SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
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ESTATE PLANNING FOR SAME-SEX COUPLES

FACULTY

Paul Hyl, Esq.

Program Coordinators: Kera Reed, Esq. and Amy Hsu, Esq.

January 9, 2020
Suffolk County Bar Association, New York

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BIOGRAPHY OF PAUL HYL, ESQ.

Paul Hyl is the principal of the Law Office of Paul Hyl, Esq., P.C., and practicing exclusively in the field of Trusts and Estates and Elder Law. Mr. Hyl advises clients regarding sophisticated estate planning matters, tax planning, asset preservation, Medicaid planning, wealth transfer strategies, charitable giving and estate and gift taxation issues.

Mr. Hyl practices before the Surrogate's Courts of Nassau and Suffolk Counties, the five boroughs of the City of New York, as well as Westchester and Duchess Counties. Previously, Mr. Hyl served as counsel to the Nassau County Public Administrator.

Mr. Hyl is an adjunct professor at Molloy College and a former adjunct professor at Dowling College. He is also a member of the New York State Bar Association and its Trusts and Estates Section. Locally, Mr. Hyl is a member of the Nassau County Bar Association, where he is the past Co- Chair of its Elder Law, Social Services and Health Advocacy Committee. Mr. Hyl is a former member of the Board of Directors of the New York State Intergenerational Network – Long Island Chapter.

Mr. Hyl has been featured in Long Island Business News, Investor's Business Daily and Newsday's *Ask the Expert* column. He has authored numerous articles which have appeared in the Nassau Lawyer, the Suffolk Lawyer, the Daily News and Long Island Business News on topics such as business succession planning, estate planning for second marriages and various trust and estate administration issues. Mr. Hyl has also been featured as a guest on various radio and television programs, including WBAB, WFAN, WRHU, News 12 and WLNY TV 10/55.

Mr. Hyl is a frequent lecturer and educator. He has lectured at professional organizations and provided continuing legal education programs for the state and county bar associations. He has also lectured at assisted living facilities, senior citizen groups and colleges and universities, such as St. Joseph's College and Dowling College's Center for Intergenerational Policy & Practice. Mr. Hyl's charitable works include the Midnight Run relief effort to bring food and clothing to New York City's homeless and the Long Island Fight for Charity, for which he boxed in 2009 to raise money on behalf of several local charities. Mr. Hyl is also a Board Member and General Counsel for Camp Bronx Fund, a 501(c)(3) organization the mission of which is to send low-income Bronx kids to accredited sleep-away camp for two weeks in the summer.

Mr. Hyl received his Bachelors Degree in Psychology from Dowling College and his Juris Doctor from St. John's University School of Law. Mr. Hyl is a former member of the Farmingville Volunteer Fire Department, where he volunteered as a Firefighter and Emergency Medical Technician, as well as serving as Recording Secretary of the Department.

Estate Planning for Same Sex Couples
Suffolk County Bar Association
January 7, 2020
Paul Hyl, Esq.

ETHICS AND DIVERSITY ISSUES

- Benefits to simultaneous representation of souses and significant others.
  - Shared Interests
  - Cost Effective
  - Desire to have a coordinated plan
  - Efficiency in Estate Planning
- Inherent conflict of interest exists.
  - Both parties could disagree on the inheritance plan
  - One party may try to have a private conversation after the joint consultation.
- New York Rules of Professional Conduct Rule 1.7 Conflict of Interest: Current Clients.
  - Allows the representation of two clients where a concurrent conflict of interest exists if, among other things, each affected client give written informed consent.
- New York Rules of Professional Conduct Rule 1.6 Confidentiality of Information.
- Sample Conflict Waiver
- Revocation of Conflict Waiver
- Gender Neutral Forms
  - Spouse One and Spouse Two
  - Proper use of pronouns

HISTORY OF SAME-SEX MARRIAGE RECOGNITION

- Defense of Marriage Act. Public Law 104-199; 110 Stat. 2419 (1996).
- United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675 (2013)
- Oberge*fell v. Hodges, 576 U.S. 1118, 135 S. Ct. 1039 (2015)*

UNMARRIED VS. MARRIED PLANNING

- Importance of Advance Directives
  - Family Health Care Decision Act

- Funeral Arrangements – New York Public Health Law Section 4201
- Trusts – Avoiding probate

CHILDREN OF SAME-SEX COUPLES

- Questions to Ask
  - Who Are the Parents?
  - Are there any custody and parenting Agreements?
- Custody and Guardianship Issues
  - Birth Certificates are not proof of parentage
  - Stepparent Adoption – An adoption by the spouse of the child's legal parent.
  - Second parent adoption – An adoption by the intimate partner of the child's legal parent. Second parent adoptions are available for couples who are not married, whether gay or straight.
  - Matter of Brooks S.B. v. Elizabeth A.C.C. 28 N.Y.3d 1 (2016) Grants standing to the non-married partner of a biological parent to seek custody or visitation of a child raised by the couple

ASSISTED REPRODUCTIVE TECHNOLOGY

- Stored Genetic Material.
  - Viewed as property, Kass v. Kass, 91 N.Y.2d 554 (1998).
  - The disposition of pre-zygotes and embryos shall be controlled by the written agreement entered into by the parties with the storage facility.
- Posthumous Heirs
  - EPTL 4-1.3 – Inheritance by Children Conceived after the death of a genetic parent.
  - EPTL 11-1.5 Extends timeline for compelling distributions where notice of the conception of a child after the death of a genetic parent.

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200

RULES OF PROFESSIONAL CONDUCT

Dated: January 1, 2017

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

RULE 1.6.

Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee

(6) when permitted or required under these Rules or tocomply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

RULE 1.7.

Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer'sprofessional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

LAW OFFICE OF PAUL HYL, ESQ., P.C.

ATTORNEY AT LAW
320 NASSAU BOULEVARD SOUTH
GARDEN CITY, NEW YORK 11530

CONSENT TO JOINT REPRESENTATION

Our attorney has informed us that it is important that we understand the basis of his representation. In providing Elder Law and Estate Planning services, we understand that we may not fully agree with each other on a specific course of action or that we may have a conflict of interest. At the same time, it is typically more practical and cost efficient to have one attorney represent the two of us.

We have also been made aware by our attorney that in the course of planning, property disposition may be recommended, including the transfer of property from one spouse to another and/or to third parties. Our attorney has advised us that we are entitled to be represented separately, to protect our individual property interests.

We have considered the possibility of separate attorneys and have decided that it would be to our benefit if we were both represented by the same attorney. We also agree that in spite of the privilege and confidentiality of the attorney-client relationship, *we both consent to the sharing of any information to either or both of us and hereby waive any privilege or confidentiality between the two of us*.

