

The Marriage Equality Cases and Constitutional Theory

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On June 26, 2015, the Supreme Court in *Obergefell v. Hodges* ruled that the Fourteenth Amendment bars states from refusing to issue marriage licenses to same-sex couples or declining to recognize their valid out-of-state marriages.¹ Justice Anthony Kennedy's opinion for the Court started: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."² The Court had long recognized the right to marry as a fundamental right protected against deprivation by the Due Process Clause. The bulk of the Court's opinion focused on the values of that constitutional liberty, holding that the values of marriage for individual spouses, for children, and for society apply with equal force to lesbian and gay couples (long excluded from the institution) as to straight couples.³

"The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment," Justice Kennedy continued, "is derived, too, from that Amendment's guarantee of the equal protection of the laws."⁴ The Equal Protection Clause has special bite when states discriminate against a minority with regard to a fundamental liberty, and so equality works together with liberty to require heightened judicial scrutiny of the states' reasons for any kind of marriage exclusion.⁵ The Court found no weighty, much less com-

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¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

² *Id.* at 2593. Justice Kennedy's majority opinion was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

³ *Id.* at 2597–602.

⁴ *Id.* at 2602.

⁵ E.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

elling, public-regarding justifications for policies adopted in Michigan, Ohio, Kentucky, and Tennessee for denying marriage licenses to same-sex couples.⁶

The primary dissenting opinion, by Chief Justice John Roberts, sadly and somberly regretted that the majority was announcing a “dramatic social change” that “has no basis in the Constitution or this Court’s precedent[s].”⁷ “[A]cross all . . . civilizations,” the chief justice insisted, marriage has “referred to only one relationship: the union of a man and a woman.”⁸ Because the Court was redefining marriage in a way that no culture had ever done (according to him), the Court’s previous right-to-marry cases were not on point. With no precedent really supporting this significant shift in family law policy, the dissenting justices charged the majority with legislating rather than judging and with violating the democratic premises of our system of government.⁹

I am one of the millions of Americans who cheered when the Supreme Court handed down its opinion in *Obergefell*. This opinion means a great deal to lesbian, gay, bisexual, and transgender Americans. *Obergefell* is a landmark decision. As much as it is celebrated today, it will be not just celebrated but will be a cornerstone of constitutional law in the decades to come. Because of its importance, and the analytical effort that went into the decision from all angles—including by people and groups supporting what they consider “traditional” marriage—it might be useful to consider the opinions and the debate within the Court in light of theories of constitutional decisionmaking.

I shall consider three theories, starting with the Constitution’s original public meaning. *Obergefell* is a missed opportunity for that theory. Although its holding is quite insightfully defensible under original-meaning originalism, the Court ignored that approach to constitutional law. Even worse, the dissenting justices who relied on

⁶ *Obergefell*, 135 S. Ct. at 2606–07.

⁷ *Id.* at 2612 (Roberts, C.J., joined by Scalia & Thomas, J.J., dissenting).

⁸ *Id.* That statement is flat wrong, as historians and anthropologists have documented same-sex marriages in dozens of cultures in human history, including many in North America. See William N. Eskridge Jr., *The Case for Same-Sex Marriage* 27–44 (1996).

⁹ *Obergefell*, 135 S. Ct. at 2616–18, 2624–26; accord, *id.* at 2626–31 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 2640–43 (Alito, J., joined by Scalia & Thomas, JJ., dissenting).

originalist argumentation cherry-picked the historical record and ignored the rich background of the term “equal protection” that would have lent support to the majority’s holding.

In contrast, *Obergefell* did follow the path of common-law constitutionalism, as both the majority and dissenting justices purported to neutrally apply precedent to resolve this highly charged case. Ad hoc case-by-case decisionmaking continues to be the theory that best approximates the approach actually followed by the Supreme Court, even in the big cases. This common-law decisionmaking, however, is not an easily defensible approach when the Court is making “big moves,” as it did in *Obergefell*. In the hard cases, precedent will not constrain the exercise of judicial judgment. The lesson suggested by *Obergefell* is that when the Court makes a big move, its methodology will be one of creatively misreading precedent, rather than mechanically applying it. But if a common-law court is creatively applying precedent, is that not cause for concern, especially in the big cases? What guides the justices, apart from their own preferences?

Deliberative theories of constitutional decisionmaking ask the Court to consider political process reactions before it applies the Constitution, especially when it is making a big move. Like common-law constitutionalism, this theory captures the Court’s methodology in *Obergefell*, and deliberative theories suggest sources of constraint. Deliberative theories ask the Court to consider legislative debates, public opinion, academic commentary, state constitutionalism, presidential election campaigns, and citizen referenda and initiatives. One lesson of *Obergefell* is that deliberative theories of judicial review need to consider not just the democratic legitimacy of the Court’s judgment and its coherence with precedent and our constitutional traditions, but also the ongoing evolution of our *pluralist* republic. The lesbian and gay rights social movement won a place at the table in *Obergefell* and other recent triumphs, but Justice Kennedy sought to assure traditionalists that they had not lost their place at the table—though they do have to share it now. What I call a pluralism-respecting approach to constitutional cases urges the Court to apply the Fourteenth Amendment to invite new social groups into the political process, on terms of equality, but without marginalizing older groups that have been resistant.

I. Original Public Meaning: A Missed Opportunity

Original-meaning theories ask what meaning constitutional text and structure would have had to a neutral reader of the English language at the time of the framing; this approach rejects a narrow focus on “original intent,” namely, the subjective expectations the Framers of a constitutional provision had for its application to specific issues.¹⁰ Thus, an original-meaning approach is not interested in how constitutional Framers would have addressed the precise issue that has become salient today—but addresses instead the general meaning constitutional text and structure would have had to neutral readers of the era.¹¹

Theorists and supporters of original meaning defend that jurisprudence as superior because it is (they claim) the only method of constitutional interpretation that neutrally applies the Constitution and actually constrains judges.¹² As far as I can determine, there is no empirical evidence to support that claim, and skeptical scholars have relentlessly attacked it, both empirically across large populations of cases¹³ and in connection with specific cases, such as the recent gun-control cases.¹⁴

¹⁰ Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 *Harv. J.L. & Pub. Pol’y* 875 (2008) (providing an account of the turn to original meaning in 1985); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113, 1134–48 (2003) (providing a broader account of the shift from “original intent” to “original meaning” jurisprudence in the 1980s).

¹¹ See, e.g., Robert Bork, *The Tempting of America: The Political Seduction of the Law* 75–77, 143–45, 154–55 (1990); Antonin Scalia, *A Matter of Interpretation* (1997); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 *Harv. J.L. & Pub. Pol’y* 63 (1989).

¹² Bork, *Tempting of America* 143–45 (1990); Antonin Scalia & Bryan A. Garner, *Reading Law* (2012); Randy Barnett, *An Originalism for Nonoriginalists*, 45 *Loy. L. Rev.* 611 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849 (1989).

