and the mentally disabled, and there were common terms used to describe these groups that were both hateful and belittling. Many of those terms have passed out of common usage precisely because their use perpetuated the legal and social discrimination that these groups faced. The decision in *Obergefell* does not prohibit a civilized discussion about differences and legal rights; but it does and it should prohibit intolerance and close-mindedness, just as the granting of civil rights to other minorities eventually stamped their opponents as bigots. Moreover, the Court has

long recognized that moral justification is an insufficient basis for discriminatory laws under the 14th Amendment. No one is forcing dissenters to have an abortion, to marry a same-sex partner, attend a particular church, or to play the lottery. The Court has merely said that those who choose not to conform cannot be discriminated against in the granting of basic civil rights by a secular state.

7. Conclusion

While the road has not been short, or bereft of obstacles, the battle for marriage equality has been won in a remarkably short time. Considering 1969 and the Stonewall Riots as the beginning of the gay rights movement, it has taken less than fifty years for the American public to approve of same-sex marriage by a historic 63%¹⁰⁹, and tolerance for homosexual relationships has led to numerous out gay and lesbian politicians and judges. We don't have a gay or lesbian president yet, so we are certainly not in a post-sexual world; nor are we in a post-racial world despite having elected an African-American to that office. But the Supreme Court's willingness to expand the important family-related constitutional rights to cover sexual minorities is an historic shift in the jurisprudence of civil rights.

In all of this, however, we cannot entirely distance ourselves from our past, a past in which racial and gender discrimination was entrenched not only in our laws but in our constitution as well. As one historian of the marriage equality debate noted:

For nearly a hundred years, in a country founded upon the immortal declaration that 'all men are created equal,' slavery was legal in parts of the United States. Until the 1920's, women were denied the right to vote. During World War II, Japanese Americans were rounded up and imprisoned in internment camps. Jim Crow laws relegated African Americans to a second-class citizenship into the 1960's. But America is also a country that corrects course, edging, in fits and starts, but inexorably, toward inclusion¹¹⁰.

The founders of this nation and of the Constitution knew that, to endure and to preserve the ideals of life, liberty, and the pursuit of happiness, America must continuously change and evolve; each generation of Americans must define what it means to be American¹¹¹. Many of the arguments made across the country by opponents of same-sex marriage in state and federal courts were based on theories of history and tradition, namely that the Constitution does not protect nor permit same-sex marriage be-

107 *Obergefell*, 135 S.Ct. at 2642 (Alito, J., dissenting).

108 *Id.* at 2626. (Roberts, J., dissenting).

109 See CNN/ORC Poll: Supreme Court Decisions, www.CNN.com/2015.

110 *Forcing the Spring: Inside the Fight for Marriage Equality* at Loc 513.

111 *Id.*

cause it never has done so in the past. Lest these individuals forget, at one time in this nation's history, the constitution expressly prescribed and protected slavery.¹¹² The Framers of the constitution on which these opponents rely did not anticipate marriage equality, nor did they anticipate racial equality, as many of the Framers themselves owned slaves. But as the march for equal rights for sexual minorities follows in the footsteps of the march for equal rights for racial minorities, the real question is whether the United States is ready to truly embrace the legacy of the Fourteenth Amendment's equal protection guarantee for all people. We believe that Justice Kennedy's path-breaking decision in *Obergefell* is one important step down that road.

112 See Article I § 2, Article I § 9, Article V, Article VI § 2.