We have also been advised of and have considered the possibility of a conflict of interest that may develop in the planning we are pursuing. If a conflict of interest arises, we are entitled to have it explained to us in order to resolve it in the best way possible.

This confirms that at any time during your representation, each of us has the right to seek independent counsel notwithstanding that we have signed this consent.

We hereby consent to and agree to joint representation. Notwithstanding the foregoing, if one of us were to advise our attorney in the future that we no longer consented to joint representation, our attorney will advise the other spouse that the joint representation and the mutual waiver of the attorney-client privilege as it relates to each other has been rescinded.

Print Name of Spouse One: _____

Signature: _____ Date: _____

Print Name of Spouse Two: _____

Signature: _____ Date: _____

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January 9, 2020

VIA FIRST CLASS MAIL

Mr. Jack Daniels
280 Lynchburg Highway
Lynchburg, Tennessee 37352

RE: Joint Spousal Representation

Dear Mr. Daniels

It has come to our attention that you and Stormy Daniels have separated. If you recall, when you and Stormy retained my office to represent you in your estate planning, you signed a Consent to Joint Representation document, a copy of which is enclosed. In view of this change in your relationship, we must rescind our joint representation of you and Stormy in connection with your estate planning. Towards that end, we no longer will be able to discuss with you any matters relating to Stormy, and likewise we no longer will be discussing with Stormy any matters relating to you. In addition, since you had named Stormy as agent and beneficiary on many of your estate planning documents, you may wish to review those to see if they are still consistent with your wishes.

Thank you for your attention to this matter and cooperation in this regard. If you should have any questions, please do not hesitate to contact me.

Very truly yours,

Paul Hyl, Esq.

PH
Enclosures

Public Law 104–199
104th Congress

An Act

To define and protect the institution of marriage.

Sept. 21, 1996
[H.R. 3396]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Defense of Marriage Act.
1 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Defense of Marriage Act".

SEC. 2. POWERS RESERVED TO THE STATES.

(a) IN GENERAL.—Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following:

"§ 1738C. Certain acts, records, and proceedings and the effect thereof

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 1738B the following new item:

"1738C. Certain acts, records, and proceedings and the effect thereof.".

SEC. 3. DEFINITION OF MARRIAGE.

(a) IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

"§ 7. Definition of 'marriage' and 'spouse'

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by inserting after the item relating to section 6 the following new item:

"7. Definition of 'marriage' and 'spouse'.".

Approved September 21, 1996.

LEGISLATIVE HISTORY—H.R. 3396:

HOUSE REPORTS: No. 104–664 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 142 (1996):
July 11, 12, considered and passed House.
Sept. 10, considered and passed Senate.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* WINDSOR, EXECUTOR OF THE ESTATE OF SPYER, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 12–307. Argued March 27, 2013—Decided June 26, 2013

The State of New York recognizes the marriage of New York residents Edith Windsor and Thea Spyer, who wed in Ontario, Canada, in 2007. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by §3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act—a law providing rules of construction for over 1,000 federal laws and the whole realm of federal regulations—to define "marriage" and "spouse" as excluding same-sex partners. Windsor paid $363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied. Windsor brought this refund suit, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment. While the suit was pending, the Attorney General notified the Speaker of the House of Representatives that the Department of Justice would no longer defend §3's constitutionality. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend §3's constitutionality. The District Court permitted the intervention. On the merits, the court ruled against the United States, finding §3 unconstitutional and ordering the Treasury to refund Windsor's tax with interest. The Second Circuit affirmed. The United States has not complied with the judgment.

Held:

1. This Court has jurisdiction to consider the merits of the case. This case clearly presented a concrete disagreement between opposing parties that was suitable for judicial resolution in the District Court, but the Executive's decision not to defend §3's constitutionali-

ty in court while continuing to deny refunds and assess deficiencies introduces a complication. Given the Government's concession, *amicus* contends, once the District Court ordered the refund, the case should have ended and the appeal been dismissed. But this argument elides the distinction between Article III's jurisdictional requirements and the prudential limits on its exercise, which are "essentially matters of judicial self-governance." *Warth* v. *Seldin*, 422 U. S. 490, 500. Here, the United States retains a stake sufficient to support Article III jurisdiction on appeal and in this Court. The refund it was ordered to pay Windsor is "a real and immediate economic injury," *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599, even if the Executive disagrees with §3 of DOMA. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. Cf. *INS* v. *Chadha*, 462 U. S. 919.

Prudential considerations, however, demand that there be "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—prudential factors that counsel against hearing this case are subject to "countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power." *Warth*, *supra,* at 500–501. One such consideration is the extent to which adversarial presentation of the issues is ensured by the participation of *amici curiae* prepared to defend with vigor the legislative act's constitutionality. See *Chadha, supra,* at 940. Here, BLAG's substantial adversarial argument for §3's constitutionality satisfies prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. This conclusion does not mean that it is appropriate for the Executive as a routine exercise to challenge statutes in court instead of making the case to Congress for amendment or repeal. But this case is not routine, and BLAG's capable defense ensures that the prudential issues do not cloud the merits question, which is of immediate importance to the Federal Government and to hundreds of thousands of persons. Pp. 5–13.

2. DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. Pp. 13–26.

(a) By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States. Congress has enacted discrete statutes to regulate the meaning of marriage in order to further federal policy, but DOMA, with a directive applicable to over 1,000 federal statutes and

the whole realm of federal regulations, has a far greater reach. Its operation is also directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. Assessing the validity of that intervention requires discussing the historical and traditional extent of state power and authority over marriage.

Subject to certain constitutional guarantees, see*, e.g.,* *Loving* v. *Virginia*, 388 U. S. 1, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States," *Sosna* v. *Iowa*, 419 U. S. 393, 404. The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States," *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379, 383–384. Marriage laws may vary from State to State, but they are consistent within each State.

DOMA rejects this long-established precept. The State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. But the Federal Government uses the state-defined class for the opposite purpose—to impose restrictions and disabilities. The question is whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment, since what New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect. New York's actions were a proper exercise of its sovereign authority. They reflect both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality. Pp. 13–20.

(b) By seeking to injure the very class New York seeks to protect, DOMA violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534–535. DOMA cannot survive under these principles. Its unusual deviation from the tradition of recognizing and accepting state definitions of marriage operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. DOMA's avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority

Syllabus

of the States.