¹³ E.g., Frank Cross, *The Theory and Practice of Statutory Interpretation* 177–79 (2009) (empirical examination of original meaning in statutory interpretation, finding that it is no more constraining than other methods); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 *UCLA L. Rev.* 217 (2004) (finding that justices relying on original meaning in federalism cases are selective in the sources they are willing to credit).

¹⁴ For critical analysis of the Supreme Court’s enforcement of the original meaning of the Second Amendment, see Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, *The New Republic* (Aug. 27, 2008) (denouncing the Court’s

Additionally, critics maintain that original meaning has a narrow appeal, namely only to those Americans who are (like Justice Antonin Scalia and the late Judge Robert Bork) politically conservative and personally hierarchical, traditionalist, or libertarian.¹⁵ The limited constituency of originalism risks further shrinkage if that theory were to stand against landmark precedents like *Brown v. Board of Education*—and so it is no coincidence that original-meaning theorists have been busy justifying previous landmark decisions, such as *Brown*, as consistent with their methodology.¹⁶

The marriage equality cases offered supporters a golden opportunity to demonstrate that original meaning is more than looking out over the crowd and picking out your friends. For the reasons that follow, I believe marriage equality is required by original meaning; if the conservative justices had taken these arguments seriously and *voted against their presumed political biases*, that would have been powerful evidence that original meaning has more bite than any other theory of constitutional decisionmaking. Even if those justices had found themselves unpersuaded by original meaning arguments, they could have pulled off an original-meaning coup if they could have demonstrated, decisively, why those arguments are wrong and could have persuaded some commentators to change their minds.

Obergefell was a complete disappointment along these lines. The five justices in the majority ignored original meaning, as did two of the four dissenting justices. And the two justices who relied on original meaning ignored the best arguments presented to them and widely discussed in public commentary on marriage equality.¹⁷

opinion as exactly the opposite of what original meaning would have dictated) available at www.newrepublic.com/article/books/defense-looseness; J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009) (raising concerns that the Court was not evaluating the original-meaning evidence in a neutral manner). But see Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. Rev. 1129 (2009).

¹⁵ Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 Colum. L. Rev. 356, 373–75 (2011).

¹⁶ E.g., Bork, *Tempting of America*, 75–77, 143–45 (defending *Brown*); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1 (2011) (defending the Court's sex discrimination jurisprudence).

¹⁷ See, e.g., Brief of Amicus Curiae Cato Institute, William N. Eskridge Jr., and Steven Calabresi in Support of Petitioners, *Obergefell v. Hodges* 135 S. Ct. 2584 (2014) (No. 14-556). Obviously, this is a brief that reflects my own views. See also Doug Kendall

As the dissenters charged, much of Justice Kennedy's opinion reads like a policy document endorsing a generally libertarian philosophy, state respect for the dignity of all citizens, and a very high opinion of marriage as the foundation of family *and* society *and* government, "without which there would be neither civilization nor progress."¹⁸ Although Kennedy connected the wonderfulness of marriage with his understanding of libertarian philosophy, he did not connect either to the original meaning of the Fourteenth Amendment's requirement that "no State shall deny any person life, liberty, or property without due process of law." Indeed, Justice Thomas's dissenting opinion demonstrated that due process "liberty" has traditionally been freedom *from* government interference in our private lives.¹⁹ Even *Loving v. Virginia* involved traditional liberty, he argued, because Virginia criminally prosecuted the different-race couple who had been validly married in the District of Columbia. Marriage is a highly regulatory institution. Its function is more disciplinary than liberating. Each spouse gives up a lot of liberties (including sexual freedoms) when he or she gets married.

In my view, Justice Kennedy was presenting a serious understanding of liberty. One role of government is to provide a productive structure within which each of us makes choices, always seeking to create a distinctively flourishing life. The "liberty" in the marriage cases is a freedom to marry the partner who will make you happy and enable your joint flourishing, and this is a liberty the government ought to respect, on an equal basis. Lesbian and gay Americans would not flourish in different-sex marriages, and so their freedom is effectively circumscribed if they do not have access to dignifying, reinforcing, benefit-conferring civil marriage. As Justice Thomas thoughtfully observed, however, there was no effort by the Court to link this positive conception of liberty to original meaning.

If it is notable that Justice Kennedy essentially ignored this line of reasoning, it is also notable that Justice Thomas ignored important

& Ilya Shapiro, The Constitutional Case for Marriage Equality, Huffington Post (Feb. 28, 2013), http://www.huffingtonpost.com/doug-kendall/the-constitutional-case-f_b_2781874.html; Steven G. Calabresi & Hannah M. Begley, Originalism and Same-Sex Marriage (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509443.

¹⁸ *Obergefell*, 135 S. Ct. at 2601 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

¹⁹ *Id.* at 2631–37 (Thomas, J., dissenting).

original-meaning arguments supporting the majority's holding. Steven Calabresi and Andrea Mathews have powerfully argued that original *meaning* solves the problem for originalism long posed by the application of original intent to *Loving v. Virginia*, the different-race marriage case.²⁰ Few originalists have argued that *Loving* is consistent with their theory because the Framers of the Fourteenth Amendment repeatedly assured congressional and ratifying supporters that anti-miscegenation laws were consistent with equal protection as they understood it.²¹ Once the focus of inquiry is no longer the subjective expectations of the framers and becomes the objective meaning of the text created by the constitutional amendment process, however, Calabresi and Mathews maintain that *Loving* becomes not only defensible but clearly correct. The original meaning of the Fourteenth Amendment was to protect the right of all Americans to enter into voluntary contracts, including marital contracts backed up by the full authority of the state.²² Indeed, the privileges and immunities (or liberties) protected by the text of the Fourteenth Amendment in 1868 would surely have included the right to marry, as most state constitutions then (and now) included specific protection for marriage rights.²³

Even informed by the Calabresi and Mathews analysis, Justice Kennedy would have to respond to the dissenters' argument, that a "fundamental right to marry" in American culture has traditionally (and perhaps embedded in the Constitution and its Reconstruction Amendments) been grounded in the policy of channeling procreative sexuality into domesticating marriage.²⁴ The majority opinion treated marriage as an institution fulfilling individual needs for personal fulfillment and expression—which is the more recent model for civil marriage but is not the only model. Why should demo-

²⁰ Steven G. Calabresi & Andrea Mathews, *Originalism and Loving v. Virginia*, 2012 *BYU L. Rev.* 1393 (2012).

²¹ *Id.* at 1394–95 (collecting and analyzing examples of originalist skepticism or silence on *Loving*); see *id.* at 1399–413 (broader examination of original intent jurisprudence and the desegregation cases).

²² See *id.* at 1413–33 (defense of *Loving*, based upon a detailed examination of the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment).

²³ *Id.* at 1437–63.