DOMA's history of enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. BLAG's arguments are just as candid about the congressional purpose. DOMA's operation in practice confirms this purpose. It frustrates New York's objective of eliminating inequality by writing inequality into the entire United States Code.

DOMA's principal effect is to identify and make unequal a subset of state-sanctioned marriages. It contrives to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State. It also forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. Pp. 20–26.

699 F. 3d 169, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ROBERTS, C. J., joined as to Part I. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined as to Parts II and III.

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER *v.* EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, *e.g.*, *Baehr* v. *Lewin*, 74

Haw. 530, 852 P. 2d 44 (1993), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U. S. C. §1738C.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, §7, of the United States Code to provide a federal definition of "marriage" and "spouse." Section 3 of DOMA provides as follows:

> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U. S. C. §7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO–04–353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside

in New York City. The State of New York deems their Ontario marriage to be a valid one. See 699 F. 3d 169, 177–178 (CA2 2012).

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." 26 U. S. C. §2056(a). Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. §530D, that the Department of Justice would no longer defend the constitutionality of DOMA's §3. Noting that "the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples," App. 184, the Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." *Id.,* at 191. The Department of Justice has submitted many §530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the §530D letter was not preceded by an adverse

judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although "the President . . . instructed the Department not to defend the statute in *Windsor*," he also decided "that Section 3 will continue to be enforced by the Executive Branch" and that the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." *Id.,* at 191–193. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised." *Id.,* at 192.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of §3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG's motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).

On the merits of the tax refund suit, the District Court ruled against the United States. It held that §3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had

urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce §3 of DOMA.

In granting certiorari on the question of the constitutionality of §3 of DOMA, the Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. All parties agree that the Court has jurisdiction to decide this case; and, with the case in that framework, the Court appointed Professor Vicki Jackson as *amicus curiae* to argue the position that the Court lacks jurisdiction to hear the dispute. 568 U. S. ___ (2012). She has ably discharged her duties.

In an unrelated case, the United States Court of Appeals for the First Circuit has also held §3 of DOMA to be unconstitutional. A petition for certiorari has been filed in that case. Pet. for Cert. in *Bipartisan Legal Advisory Group* v. *Gill*, O. T. 2012, No. 12–13.

II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here.

There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution. "[A] taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599 (2007) (plurality opinion) (emphasis deleted). Windsor suffered a redressable injury when she was required to pay estate taxes from which, in her view, she was exempt

but for the alleged invalidity of §3 of DOMA.

The decision of the Executive not to defend the constitutionality of §3 in court while continuing to deny refunds and to assess deficiencies does introduce a complication. Even though the Executive's current position was announced before the District Court entered its judgment, the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. Windsor, the Government, BLAG, and the *amicus* appear to agree upon that point. The disagreement is over the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court.

The *amicus'* position is that, given the Government's concession that §3 is unconstitutional, once the District Court ordered the refund the case should have ended; and the *amicus* argues the Court of Appeals should have dismissed the appeal. The *amicus* submits that once the President agreed with Windsor's legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the *amicus* reasons, it is inappropriate for this Court to grant certiorari and proceed to rule on the merits; for the United States seeks no redress from the judgment entered against it.

This position, however, elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise. See *Warth* v.

Seldin, 422 U. S. 490, 498 (1975). The latter are "essentially matters of judicial self-governance." *Id.*, at 500. The Court has kept these two strands separate: "Article III standing, which enforces the Constitution's case-or-controversy requirement, see *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 559–562 (1992); and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction,' *Allen* [v. *Wright*,] 468 U. S. [737,] 751 [(1984)]." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 11–12 (2004).

The requirements of Article III standing are familiar:

> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural or hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, *supra,* at 560–561 (footnote and citations omitted).

Rules of prudential standing, by contrast, are more flexible "rule[s] . . . of federal appellate practice," *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 333 (1980), designed to protect the courts from "decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, *supra,* at 500.

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in pro-

ceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is "a real and immediate economic injury," *Hein*, 551 U. S., at 599, indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with §3 of DOMA, which results in Windsor's liability for the tax. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling.

This Court confronted a comparable case in *INS* v. *Chadha*, 462 U. S. 919 (1983). A statute by its terms allowed one House of Congress to order the Immigration and Naturalization Service (INS) to deport the respondent Chadha. There, as here, the Executive determined that the statute was unconstitutional, and "the INS presented the Executive's views on the constitutionality of the House action to the Court of Appeals." *Id.,* at 930. The INS, however, continued to abide by the statute, and "the INS brief to the Court of Appeals did not alter the agency's decision to comply with the House action ordering deportation of Chadha." *Ibid.* This Court held "that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take," *ibid.,* regardless of whether the agency welcomed the judgment. The necessity of a "case or controversy" to

satisfy Article III was defined as a requirement that the Court's "'decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold [the statute], the INS will execute its order and deport him.'" *Id.,* at 939–940 (quoting *Chadha* v. *INS*, 634 F. 2d 408, 419 (CA9 1980)). This conclusion was not dictum. It was a necessary predicate to the Court's holding that "prior to Congress' intervention, there was adequate Art. III adverseness." 462 U. S.*,* at 939. The holdings of cases are instructive, and the words of *Chadha* make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III. In short, even where "the Government largely agree[s] with the opposing party on the merits of the controversy," there is sufficient adverseness and an "adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party." *Id.*, at 940, n. 12.

It is true that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Roper*, *supra,* at 333, see also *Camreta* v. *Greene*, 563 U. S. ___, ___ (2011) (slip op., at 8) ("As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so"). But this rule "does not have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted . . . at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Roper*, *supra,* at 333–334.

While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems inherent in the Executive's unusual position require some further discussion. The Executive's agreement with Windsor's legal argument raises the risk

that instead of a "'real, earnest and vital controversy,'" the Court faces a "friendly, non-adversary, proceeding . . . [in which] 'a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.'" *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 345 (1892)). Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

There are, of course, reasons to hear a case and issue a ruling even when one party is reluctant to prevail in its position. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to "countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power." *Warth*, 422 U. S., at 500–501. One consideration is the extent to which adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act. With respect to this prudential aspect of standing as well, the *Chadha* Court encountered a similar situation. It noted that "there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of [this case] in the absence of any participant supporting the validity of [the statute]. The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress." 462 U. S., at 940. *Chadha* was not an anomaly in this respect. The Court adopts the practice of entertaining arguments made by an *amicus* when the

Solicitor General confesses error with respect to a judgment below, even if the confession is in effect an admission that an Act of Congress is unconstitutional. See, *e.g., Dickerson* v. *United States*, 530 U. S. 428 (2000).

In the case now before the Court the attorneys for BLAG present a substantial argument for the constitutionality of §3 of DOMA. BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations. For instance, the opinion of the Court of Appeals for the First Circuit, addressing the validity of DOMA in a case involving regulations of the Department of Health and Human Services, likely would be vacated with instructions to dismiss, its ruling and guidance also then erased. See *Massachusetts* v. *United States Dept. of Health and Human Servs.*, 682 F. 3d 1 (CA1 2012). Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent. That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. True, the very extent of DOMA's mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circum-

stances, the very term "prudential" counsels that it is a proper exercise of the Court's responsibility to take jurisdiction. For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.

The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Zivotofsky* v. *Clinton*, 566 U. S. ___, ___ (2012) (slip op., at 7) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.

The Court's jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance. Yet the difficulty the Executive faces should be acknowledged. When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice. Still, there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise. But this case is not routine. And the capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits.

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States

concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N. Y. Laws 749 (codified at N. Y. Dom. Rel. Law Ann. §§10–a, 10–b, 13 (West 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting dis-

crete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. *Hillman* v. *Maretta*, 569 U. S. ___ (2013); see also *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981); *Wissner* v. *Wissner*, 338 U. S. 655 (1950). This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. 8 U. S. C. §1186a(b)(1) (2006 ed. and Supp. V). And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships. 42 U. S. C. §1382c(d)(2).

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to

over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003); An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts no. 09–13; *Varnum* v. *Brien*, 763 N. W. 2d 862 (Iowa 2009); Vt. Stat. Ann., Tit. 15, §8 (2010); N. H. Rev. Stat. Ann. §457:1–a (West Supp. 2012); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D. C. Reg. 27 (Dec. 18, 2009); N. Y. Dom. Rel. Law Ann. §10–a (West Supp. 2013); Wash. Rev. Code §26.04.010 (2012); Citizen Initiative, Same-Sex Marriage, Question 1 (Me. 2012) (results online at http://www.maine.gov/sos/cec/elec/2012/tab-ref-2012.html (all Internet sources as visited June 18, 2013, and available in Clerk of Court's case file)); Md. Fam. Law Code Ann. §2–201 (Lexis 2012); An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws ch. 19 (2013); An act relating to marriage; providing for civil marriage between two persons; providing for exemptions and protections based on religious association, 2013 Minn. Laws ch. 74; An Act Relating to Domestic Relations—Persons Eligible to Marry, 2013 R. I. Laws ch. 4.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see*, e.g., Loving* v. *Virginia*, 388 U. S. 1 (1967); but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U. S. 393,

404 (1975).

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams* v. *North Carolina*, 317 U. S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid.* "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock* v. *Haddock*, 201 U. S. 562, 575 (1906); see also *In re Burrus*, 136 U. S. 586, 593–594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva* v. *Ballentine*, 351 U. S. 570 (1956), for example, the Court held that, "[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin," under the Copyright Act "requires a reference to the law of the State which created those legal relationships" because "there is no federal law of domestic relations." *Id.,* at 580. In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. See *Ankenbrandt* v. *Richards*, 504 U. S. 689, 703 (1992). Federal courts will not hear divorce and custody cases even if they arise in diversity because of "the virtually exclusive primacy . . . of the

States in the regulation of domestic relations." *Id.,* at 714 (Blackmun, J., concurring in judgment).

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379, 383–384 (1930). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare Vt. Stat. Ann., Tit. 18, §5142 (2012), with N. H. Rev. Stat. Ann. §457:4 (West Supp. 2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington, see Iowa Code §595.19 (2009); Wash. Rev. Code §26.04.020 (2012)—prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of

its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer* v. *Evans*, 517 U. S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U. S. 32, 37–38 (1928)).

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding "to the initiative of those who [sought] a voice in shaping the destiny of their own times." *Bond* v. *United States*, 564 U. S. ___, ___ (2011) (slip op., at 9). These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence* v. *Texas*, 539 U. S. 558, 567 (2003). By its recognition of the validity of same-sex

marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U. S. Const., Amdt. 5; *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534–535 (1973). In determining whether a law is motived by an improper animus or purpose, "'[d]iscriminations of an unusual character'" especially require careful consideration. *Supra,* at 19 (quoting *Romer*, *supra*, at 633). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a

law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H. R. Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.,* at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a

state's decision as to how to shape its own marriage laws." *Massachusetts*, 682 F. 3d, at 12–13. The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples,

and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. See 5 U. S. C. §§8901(5), 8905. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. See 11 U. S. C. §§101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15). It forces them to follow a complicated procedure to file their state and federal taxes jointly. Technical Bulletin TB–55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); Brief for Federalism Scholars as *Amici Curiae* 34. It prohibits them from being buried together in veterans' cemeteries. National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008).

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] . . . a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," 18 U. S. C. §115(a)(1)(A), with the intent to influence or retaliate against that official, §115(a)(1). Although a "spouse" qualifies as a member of the officer's "immediate

family," §115(c)(2), DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. See 26 U. S. C. §106; Treas. Reg. §1.106–1, 26 CFR §1.106–1 (2012); IRS Private Letter Ruling 9850011 (Sept. 10, 1998). And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. See Social Security Administration, Social Security Survivors Benefits 5 (2012) (benefits available to a surviving spouse caring for the couple's child), online at http://www.ssa.gov/pubs/EN-05-10084.pdf.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. See 20 U. S. C. §1087nn(b). Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from "participat[ing] personally and substantially" in matters as to which they or their spouses have a financial interest. 18 U. S. C. §208(a). A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, see 2 U. S. C. §31–2(a)(1), and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See 5 U. S. C. App. §§102(a), (e). Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

* * *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling*, 347 U. S., at 499–500; *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 217–218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its mar-

riage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER *v.* EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

CHIEF JUSTICE ROBERTS, dissenting.

I agree with JUSTICE SCALIA that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with JUSTICE SCALIA that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world. *Post*, at 19–20 (dissenting opinion).

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something—as the majority puts it—"thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." *Ante*, at 13. That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the "principal purpose," *ante*, at 22, of the 342 Representa-

tives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," *ante*, at 18, may continue to utilize the traditional definition of marriage.

The majority goes out of its way to make this explicit in the penultimate sentence of its opinion. It states that "[t]his opinion and its holding are confined to those lawful marriages," *ante*, at 26—referring to same-sex marriages that a State has already recognized as a result of the local "community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Ante,* at 20. JUSTICE SCALIA believes this is a "'bald, unreasoned disclaime[r].'" *Post*, at 22. In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt. The dominant theme of the majority opinion is that the Federal Government's intrusion into an area "central to state domestic relations law applicable to its residents and citizens" is sufficiently "unusual" to set off alarm bells. *Ante*, at 17, 20. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.