²⁴ See *Obergefell*, 135 S. Ct. at 2641–42 (Alito, J., joined by Scalia & Thomas, J.J., dissenting).

cratically accountable state legislatures (and not life-tenured federal judges) not be making the choice between these two models?

In short, Justice Kennedy's opinion not only substantially ignored original meaning, but was vulnerable to original-meaning objections. The more deeply the majority grounded its analysis in substantive due process liberty, the more discordant the analysis was with a historical case for its asserted right. Joined only by Justice Scalia, Justice Thomas made a serious original meaning case for the proposition that "liberty" is constitutionally protected only as a matter of "due process" (and not as a substantive matter) and that the protected "liberty" does not include positive rights such as the thousands associated with civil marriage.²⁵ Is it possible that original-meaning theory proved its neutrality through the analysis of Justice Thomas? Surprisingly, though, the dissenters made their originalist case by ignoring the best original-meaning arguments.

For example, the Calabresi-Mathews defense of *Loving* is grounded in the original meaning of the Equal Protection Clause, which Justice Thomas ignored entirely. The majority relied, in part, on the Equal Protection Clause, which was the main provision invoked by the petitioners; rejecting all claims for a constitutional right to marriage equality, the dissenters were obliged to demonstrate why the equal protection claim, like the due process claim, was not supported by original meaning analysis. The liberty focus of the Court's debate obscures the best original-meaning argument for marriage equality, one that was offered to the Court in great detail.

Unlike the Fourteenth Amendment's Due Process Clause, which was copied from the Fifth Amendment equivalent, and the Privileges or Immunities Clause, which is similar to language in Article IV, the Equal Protection Clause was new language added to the Constitution by the Fourteenth Amendment. What public meaning did that language have in 1868? This was a term of art with an established legal meaning. As early as the Jacksonian era, "equal protection" was an expression of the old principle that government must legislate for the common good and must avoid "class legislation" that favored one class of citizens with special benefits or denigrated one class with special disabilities.²⁶ Conscience Whigs, anti-slavery

²⁵ *Id.* at 2631–37 (Thomas, J., joined by Scalia, J., dissenting).

²⁶ Andrew Jackson, Veto Report (July 10, 1832), in 2 *A Compilation of the Messages and Papers of the Presidents: 1789–1897*, at 590 (James D. Richardson ed., 1896) (early

Democrats, and Republicans in the 1840s and 1850s popularized the term “equal protection” and deepened its meaning to include social “castes” as well as economic “classes.”²⁷

When the Fourteenth Amendment was drafted and debated, Americans understood that a guarantee of “equal protection of the laws,” by its terms, “abolishes all class legislation in the States,” thereby “securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction.”²⁸ State legislatures ratifying the Fourteenth Amendment discussed the Equal Protection Clause in precisely these terms.²⁹

What are the hallmarks of class or caste legislation? Contemporary authors explained what judges and advocates meant by class legislation—and theirs was a broad reading of equality. “Under a system of caste, personal liberty and the right of property are controlled by laws restraining the activity of a class of persons, more or less strictly defined, to a particular course of life, and allowing only a limited enjoyment of property and relative rights.”³⁰ Thus, “a statute would not be constitutional which should proscribe a class or party for opinion’s sake, or which should [identify] particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt. . . . Special privileges are obnoxious, and discriminations against persons or classes are still more so.”³¹

deployment of the term “equal protection” to target “class legislation”). See generally William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 *Hous. L. Rev.* 1067 (2015).

²⁷ E.g., Ohio Const. of 1851, art. I, § 2 (specific constitutional provision for “equal protection”); Charles Sumner, *Equality before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts* (1870). Argument of Charles Sumner, Esq., before the Supreme Court of Massachusetts in the Case of Sarah C. Roberts v. City of Boston [1849], at 7, 9–10, 13 (1870). See generally Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 *Mich. L. Rev.* 245, 253–54 & n.34 (1997) (reporting other state constitutional provisions).

²⁸ Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (first quotation in text); *id.* at 2502 (second quotation).

²⁹ William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 67, 73, 79 (1988); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 *Tex. L. Rev.* 1, 35–42 (2011).

³⁰ John C. Hurd, *Topics of Jurisprudence Connected with Conditions of Freedom and Bondage* 44 (1856); accord *Wally’s Heirs*, 10 *Tenn.* (2 Yer.) at 555–57.

³¹ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 390–91, 393 (1868).

Is exclusion from the definition of marriage class or caste legislation within the original meaning of the Fourteenth Amendment? It may be fairly debatable whether a state affording all normal rights to lesbian and gay persons but retaining its ancient definition of marriage as one man, one woman has violated the original meaning of equal protection. But none of the states in *Obergefell* offered the Court such a regime.

Michigan, one of the states defending its recent and broadly written marriage exclusion, had long treated lesbian and gay citizens as presumptive criminals whose consensual intimacy subjected them to potential life sentences in prison.³² Michigan also created a regime for civilly committing people convicted of sex offences who “appear to be psychopathic, or a sex degenerate” or a “sex pervert.”³³ Such “perverts” could be committed for an indeterminate time in a state mental hospital and, possibly, sterilized.³⁴ In 1948, Michigan’s Liquor Control Commission informed bars that they would lose their liquor licenses if they served “homosexuals.”³⁵ Because anti-gay discrimination was grounded upon the view that lesbians and gay men were sterile, predatory, and anti-family, it went without saying that Michigan openly discriminated against lesbian and gay families. Thus, state judges often denied lesbian and gay parents custody of—and sometimes barred visitation with—their own biological children.³⁶

In the 20th century, Michigan created a caste regime demonizing gay people and imposing special disabilities upon them. To be sure, gay people pushed back at the end of the century—but instead of repealing its anti-gay caste regime, Michigan *expanded* it. Thus, the legislature amended Michigan’s marriage code to exclude lesbian and gay marriages, to promote the “welfare of society and its children,”³⁷ even though thousands of Michigan children would have benefitted from the marriage of their gay parents. In 2004, acting for the benefit of “future generations of children,” the voters amended the state constitution to ensure that “the union of one man and one woman

³² Mich. Penal Code §§ 750.158, 750.338–338a (current codification of the state consensual sodomy [anal sex] and gross indecency [oral sex] laws).

³³ 1935 Mich. Pub. Acts 87–88, 141.

³⁴ 1929 Mich. Pub. Acts 281 (authorizing the sterilization of incarcerated “moral degenerates and sexual perverts”).

³⁵ Mich. Liquor Comm’n, Admin. Rule 436-3 (1948).

³⁶ *Hall v. Hall*, 95 Mich. App. 614, 615 (1980) (per curiam).