The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State

and Federal Governments, emphasizing that DOMA "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." *Ante,* at 18. But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would "vary, subject to constitutional guarantees, from one State to the next." *Ibid.* Thus, while "[t]he State's power in defining the marital relation is of central relevance" to the majority's decision to strike down DOMA here, *ibid.*, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case. See *ante,* at 19.

It is not just this central feature of the majority's analysis that is unique to DOMA, but many considerations on the periphery as well. For example, the majority focuses on the legislative history and title of this particular Act, *ante*, at 21; those statute-specific considerations will, of course, be irrelevant in future cases about different statutes. The majority emphasizes that DOMA was a "system-wide enactment with no identified connection to any particular area of federal law," but a State's definition of marriage "is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Ante*, at 22, 17. And the federal decision undermined (in the majority's view) the "dignity [already] conferred by the States in the exercise of their sovereign power," *ante*, at 21, whereas a State's decision whether to expand the definition of marriage from its traditional contours involves no similar concern.

We may in the future have to resolve challenges to state

marriage definitions affecting same-sex couples. That issue, however, is not before us in this case, and we hold today that we lack jurisdiction to consider it in the particular context of *Hollingsworth* v. *Perry*, *ante,* p. ___. I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA's constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER *v.* EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

I

A

The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the "judicial Power," a power to decide not abstract questions but real, concrete

"Cases" and "Controversies." Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?

The answer lies at the heart of the jurisdictional portion of today's opinion, where a single sentence lays bare the majority's vision of our role. The Court says that we have the power to decide this case because if we did not, then our "primary role in determining the constitutionality of a law" (at least one that "has inflicted real injury on a plaintiff") would "become only secondary to the President's." *Ante,* at 12. But wait, the reader wonders—Windsor won below, and so *cured* her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we "undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is." *Ibid.* (internal quotation marks and brackets omitted).

That is jaw-dropping. It is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere "primary" in its role.

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of "primary" power, and so created branches of government that would be "perfectly coordinate by the terms of their common commission," none of which branches could "pretend to an exclusive or superior right of settling the boundaries between their respective powers." The Federalist, No. 49, p. 314 (C. Rossiter ed. 1961) (J. Madison). The people did this to protect

themselves. They did it to guard their right to self-rule against the black-robed supremacy that today's majority finds so attractive. So it was that Madison could confidently state, with no fear of contradiction, that there was nothing of "greater intrinsic value" or "stamped with the authority of more enlightened patrons of liberty" than a government of separate and coordinate powers. *Id.*, No. 47, at 301.

For this reason we are quite forbidden to say what the law is whenever (as today's opinion asserts) "'an Act of Congress is alleged to conflict with the Constitution.'" *Ante*, at 12. We can do so only when that allegation will determine the outcome of a lawsuit, and is contradicted by the other party. The "judicial Power" is not, as the majority believes, the power "'to say what the law is,'" *ibid.,* giving the Supreme Court the "primary role in determining the constitutionality of laws." The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit. See, *e.g.,* Basic Law for the Federal Republic of Germany, Art. 93. The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. Sometimes (though not always) the parties before the court disagree not with regard to the facts of their case (or not *only* with regard to the facts) but with regard to the applicable law—in which event (and *only* in which event) it becomes the "'province and duty of the judicial department to say what the law is.'" *Ante*, at 12.

In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court, it is not a separate, free-

standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become "'the province and duty of the judicial department to say what the law is.'" That is why, in 1793, we politely declined the Washington Administration's request to "say what the law is" on a particular treaty matter that was not the subject of a concrete legal controversy. 3 Correspondence and Public Papers of John Jay 486–489 (H. Johnston ed. 1893). And that is why, as our opinions have said, some questions of law will *never* be presented to this Court, because there will never be anyone with standing to bring a lawsuit. See *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 227 (1974); *United States* v. *Richardson*, 418 U. S. 166, 179 (1974). As Justice Brandeis put it, we cannot "pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding"; absent a "'real, earnest and vital controversy between individuals,'" we have neither any work to do nor any power to do it. *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (concurring opinion) (quoting *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 345 (1892)). Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

That is completely absent here. Windsor's injury was cured by the judgment in her favor. And while, in ordinary circumstances, the United States is injured by a directive to pay a tax refund, this suit is far from ordinary. Whatever injury the United States has suffered will surely not be redressed by the action that it, as a litigant, asks us to take. The final sentence of the Solicitor General's brief on the merits reads: "For the foregoing reasons, the judgment of the court of appeals *should be affirmed*." Brief for United States (merits) 54 (emphasis added). That will not cure the Government's injury, but carve it into stone. One

could spend many fruitless afternoons ransacking our library for any other petitioner's brief seeking an affirmance of the judgment against it.[1] What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct. And the same was true in the Court of Appeals: Neither party sought to undo the judgment for Windsor, and so that court should have dismissed the appeal (just as we should dismiss) for lack of jurisdiction. Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.

We have never before agreed to speak—to "say what the law is"—where there is no controversy before us. In the more than two centuries that this Court has existed as an institution, we have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question's answer. The United States reluctantly conceded that at oral argument. See Tr. of Oral Arg. 19–20.

The closest we have ever come to what the Court blesses today was our opinion in *INS* v. *Chadha*, 462 U. S. 919 (1983). But in that case, two parties to the litigation

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[1] For an even more advanced scavenger hunt, one might search the annals of Anglo-American law for another "Motion to Dismiss" like the one the United States filed in District Court: It argued that the court should agree "with Plaintiff and the United States" and "*not* dismiss" the complaint. (Emphasis mine.) Then, having gotten exactly what it asked for, the United States promptly appealed.

disagreed with the position of the United States and with the court below: the House and Senate, which had intervened in the case. Because *Chadha* concerned the validity of a mode of congressional action—the one-house legislative veto—the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers. The Executive choosing not to defend that power,[2] we permitted the House and Senate to intervene. Nothing like that is present here.

To be sure, the Court in *Chadha* said that statutory aggrieved-party status was "not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional." *Id.*, at 930–931. But in a footnote to that statement, the Court acknowledged Article III's separate requirement of a "justiciable case or controversy," and stated that *this* requirement was satisfied "because of the presence of the two Houses of Congress as adverse parties." *Id.,* at 931, n. 6. Later in its opinion, the *Chadha* Court remarked that the United States' announced intention to enforce the statute also sufficed to permit judicial review, even absent congressional participation. *Id.,* at 939. That remark is true, as a description of the judicial review conducted in the Court of Appeals, where the Houses of Congress had not inter-

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[2]There the Justice Department's refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers. There is no justification for the Justice Department's abandoning the law in the present case. The majority opinion makes a point of scolding the President for his "failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions," *ante,* at 12. But the rebuke is tongue-in-cheek, for the majority gladly gives the President what he wants. Contrary to all precedent, it decides this case (and even decides it the way the President wishes) *despite* his abandonment of the defense and the consequent absence of a case or controversy.

vened. (The case originated in the Court of Appeals, since it sought review of agency action under 8 U. S. C. §1105a(a) (1976 ed.).) There, absent a judgment setting aside the INS order, Chadha faced deportation. This passage of our opinion seems to be addressing that initial standing in the Court of Appeals, as indicated by its quotation from the lower court's opinion, 462 U. S., at 939–940. But if it was addressing standing to pursue the appeal, the remark was both the purest dictum (as congressional intervention at that point made the required adverseness "beyond doubt," *id.*, at 939), and quite incorrect. When a private party has a judicial decree safely in hand to prevent his injury, additional judicial action requires that a party injured by the decree *seek to undo it*. In *Chadha*, the intervening House and Senate fulfilled that requirement. Here no one does.

The majority's discussion of the requirements of Article III bears no resemblance to our jurisprudence. It accuses the *amicus* (appointed to argue against our jurisdiction) of "elid[ing] the distinction between . . . the jurisdictional requirements of Article III and the prudential limits on its exercise." *Ante*, at 6. It then proceeds to call the requirement of adverseness a "prudential" aspect of standing. *Of standing*. That is incomprehensible. A plaintiff (or appellant) can have all the standing in the world—satisfying all three standing requirements of *Lujan* that the majority so carefully quotes, *ante,* at 7—and yet no Article III controversy may be before the court. Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint. It is not the *amicus* that has done the eliding of distinctions, but the majority, calling the quite separate Article III requirement of adverseness between the parties an element (which it then pronounces a "prudential" element) of standing. The question here is not whether, as the majority puts it, "the United States retains a stake

sufficient to support Article III jurisdiction," *ibid.* the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not.

I find it wryly amusing that the majority seeks to dismiss the requirement of party-adverseness as nothing more than a "prudential" aspect of the sole Article III requirement of standing. (Relegating a jurisdictional requirement to "prudential" status is a wondrous device, enabling courts to ignore the requirement whenever they believe it "prudent"—which is to say, a good idea.) Half a century ago, a Court similarly bent upon announcing its view regarding the constitutionality of a federal statute achieved that goal by effecting a remarkably similar *but completely opposite* distortion of the principles limiting our jurisdiction. The Court's notorious opinion in *Flast* v. *Cohen*, 392 U. S. 83, 98–101 (1968), held that *standing* was merely an element (which it pronounced to be a "prudential" element) of the sole Article III requirement of *adverseness*. We have been living with the chaos created by that power-grabbing decision ever since, see *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587 (2007), as we will have to live with the chaos created by this one.

The authorities the majority cites fall miles short of supporting the counterintuitive notion that an Article III "controversy" can exist without disagreement between the parties. In *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326 (1980), the District Court had entered judgment in the individual plaintiff's favor based on the defendant bank's offer to pay the full amount claimed. The plaintiff, however, sought to appeal the District Court's denial of class certification under Federal Rule of Civil Procedure 23. There was a continuing dispute between the parties concerning the issue raised on appeal. The same is true of the other case cited by the majority, *Camreta* v. *Greene*,

563 U. S. ___ (2011). There the District Court found that the defendant state officers had violated the Fourth Amendment, but rendered judgment in their favor because they were entitled to official immunity, application of the Fourth Amendment to their conduct not having been clear at the time of violation. The officers sought to appeal the holding of Fourth Amendment violation, which would circumscribe their future conduct; the plaintiff continued to insist that a Fourth Amendment violation had occurred. The "prudential" discretion to which both those cases refer was the discretion to *deny* an appeal even when a live controversy exists—not the discretion to *grant* one when it does not. The majority can cite no case in which this Court entertained an appeal in which both parties urged us to affirm the judgment below. And that is because the existence of a controversy is not a "prudential" requirement that we have invented, but an essential element of an Article III case or controversy. The majority's notion that a case between friendly parties can be entertained so long as "adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor" the other side of the issue, *ante*, at 10, effects a breathtaking revolution in our Article III jurisprudence.

It may be argued that if what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement. This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce

nor to defend the statute he believed to be unconstitutional, see Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (Nov. 2, 1994)—in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive's determination of unconstitutionality would have escaped this Court's desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Or the President could have evaded presentation of the constitutional issue to this Court simply by declining to appeal the District Court and Court of Appeals dispositions he agreed with. Be sure of this much: If a President wants to insulate his judgment of unconstitutionality from our review, he can. What the views urged in this dissent produce is not insulation from judicial review but insulation from Executive contrivance.

The majority brandishes the famous sentence from *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Ante*, at 12 (internal quotation marks omitted). But that sentence neither says nor implies that it is *always* the province and duty of the Court to say what the law is—much less that its responsibility in that regard is a "primary" one. The very next sentence of Chief Justice Marshall's opinion makes the crucial qualification that today's majority ignores: "*Those who apply the rule to particular cases*, must of necessity expound and interpret that rule." 1 Cranch, at 177 (emphasis added). Only when a "particular case" is before us—that is, a controversy that it is our business to resolve under Article III—do we have the province and duty to pronounce the law. For the views of our early Court more

precisely addressing the question before us here, the majority ought instead to have consulted the opinion of Chief Justice Taney in *Lord* v. *Veazie*, 8 How. 251 (1850):

> "The objection in the case before us is . . . that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.
>
> "A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible . . . . A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed." *Id.,* at 255–256.

There is, in the words of *Marbury,* no "necessity [to] expound and interpret" the law in this case; just a desire to place this Court at the center of the Nation's life. 1 Cranch, at 177.