³⁷ 1996 Mich. Pub. Act 324 (codified at Mich. Comp. Laws § 551.1).

in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”³⁸ The Michigan Supreme Court applied this sweeping bar to deprive lesbian and gay municipal employees of health insurance and other contract-based benefits.³⁹ After some cities and the state civil service commission created a new category of “other qualified persons” who could be awarded employment benefits without seeming to recognize a “similar union” for gays, the legislature overrode those humane efforts and reinstated the contract-based discrimination.⁴⁰

April DeBoer and Jayne Rowse, a female couple rearing an ever-increasing number of adopted children, challenged Michigan’s pervasive exclusion of them from the normal guarantees of state family law. (Theirs was one of the four clusters of state marriage-exclusion challenges that the Supreme Court consolidated under the *Obergefell* caption.) If you take seriously the original public meaning of the Equal Protection Clause in 1868, it is hard to avoid the conclusion that the intricate array of anti-gay discriminations do not violate that constitutional provision—a conclusion that becomes all the more compelling in light of the Calabresi-Mathews demonstration that the Fourteenth Amendment has even sharper teeth when the state is denying a despised class the right to civil marriage.

Yet neither Justice Thomas nor any of the other dissenting justices even considered this original-meaning argument. If they had considered it, is there any chance they would have changed their votes? Apparently, not a chance, because applying original meaning seems like looking out over the crowd and picking out your friends. Just as original-intent theory struck out in *Brown v. Board of Education*, so original meaning theory has struck out in *Obergefell v. Hodges*. Does this suggest that original meaning is dead as a theory of constitutional decisionmaking? Of course not. What it does mean is that this theory missed a golden opportunity to reveal its power to constrain judges and to inform decisionmaking for a hotly contested issue.

³⁸ Mich. Const. art. I, § 25.

³⁹ See *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (2008).

⁴⁰ Public Employee Domestic Partner Benefit Restriction Act, 2011 Mich. Pub. Act 297 (a discrimination found to be unconstitutional caste legislation in *Bassett v. Snyder*, 59 F. Supp. 3d 837, 839 (E.D. Mich. 2014)).

II. Common Law Constitutionalism: Creative Misreadings

Because it is a legal document that is very old, relatively short, and infrequently amended, the U.S. Constitution's text and structure may not determinatively answer most of the novel interpretive issues of the day. Original meaning is a serious methodology for giving content to constitutional text and structure, but it does not seem to constrain or even guide the justices in landmark cases such as *Brown* and *Obergefell*.

In that event, the Supreme Court might follow the example of Ulysses, who strapped himself to the mast of his ship, to avoid following the tempting Siren song to ruin. Knowing that any justice is tempted to read constitutional text to reflect her or his political preferences, the Court might adopt a "Thayerite" strategy of invalidating state and federal laws only when the political process has made a "clear mistake," violating the plain meaning of the Constitution.⁴¹ This is, obviously, a strategy the Supreme Court has rejected and is certainly not the strategy taken by the Court in *Obergefell*, which is an ambitious reading of the Fourteenth Amendment's open-textured language. (This is also not a strategy the *Obergefell* dissenters have taken in other constitutional cases, such as *Shelby County v. Holder*, which was as ambitious a reading of the Constitution by Chief Justice Roberts as that by Justice Kennedy in *Obergefell*.⁴²)

Ignoring original meaning and rejecting a strong Thayerite presumption, Justice Kennedy's opinion in *Obergefell* appealed to a different, and highly popular, strategy of constitutional theory—what David Strauss has called "common law constitutionalism."⁴³ Under this theory, text and original meaning are not serious constraints on a Court applying broad constitutional provisions such as the Due Process, Equal Protection, and Free Speech Clauses. What does con-

⁴¹ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893); see Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (2006) (proposing a similarly stingy approach to judicial review).

⁴² Compare *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2618–31 (2013), with *id.* at 2632–52 (Ginsburg, J., dissenting) (strong objection to the Court's dynamic interpretation of the constitutional text and precedent).

⁴³ David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996); see also David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457 (2001).

strain the justices is the common law tradition, which requires them to follow precedent, take its reasoning as well as results seriously, and advance the law case by case through analogy of new problems to older decisions.

The heart of Justice Kennedy's opinion is precisely this appeal to precedent. Repeatedly, the Supreme Court has recognized the right to marry as constitutionally fundamental and has insisted on the rights of interracial couples, deadbeat dads, and even convicted prisoners to marry the spouses of their choice.⁴⁴ From more than a century of constitutional case law, Justice Kennedy deduced four principles undergirding the right to marry—respect for individual autonomy and choice, the unique association entailed by marriage, the well-being of children reared by couples, and social order and stability.⁴⁵ Justice Kennedy maintained that these underlying constitutional values apply just as much to lesbian and gay couples as to straight couples. As presented, this is an eloquent statement of why gay people ought to be given the same marriage rights as other citizens, a proposition also supported by the Court's precedents striking down state "homosexual sodomy" laws⁴⁶ and part of the Defense of Marriage Act.⁴⁷

As Chief Justice Roberts objected in dissent, Justice Kennedy's deployment of precedent involved a significant recharacterization of the Court's prior decisions, all but one of which assumed that protected marriage involved potential procreation.⁴⁸ The Chief Justice's bigger point is that the Court was deploying precedent instrumentally, to "redefine" marriage in the face of millennia of traditional practices and thereby to effect a "dramatic social change." Most of

⁴⁴ See *Obergefell*, 135 S. Ct. at 2598–2601 (citing and discussing *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial couples); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (deadbeat dads); *Turner v. Safley*, 482 U.S. 78 (1987) (prisoners)).

⁴⁵ *Obergefell*, 135 S. Ct. at 2599–2601.

⁴⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁷ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

⁴⁸ Thus, *Loving* involved interracial couples, who were denied marriage rights because Virginia feared "mongrelization" through procreation that was not racially pure. *Turner v. Safley* involved some inmates who were serving life sentences and would not have been able to procreate, even theoretically, and so the Court's protection extended beyond the usual assumptions. (Additionally, Missouri allowed procreating inmates to marry, and the Court's judgment only protected inmates that the state conceded were not procreating. *Turner*, 482 U.S. at 97–99.)

the theorists of common law constitutionalism (such as the Columbia School theorists Henry Monaghan and Thomas Merrill) defend this approach to constitutional interpretation as incrementalist, cautious, and respectful of the nation's traditions.⁴⁹ Even fans of Justice Kennedy's opinion should admit that it took a big step, well beyond the holdings of the Court's earlier precedents.

Although unremarked by the dissenters, Justice Kennedy also garbled some of the precedents he was synthesizing. The newer precedents emphasized individual autonomy and marriage as a special situs for human flourishing for the spouses, as Justice Kennedy emphasized.⁵⁰ And the Court has, in the older cases, given great weight to marriage as the best context for children and indeed as the "keystone of our social order."⁵¹ What Justice Kennedy jumbled together is that most of the precedents celebrating marital childrearing⁵² and all the precedents emphasizing social order⁵³ were premised on the assumption of traditional marriage, as a situs not of individual spousal fulfillment, but as a situs of spousal self-sacrifice for the good of the procreated family.