B

A few words in response to the theory of jurisdiction set forth in JUSTICE ALITO's dissent: Though less far reaching in its consequences than the majority's conversion of constitutionally required adverseness into a discretionary element of standing, the theory of that dissent similarly elevates the Court to the "primary" determiner of constitutional questions involving the separation of powers, and, to boot, increases the power of the most dangerous branch: the "legislative department," which by its nature "draw[s] all power into its impetuous vortex." The Federalist, No. 48, at 309 (J. Madison). Heretofore in our national history, the President's failure to "take Care that the Laws be faithfully executed," U. S. Const., Art. II, §3, could only be

brought before a judicial tribunal by someone whose concrete interests were harmed by that alleged failure. JUSTICE ALITO would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws.[3] This would lay to rest Tocqueville's praise of our judicial system as one which "intimately bind[s] the case made for the law with the case made for one man," one in which legislation is "no longer exposed to the daily aggression of the parties," and in which "[t]he political question that [the judge] must resolve is linked to the interest" of private litigants. A. de Tocqueville, Democracy in America 97 (H. Mansfield

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[3]JUSTICE ALITO attempts to limit his argument by claiming that Congress is injured (and can therefore appeal) when its statute is held unconstitutional without Presidential defense, but is *not* injured when its statute is held unconstitutional *despite* Presidential defense. I do not understand that line. The injury to Congress is the same whether the President has defended the statute or not. And if the injury is threatened, why should Congress not be able to participate in the suit from the beginning, just as the President can? And if having a statute declared unconstitutional (and therefore inoperative) by a court is an injury, why is it not an injury when a statute is declared unconstitutional by the President and rendered inoperative by his consequent failure to enforce it? Or when the President simply declines to enforce it without opining on its constitutionality? If it is the *inoperativeness* that constitutes the injury—the "impairment of [the legislative] function," as JUSTICE ALITO puts it, *post,* at 4—it should make no difference which of the other two branches inflicts it, and whether the Constitution is the pretext. A principled and predictable system of jurisprudence cannot rest upon a shifting concept of injury, designed to support standing when we would like it. If this Court agreed with JUSTICE ALITO's distinction, its opinion in *Raines* v. *Byrd*, 521 U. S. 811 (1997), which involved an original suit by Members of Congress challenging an assertedly unconstitutional law, would have been written quite differently; and JUSTICE ALITO's distinguishing of that case on grounds quite irrelevant to his theory of standing would have been unnecessary.

& D. Winthrop eds. 2000). That would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking.

JUSTICE ALITO's notion of standing will likewise enormously shrink the area to which "judicial censure, exercised by the courts on legislation, cannot extend," *ibid.* For example, a bare majority of both Houses could bring into court the assertion that the Executive's implementation of welfare programs is too generous—a failure that no other litigant would have standing to complain about. Moreover, as we indicated in *Raines* v. *Byrd*, 521 U. S. 811, 828 (1997), if Congress can sue the Executive for the erroneous application of the law that "injures" its power to legislate, surely the Executive can sue Congress for its erroneous adoption of an unconstitutional law that "injures" the Executive's power to administer—or perhaps for its protracted failure to act on one of his nominations. The opportunities for dragging the courts into disputes hitherto left for political resolution are endless.

JUSTICE ALITO's dissent is correct that *Raines* did not formally decide this issue, but its reasoning does. The opinion spends three pages discussing famous, decades-long disputes between the President and Congress—regarding congressional power to forbid the Presidential removal of executive officers, regarding the legislative veto, regarding congressional appointment of executive officers, and regarding the pocket veto—that would surely have been promptly resolved by a Congress-vs.-the-President lawsuit if the impairment of a branch's powers alone conferred standing to commence litigation. But it does not, and never has; the "enormous power that the judiciary would acquire" from the ability to adjudicate such suits "would have made a mockery of [Hamilton's]

quotation of Montesquieu to the effect that 'of the three powers above mentioned . . . the JUDICIARY is next to nothing.'" *Barnes* v. *Kline*, 759 F. 2d 21, 58 (CADC 1985) (Bork, J., dissenting) (quoting The Federalist No. 78 (A. Hamilton)).

To be sure, if Congress cannot invoke our authority in the way that JUSTICE ALITO proposes, then its only recourse is to confront the President directly. Unimaginable evil this is not. Our system is *designed* for confrontation. That is what "[a]mbition . . . counteract[ing] ambition," The Federalist, No. 51, at 322 (J. Madison), is all about. If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding. (Nothing says "enforce the Act" quite like ". . . or you will have money for little else.") But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so. Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. And by the way, if the President loses the lawsuit but does not faithfully implement the Court's decree, just as he did not faithfully implement Congress's statute, what then? Only Congress can bring him to heel by . . . what do you think? Yes: a direct confrontation with the President.

II

For the reasons above, I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal. Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

A

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution," and that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism" because "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import." *Ante,* at 18. But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of "the usual tradition of recognizing and accepting state definitions of marriage" continue. See, *e.g., ante,* at 20. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of "marriage" in federal statutes is unsupported by any of the Federal Government's enumerated powers,[4] nonetheless needs some rhetorical basis to support its pretense that today's prohibition of

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[4] Such a suggestion would be impossible, given the Federal Government's long history of making pronouncements regarding marriage—for example, conditioning Utah's entry into the Union upon its prohibition of polygamy. See Act of July 16, 1894, ch. 138, §3, 28 Stat. 108 ("The constitution [of Utah]" must provide "perfect toleration of religious sentiment," "*Provided*, That polygamous or plural marriages are forever prohibited").

laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Equally perplexing are the opinion's references to "the Constitution's guarantee of equality." *Ibid.* Near the end of the opinion, we are told that although the "equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved"—what can *that* mean?—"the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does." *Ante,* at 25. The only possible interpretation of this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), *Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973), and *Romer* v. *Evans*, 517 U. S. 620 (1996)—*all* of which are equal-protection cases.[5] And those three cases are the *only* authorities that the Court cites in Part IV about the Constitution's meaning, except for its citation of *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (not an equal-protection case) to support its passing assertion that the Constitution protects the "moral and sexual choices" of same-sex couples, *ante,* at 23.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the

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[5] Since the Equal Protection Clause technically applies only against the States, see U. S. Const., Amdt. 14, *Bolling* and *Moreno*, dealing with federal action, relied upon "the equal protection component of the Due Process Clause of the Fifth Amendment," *Moreno*, 413 U. S., at 533.

central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below, compare Brief for Respondent Bipartisan Legal Advisory Group of U. S. House of Representatives (merits) 24–28 (no), with Brief for Respondent Windsor (merits) 17–31 and Brief for United States (merits) 18–36 (yes); and compare 699 F. 3d 169, 180–185 (CA2 2012) (yes), with *id.,* at 208–211 (Straub, J., dissenting in part and concurring in part) (no). In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. See *United States* v. *Virginia*, 518 U. S. 515, 567–570 (1996) (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework. See *Heller* v. *Doe*, 509 U. S. 312, 320 (1993) (a classification "'must be upheld . . . if there is any reasonably conceivable state of facts'" that could justify it).