Indeed, this understanding of marriage, as intimately linked with the possibility of procreation by the spouses, was probably the basis for the Court's summary disposition of the first marriage equality case, *Baker v. Nelson*.⁵⁴ In 1971–72, Jack Baker and Mike McConnell had made almost exactly the same argument accepted in *Obergefell*, namely the protection of their fundamental right to marry under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁵⁵ The county attorney had responded that their

⁴⁹ Henry Monaghan, *Stare Decisis* and Constitutional Adjudication, 88 Colum. L. Rev. 723 (1988); Thomas W. Merrill, Originalism, *Stare Decisis*, and the Promotion of Judicial Restraint, 22 Const. Comment. 271 (2005); Ernest Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C. L. Rev. 619 (1994).

⁵⁰ *Obergefell*, 135 S. Ct. at 2599–600.

⁵¹ *Id.* at 2600–01.

⁵² E.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 399 (1926).

⁵³ E.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Justice Kennedy also invoked de Toqueville, who also assumed traditional marriage.

⁵⁴ *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972).

⁵⁵ Jurisdictional Statement at 12, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

claim would redefine marriage, which was a major policy change well beyond the competence and legitimacy for judges to effect.⁵⁶ The Supreme Court had, unanimously, dismissed Baker and McConnell's appeal for lack of a "substantial federal question."⁵⁷ Although summary dispositions do not carry the full weight of *stare decisis* that decisions after full briefing and argument do, they still count as precedents and imposed upon the *Obergefell* Court a higher burden of justification.

Again, more focus on the Court's equal-protection precedents would have addressed these analytical gaps in the Court's common law reasoning. The Court's 19th- and early 20th-century marriage jurisprudence had been delivered against the traditional background norm that "the good husband is the good citizen."⁵⁸ In the course of the 20th century, that gendered background norm gave way to a more modern understanding that not only can a "good wife" be a "good citizen" and unselfish caregiver, but so can a "good wife" married to another woman, as Michigan plaintiffs DeBoer and Rowse had been since 2007 (without state recognition). Indeed, Justice Kennedy explicitly invoked the Court's constitutional sex discrimination jurisprudence in his discussion of the dynamics of equal protection. As his opinion observed, American family law was deeply gendered until the last generation, and the Court itself cleared away much of the nation's gendered family law.⁵⁹ Kennedy could have carried this discussion further, to argue that women's constitutional equality has rendered the procreation imperative in the constitutional right to marry inadmissible.

The central point of the chief justice's dissent is that Justice Kennedy was reading the Court's precedents very dynamically—and of course Kennedy's response was that the chief justice was mischaracterizing precedent himself. Their debate reminds us that precedent in a heavily contested area of the law is not the constraining mechanism that common law constitutionalism makes it out to be.

⁵⁶ Memorandum from Hennepin County Attorney George C. Scott to Hennepin County District Court Clerk Gerald R. Nelson, May 22, 1970, in University of Minnesota, Tretter Collection, McConnell Files, Box 21.

⁵⁷ *Baker v. Nelson*, 409 U.S. 810 (1972), about which more below.

⁵⁸ Walter Berns, *Marriage Anyone?*, *First Things*, April 1996, available at <http://www.firstthings.com/article/1996/04/002-marriage-anyone> (viewed Aug. 1, 2015).

⁵⁹ *Obergefell*, 135 S. Ct. at 2603–04.

As David Cole has put it, the justices, especially in the great cases, not only pick and choose precedents they like and recharacterize prior decisions, but engage in a process of *creative misreading* of the precedents they do discuss.⁶⁰ For Justice Kennedy, *Loving v. Virginia*, a case pitting hysterical fears of interracial procreation against the central (anti-racism) agenda of the Fourteenth Amendment, became a case about individualized marriage. For Justice Thomas, *Loving's* great equal-protection core was overshadowed by a libertarian feature that played virtually no role in the Court's reasoning in that case. This process of misreading or recharacterizing precedent recurs in the debate among the justices in *Obergefell*.

Justice Kennedy's opinion in *Obergefell* is a far cry from the Burkean approach to common-law constitutionalism advocated by the Columbia School and virtually all judges who would dare say anything in support of such a theory. Instead, it is an example of common law *modernization*.⁶¹ Justice Kennedy's opinion modernized the Fourteenth Amendment to account for two momentous changes in the United States, changes driven by the needs and preferences of Americans in the modern era.

One is the shift in the American family, and family law, away from a notion of marriage as creating a lifetime unity to what sociologist Andrew Cherlin calls "individualized marriage."⁶² That family law has accommodated and even encouraged individualized marriage (through no-fault divorce, marital rape laws, promotion of birth control and family planning, promotion of adoption, and allowance of assisted reproduction) may be poor policy, but it is the marriage regime available to straight couples—but not to lesbian and gay couples until recently. When the *Obergefell* dissenters complained that the majority was redefining marriage, they were missing Cherlin's point, that Americans had redefined marriage through their choices. Following those choices, Michigan had redefined marriage, away from the communitarian, children-based vision of traditional mar-

⁶⁰ David Cole, *Agon at the Agora: Creative Misreadings in the First Amendment Tradition*, 95 *Yale L.J.* 857 (1986).

⁶¹ David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 *U. Chi. L. Rev.* 859 (2009); cf. Jack Balkin, *Living Originalism* (2011) (repackaging a modernizing common law constitutionalism as "originalism," in a tour de force of creative misreading).

⁶² Andrew J. Cherlin, *The Marriage Go-Round* 88 (2009); Andrew J. Cherlin, *Deinstitutionalization of American Marriage*, 66 *J. Marriage & Fam.* 848, 851 (2004).

riage and toward a liberal, choice-based regime where almost anybody can marry and just as easily get divorced—everyone, that is, except for lesbian and gay couples.

The other shift has been the advance of lesbians, gay men, bisexuals, and transgender persons from outlaws to “inlaws” in one generation. In the 1970s, when the Supreme Court dismissed the appeal in *Baker v. Nelson*, gay people were presumptive criminals in most states (including liberal Minnesota), and their outlaw status, repeatedly reaffirmed by the Supreme Court, legitimated the many state discriminations against them.⁶³ Indeed, the status of gay people as outlaws or, in the more tolerant states, social outcasts rested upon a core stereotype of them as antithetical to family. Denying child visitation to a gay (biological) parent in 1985, an Ohio court explained that “given its concern for perpetuating the values associated with conventional marriage and the family as the basic unit of society, the state has a substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric, and in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles.”⁶⁴

In the last generation, stereotypes such as these have eroded, as hundreds of thousands of LGBT persons have come out of the closet and entered public life—increasingly as committed partners and as parents. For decades, social scientists have documented that LGBT persons are capable parents and that children flourish under their care.⁶⁵ As the *Obergefell* majority observed, hundreds of thousands of children are presently being raised in lesbian and gay households; discrimination against their parents’ committed relationship is, even according to many traditional marriage supporters, harmful to those children as well.⁶⁶ Does that new but documented concern not raise

⁶³ On the pervasive anti-gay state discriminations, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (1999).

⁶⁴ *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985); accord, *S. v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980); *Hall*, 95 Mich. App. at 615. See generally Angela Simon, *The Relationship Between Stereotypes and Attitudes Toward Lesbians and Gays, in Stigma and Sexual Orientation* 62–63 (Gregory Herek, ed., 1998).

⁶⁵ See, e.g., Brief of the American Psychological Association et al. as Amici Curiae, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

⁶⁶ *Obergefell*, 135 S. Ct. at 2600–01; see *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 771 (E.D. Mich. 2013) (findings of fact on this point).

equal-protection problems? That is, is the state not discriminating against the children raised within lesbian and gay families by denying them the security and other advantages claimed for marriage from its traditionalist defenders?

So LGBT persons have moved from outlaws to inlaws, a process completed by the *Obergefell* Court through a modernized and dynamic reading of the Fourteenth Amendment and the Court's precedents. Although the dissenting justices did not deny the foregoing changes in American society, they questioned the legitimacy of the unelected Court's modernizing family law through constitutional activism. In a representative democracy, the proper engine for family law modernization is the state legislatures, many of which had already updated their law in precisely the manner the Court was imposing on all the states. Are the five majority justices wiser than their four dissenting colleagues, the large majority of state legislators and governors, and the people who for hundreds of years supported traditional marriage (or even its modern individualized version for straight couples)? "Just who do we think we are?" wondered Chief Justice Roberts.⁶⁷

Again, more attention to the Equal Protection Clause might have answered these concerns more satisfactorily than the liberty-supported-by-equality approach taken by the majority. The Equal Protection Clause, read literally, seems strongly inconsistent with the massively discriminatory regime Michigan offered DeBoer and Rowse, for example. Even as narrowed by original meaning, the clause bars "class" or "caste" legislation, which also characterized the Michigan regime. The most irresponsible straight couple could get married in Michigan, and then divorced overnight, while the committed lesbian couple unselfishly devoted to their (now) five children were not afforded the dignity of the same marriage license that the state hands out like lollipops at the dentist's office to straight couples. This is such an upside-down understanding of "traditional" marriage as to challenge the rationality of the discrimination.

⁶⁷ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting); see also DeBoer, 772 F.3d at 406–07 (Sutton, J., for the majority in the lower court) (conceding the "costs to the plaintiffs of allowing the States to work through this profound policy debate," but urging, from a "Burkean sense of caution," that courts should allow "state democratic forces" to solve the problems caused by the state's own longstanding anti-gay caste regime when "evolving community mores show they should be fixed").

But is this analysis not anti-democratic? Yes. Constitutionalism is anti-democratic in the short term. The proudest moments of the Equal Protection Clause, in particular, have been when the Court wielded it to protect despised minorities—and its most shameful moments have come when the Court ratified discriminatory treatment of Japanese-American citizens, for the most notorious example,⁶⁸ and felony criminalization of “homosexual sodomy,” to take a more recent example.⁶⁹ “The idea of the Constitution ‘was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’”⁷⁰

If that is the case, was *Baker v. Nelson* wrongly decided in 1972? Mike McConnell and Jack Baker made almost exactly the same argument that Justice Kennedy accepted in *Obergefell*. Although *Obergefell* explicitly overruled *Baker*, it did not say, as Justice Kennedy said in *Lawrence*, that the discredited precedent was wrong the day it was decided. Indeed, it is doubtful that any justice on the current Court would have voted differently in 1972—or perhaps even in 2013, when no justice reached the merits in *Hollingsworth v. Perry*, the Fourteenth Amendment challenge to California’s constitutional exclusion of same-sex couples from marriage in Proposition 8.⁷¹ Justice Kennedy’s modernizing version of common-law constitutionalism suggests that it was premature in 1972 for the justices to settle the issue of marriage equality, because the changes in the American family, in state family law, and in the status of LGBT persons had not undergone the sea change that had become clear by 2015.

⁶⁸ *Korematsu v. United States*, 323 U.S. 214 (1944) (interpreting the equal protection component of the Fifth Amendment’s Due Process Clause to allow imprisonment of Japanese-American citizens without any demonstrated basis).

⁶⁹ *Obergefell*, 135 S. Ct. at 2606, discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting a due process challenge to a Georgia statute making consensual sodomy a felony, with a mandatory minimum term of one year in jail and a maximum of 20 years), overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (enforcing a due process liberty right to engage in consensual sodomy in private places).

⁷⁰ *Obergefell*, 135 S. Ct. at 2605–06, quoting *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

⁷¹ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (holding that the defenders of Prop 8 did not have constitutional standing, thereby rendering the appellate federal courts without jurisdiction to hear the constitutional challenges to Prop 8; dissenting justices argued that the defenders had standing, but did not reach the merits).

But of course all those changes were clear by 2013 and perhaps even by 2003, when the Court decided *Lawrence v. Texas* and the Massachusetts Supreme Court decided *Goodridge v. Department of Public Health*.⁷² Justice Kennedy was very probably unwilling to write an *Obergefell*-type landmark in 2003, when his *Lawrence* opinion scrupulously avoided mention of marriage rights (in contrast to Justice Scalia's cassandric dissenting opinion, which predicted the Court's trajectory on the marriage issue). Something more is going on with the Court's modernized version of common law constitutionalism than new circumstances. Consider a third way of understanding constitutional decisionmaking.

III. Pluralism-Respecting Judicial Review: Equality over Time

Speaking for the five justices in the majority, Justice Kennedy's opinion responded to the dissenters' claim that the nation was unsettled on the need for marriage equality. This was certainly true in 1972, when the Court dismissed the appeal in *Baker v. Nelson*, and may have been true in 2013, when the Justices declined to evaluate Proposition 8. But Justice Kennedy rejected the view that the Constitution demanded more deliberation on this issue in 2015:

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding

⁷² *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (requiring marriage equality under the state constitution).

reflected in the arguments now presented for resolution as a matter of constitutional law.⁷³

This discussion baffled the dissenters and will likely draw fire from commentators, but in my view it was quite thoughtful. And it reflects a deliberation-based theory for judicial review.

The parent of this theory is Professor Alexander Bickel, whose endorsement of the “passive virtues” suggested that judicial review is more complicated than simple enforcement of original meaning or application of constitutional text in a common law manner.⁷⁴ In contrast to John Hart Ely’s representation-reinforcing theory of judicial review, which urged courts to protect politically marginalized social groups,⁷⁵ Bickel’s theory cautioned that the Supreme Court is “the least dangerous” branch, because it has no lawmaking, taxing, or enforcement authority.⁷⁶ Hence, its ability to enforce constitutional values is hemmed in by the justices’ ability to persuade the country of the correctness (or at least plausibility) of its pronouncements. Even when the logic of original meaning and of precedent seem to support a particular constitutional ruling, the Court ought to hesitate before making broad pronouncements until the country is at rest on the matter.

The passive virtues are techniques of substantive avoidance and postponement until a constitutional issue is ripe for national settlement. Thus, the Court in 2013 avoided decision in the Proposition 8 Case (*Hollingsworth*) by dismissing the appeal for lack of appellate standing (a classic passive-virtue device). Likewise, *Baker v. Nelson* may have been an example of the passive virtues in action; although dismissal of the appeal was a substantive judgment, it carried less precedential effect. Accordingly, *Obergefell* could overrule *Baker v. Nelson* without faulting the Court’s strategy in that case, because the Court recognized that the country was not ready for gay marriage in 1972; even LGBT people were apprehensive, as most were still hovering in

⁷³ *Obergefell*, 135 S. Ct. at 2605 (citations omitted); see Appendices to the Court’s opinion, listing state and federal judicial opinions as well as statutes recognizing marriage equality.

⁷⁴ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

⁷⁵ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

⁷⁶ Bickel is appropriating and updating Federalist 78, where Hamilton explained why the judiciary was “the least dangerous branch” for these reasons.

the closet. Nor was the country ready in 2003, when most states were responding to the possibility of gay marriage by amending their constitutions (by overwhelming margins) to prevent such a development—and any other kind of relationship recognition for good measure, as Michigan did in 2004. But *Lawrence v. Texas* encouraged LGBT persons to come out of the closet and engage in public debate, seeking equality in family recognition as well as other arenas.⁷⁷

Both the majority and dissenting justices were impressed with the rapidity by which LGBT groups have been able to persuade most Americans that marriage equality is an idea whose time has come. Since 2011, more Americans have supported marriage equality than have opposed it, and the margin of approval will probably increase in the next five years. The dissenting Justices raised a few related concerns, however, about the Court's willingness to settle the debate in favor of nationwide marriage equality. Why not let the democratic process take its course, and let marriage equality come through the democratic process? And will nationwide marriage equality not marginalize a new religious minority, namely, those Americans still supporting traditional marriage?

In my view, a pluralism-facilitating approach to judicial review provides Justice Kennedy with answers to both of these questions—answers that help explain features of his opinion that are otherwise elliptical.⁷⁸

The United States is a (1) constitutional (2) democracy embedded within a (3) pluralist political system. Overlooked by scholars both before and after Professor Bickel, the pluralist features of America's constitutional democracy help explain and justify *Obergefell*. A pluralist political system is one whose goal is the accommodation of the interests of as many salient groups as possible, without disturbing the ability of the state and the community to press forward with collective projects.⁷⁹ In a pluralist democracy, social, economic, and

⁷⁷ *Obergefell*, 135 S. Ct. at 2604.

⁷⁸ The discussion that follows is adapted from William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *Yale L.J.* 1279 (2005), as well as William N. Eskridge Jr., *A Pluralist Theory of Equal Protection*, 11 *U. Pa. J. Const. L.* 1239 (2009).

⁷⁹ See Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (1967); Nicholas R. Miller, *Pluralism and Social Choice*, 77 *Am. Pol. Sci. Rev.* 734 (1983).

ideological groups compete for the approval and support of representatives and the electorate. The polity, in turn, encourages groups to participate in the marketplace of politics.

The 20th century saw an evolving landscape of American pluralism, generating wave after wave of new identity-based social movements. Those movements sought to change public opinion about norms involving race, sex/gender, sexual orientation, and disability, and worked through the political process to change the law. Those movements reflected a multicultural pluralism, in which an increasing array of groups or subgroups would work from within their own communities to assert the equal citizenship of its members within the larger culture.⁸⁰ Because many cohesive minority groups are also the objects of governmental as well as private discrimination and abuse, they formed law-reforming social movements to challenge social norms demonizing them and policies disadvantaging them. Social movements, in turn, inspired countermovements. The states-rights response to the civil-rights movement is one example, the pro-life movement in response to *Roe v. Wade* is another. The LGBT-rights movement has inspired a traditional-family-values (TFV) countermovement that successfully opposed marriage equality for many decades.⁸¹

Although the Framers of the Constitution did not anticipate our modern multifaceted pluralism, they appreciated the fragility of democracy when the “stakes” of pluralist politics get too high. Stakes get high when the system becomes embroiled in bitter disputes that drive salient, productive groups away from engagement in pluralist politics.⁸² Such politics not only needs all established social groups to participate, but also needs new social groups seeking to secure political goals. Unfortunately, groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them, or due to their perception that the process

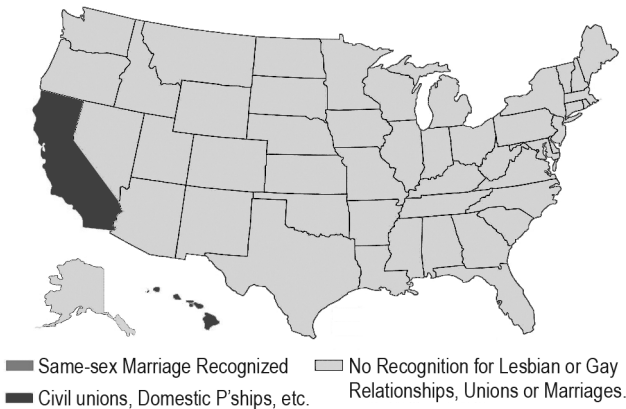
⁸⁰ See Will Kymlicka, *Multicultural Citizenship* (1996); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (2000).

⁸¹ For a history of the LGBT-rights movement and its corresponding TFV countermovement, see William N. Eskridge Jr., *Dishonorable Passions: Sodomy Law in America, 1861–2003* (2008).

⁸² On the dangers of high-stakes issues in a pluralist system, see Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* 36–37 (1991).

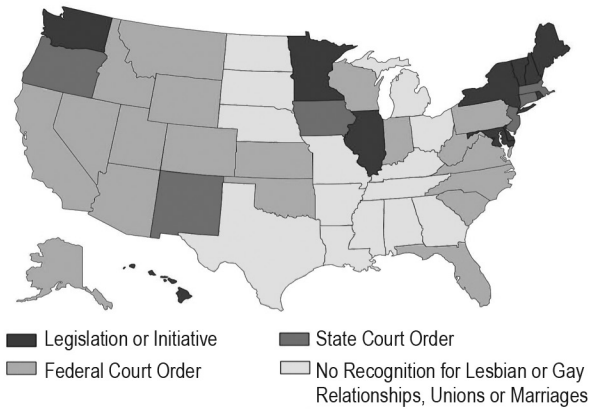
is stacked against them, or when the political process imposes fundamental burdens upon them or threatens their group identity or cohesion. At the founding of our nation, religion was the classic example of high-stakes pluralist politics; the religion clauses of the First Amendment sought to lower the stakes of religion-based politics by preventing one religion from securing state endorsement *and* by assuring state tolerance of religious minorities.⁸³ Today, issues such as abortion and same-sex marriage are the paradigm for high-stakes politics.

When a minority group is seeking tolerance from a suspicious majority, judicial review enforcing basic liberties, including free speech and association, can protect minorities and give them an opportunity to make their case for inclusion. *Lawrence v. Texas* played that role for sexual minorities in 2003. Based upon a libertarian reading of the Due Process Clause, the Court held that the state cannot criminalize private, consensual “homosexual sodomy.” Justice Kennedy’s opinion there highlighted an equal protection bonus: nor can the state discriminate against gay people as presumptive outlaws. *Lawrence* energized the LGBT-rights movement generally, and the marriage-equality movement in particular. Between *Lawrence* (2003) and *Obergefell* (2015), recognition of marriage equality for LGBT persons went from zero states to at least 36, as illustrated by the maps below.



Marriage Equality, June 26, 2003 (*Lawrence*)

⁸³ Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 202–08, 222–27 (1995).



Marriage Equality, June 25, 2015 (Day before *Obergefell*)

As the second map illustrates, 11 of the 36 states achieved marriage equality by legislation, and another six achieved marriage equality by state-court decree that could have been overridden by a state constitutional amendment (but there was enough political mobilization to head off such a move). The *Obergefell* dissenters protested that marriage equality was sweeping the country only because unelected federal judges were imposing it (the second-lightest gray states). Why not let the process play out politically, rather than judicially?

Justice Kennedy's analysis, quoted above, suggests that there has been a national conversation, with the fact-based argumentation pushing strongly in the direction of marriage equality. The supporters of traditional marriage in this national conversation had run out of arguments for excluding lesbian and gay couples from civil marriage. They still had good arguments for advocating stable marriages as a good situs for rearing children, but they did not have good arguments for thinking that gender complementarity is necessary for this institution and for childrearing. Although their arguments were, essentially, exhausted, supporters of traditional marriage likely would have held most of the nonrecognition states for a decade or more, because the political process in places like Texas, Alabama, Mississippi, Louisiana, Arkansas, and even the midwestern and plains states were just too strongly stacked against sexual minorities.

A Bickelian justice might still have hesitated, but the Bickelians in the *Obergefell* majority did not. Possibly decisive for them were deliberative moments that did not occur, as well as those that did. In May 2012, Vice President Biden and President Obama came out in favor of marriage equality on national television—to general acclaim and with virtually no pushback from Governor Romney and Representative Ryan, ultimately their GOP opponents in the November 2012 election. When the Supreme Court decided *Windsor* in 2013, the only American who seemed genuinely peeved with the Court was Justice Scalia and a few colleagues who stoutly defended the constitutionality of the Defense of Marriage Act. The nonreaction to Edie Windsor’s triumph suggested not only that Americans really had turned the corner on marriage equality, but that opponents were losing intensity as well as numbers.

So the five majority justices felt it was the right time to insist on marriage equality in *Obergefell*. As in *Windsor*, it seemed like the only American completely riled up by the decision was Justice Scalia, who wrote an intemperate dissenting opinion, denouncing the majority for a “judicial Putsch” and ridiculing Justice Kennedy’s words, logic, and even his level of linguistic generality.⁸⁴ To express outrage and disrespect for majority opinions he especially dislikes, Justice Scalia sometimes concludes his dissents with “I dissent,” rather than “I respectfully dissent.”⁸⁵ In *Obergefell*, he simply ended his opinion; tellingly, its last word was “impotence.”

A pluralism-respecting theory of judicial review should attend not just to new social groups, but also to older ones. Justice Alito and other dissenters expressed concern that marriage equality “will be used to vilify Americans who are unwilling to assent to the new orthodoxy.”⁸⁶ By imposing marriage equality on all the states, moreover, the Court is closing off havens for diversity of belief about marriage and other matters of spiritual concern.⁸⁷

The *Obergefell* majority sought to allay these concerns. Nothing in recognition of equality in civil marriages, Justice Kennedy advised,

⁸⁴ *Obergefell*, 135 S. Ct. at 2629–31, especially n. 22 (Scalia, J., dissenting).

⁸⁵ See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting in the Affordable Care Act Case, handed down the day before *Obergefell*).

⁸⁶ *Obergefell*, 135 S. Ct. at 2642 (Alito, J., joined by Scalia & Thomas, J.J., dissenting); accord *id.* at 2638–39 (Thomas, J., joined by Scalia, J., dissenting).

⁸⁷ *Id.* at 2643 (Alito, J., dissenting).

prevents religious organizations and persons from continuing to recognize only one-man, one-woman marriages consistent with their faith traditions. Indeed, the First Amendment affirmatively protects the freedom of religious organizations and persons “to teach the principles that are so fulfilling and so central to their lives and faiths” and to advocate and live “the family structure they have so long revered.”⁸⁸

As before, the dissenting justices have a deeper point that the Court did not address. Once the media, most Americans, the state and federal governments, and now the U.S. Constitution line up decisively in favor of marriage equality for LGBT persons, there will be enormous pressure on traditionalist organizations to change their tone and on many religious individuals to hold their tongues on this issue in public discourse. As LGBT people learned in the 1950s, normalization is a more powerful force than state regulation—and normalization silences. Just as LGBT persons are still streaming out of their closets, now persons of faith and other skeptics of marriage equality are likely to slip into their own closets.

I believe that Justice Kennedy, in particular, is mindful of these concerns. Indeed, they may have motivated him to focus on the fundamental right to marry, rather than classification-based equal protection scrutiny, because the liberty-based analysis allowed the Court to avoid any mention of “animus”—and to avoid taking a position on whether sexual orientation is a suspect classification. With the latter question unanswered, the Court retains the option of protecting religious liberty interests in future cases.

This suggests yet another deep point about *Obergefell* and why the Equal Protection Clause is, in the end, the central constitutional assurance at stake in this and subsequent cases. Contrary to the rhetoric one often sees in Supreme Court opinions, *equality* is a process more than a declared status. As a formal matter, LGBT Americans

⁸⁸ *Id.* at 2607 (opinion of the Court). First Amendment protections include not just those of the Free Exercise Clause—see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (protecting churches against application of anti-discrimination laws to “ministerial” personnel)—but also (potentially) the Free Speech Clause and the general freedom of association that the amendment has long been understood to guarantee. Of course, Justice Kennedy only spoke of teaching and advocating religious views, omitting any guidance that would be relevant to the hot debate regarding wedding vendors and others who don’t want to participate in same-sex ceremonies.

now have all the legal rights and responsibilities that everyone else has in most states. As an informal matter, social equality is still a project in the works—and now citizens who still believe in “traditional marriage” fear that they will suffer social and economic discrimination. The Supreme Court is not the primary engine for the process by which Americans work through the implications of gay rights, but that process will, assuredly, bring new equality–liberty clashes to the Court in the next decade.