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," *ante,* at 25; that it violates "basic due process" principles, *ante,* at 20; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment," *ante,* at 19. The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition,"

Washington v. *Glucksberg*, 521 U. S. 702, 720–721 (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "'ordered liberty.'" *Id.,* at 721 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)).

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare . . . desire to harm'" couples in same-sex marriages. *Ante,* at 20. It is this proposition with which I will therefore engage.

B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence* v. *Texas*, 539 U. S. 558, 599 (2003) (SCALIA, J., dissenting). I will not swell the U. S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legis-

lators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968). Or at least it *was* a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare . . . desire to harm a politically unpopular group." *Ante,* at 20. Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn, see, *e.g.*, *Edwards* v. *Aguillard*, 482 U. S. 578 (1987)), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. See *ante,* at 21. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. See, *e.g.,* Baude, Beyond DOMA: Choice of State Law in Federal Statutes, 64 Stan. L. Rev. 1371 (2012). Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of

parties of the same sex." Ala. Code §30–1–19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? See *Godfrey* v. *Spano*, 13 N. Y. 3d 358, 920 N. E. 2d 328 (2009). DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only *opposite-sex* spouses—those being the only sort that were recognized in *any* State at the time of DOMA's passage. When it became clear that changes in state law might one day alter that balance, DOMA's definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation. See, *e.g.,* Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or

even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with *malice*—with *the "purpose"* (*ante,* at 25) "to disparage and to injure" same-sex couples. It says that the motivation for DOMA was to "demean," *ibid.*; to "impose inequality," *ante,* at 22; to "impose . . . a stigma," *ante,* at 21; to deny people "equal dignity," *ibid.*; to brand gay people as "unworthy," *ante,* at 23; and to "*humiliat*[*e*]" their children, *ibid.* (emphasis added).

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans *this institution.* In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with *the purpose* to "disparage," "injure," "degrade," "demean," and "humiliate" our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.

* * *

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are

confined" to those couples "joined in same-sex marriages made lawful by the State." *Ante,* at 26, 25. I have heard such "bald, unreasoned disclaimer[s]" before. *Lawrence*, 539 U. S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.,* at 578. Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects," *ante,* at 23—with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with.

I do not mean to suggest disagreement with THE CHIEF JUSTICE's view, *ante,* p. 2–4 (dissenting opinion), that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples—or even that this Court could *theoretically* do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "'bare . . . desire to harm'"

couples in same-sex marriages. *Supra,* at 18. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today's opinion *ante*, at 22:

> "~~DOMA's~~ *This state law's* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships,* see *Lawrence,* and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities."

Or try this passage, from *ante*, at 22–23:

> "~~[DOMA]~~ *This state law* tells those couples, and all the world, that their otherwise valid ~~marriages~~ *relationships* are unworthy of ~~federal~~ *state* recognition. This places same-sex couples in an unstable position of being in a second-tier ~~marriage~~ *relationship*. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, ..."

Or this, from *ante*, at 23—which does not even require alteration, except as to the invented number:

> "And it humiliates ~~tens of~~ thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. *Ante*, at 26. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples, see *ante,* at 25, 26. The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy "help" only to a member of this institution.

As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place

for some, see North Carolina Const., Amdt. 1 (providing that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State") (approved by a popular vote, 61% to 39% on May 8, 2012),[6] are offset by victories in other places for others, see Maryland Question 6 (establishing "that Maryland's civil marriage laws allow gay and lesbian couples to obtain a civil marriage license") (approved by a popular vote, 52% to 48%, on November 6, 2012).[7] Even in a *single State*, the question has come out differently on different occasions. Compare Maine Question 1 (permitting "the State of Maine to issue marriage licenses to same-sex couples") (approved by a popular vote, 53% to 47%, on November 6, 2012)[8] with Maine Question 1 (rejecting "the new law that lets same-sex couples marry") (approved by a popular vote, 53% to 47%, on November 3, 2009).[9]

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was

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[6] North Carolina State Board of Elections, Official Results: Primary Election of May 8, 2012, Constitutional Amendment.

[7] Maryland State Board of Elections, Official 2012 Presidential General Election Results for All State Questions, Question 06.

[8] Maine Bureau of Elections, Nov. 3, 2009, Referendum Tabulation (Question 1).

[9] Maine Bureau of Elections, Nov. 6, 2012, Referendum Election Tabulations (Question 1).

theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER *v.* EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

JUSTICE ALITO, with whom JUSTICE THOMAS joins as to Parts II and III, dissenting.

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting §3 of the Defense of Marriage Act (DOMA), 110 Stat. 2419, which defines the meaning of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

I

I turn first to the question of standing. In my view, the

United States clearly is not a proper petitioner in this case. The United States does not ask us to overturn the judgment of the court below or to alter that judgment in any way. Quite to the contrary, the United States argues emphatically in favor of the correctness of that judgment. We have never before reviewed a decision at the sole behest of a party that took such a position, and to do so would be to render an advisory opinion, in violation of Article III's dictates. For the reasons given in JUSTICE SCALIA's dissent, I do not find the Court's arguments to the contrary to be persuasive.

Whether the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has standing to petition is a much more difficult question. It is also a significantly closer question than whether the intervenors in *Hollingsworth* v. *Perry*, *ante,* p.___—which the Court also decides today—have standing to appeal. It is remarkable that the Court has simultaneously decided that the United States, which "receive[d] all that [it] ha[d] sought" below, *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 333 (1980), is a proper petitioner in this case but that the intervenors in *Hollingsworth*, who represent the party that lost in the lower court, are not. In my view, both the *Hollingsworth* intervenors and BLAG have standing.[1]

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[1] Our precedents make clear that, in order to support our jurisdiction, BLAG must demonstrate that it had Article III standing in its own right, quite apart from its status as an intervenor. See *Diamond* v. *Charles*, 476 U. S. 54, 68 (1986) ("Although intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III" (citation omitted)); *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64 (1997) ("Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome" (internal quotation marks omitted)); *id.*,

A party invoking the Court's authority has a sufficient stake to permit it to appeal when it has "'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'" *Camreta* v. *Greene*, 563 U. S. ___, ___ (2011) (slip op., at 5) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992)). In the present case, the House of Representatives, which has authorized BLAG to represent its interests in this matter,[2] suffered just such an injury.

In *INS* v. *Chadha*, 462 U. S. 919 (1983), the Court held that the two Houses of Congress were "proper parties" to file a petition in defense of the constitutionality of the one-house veto statute, *id.*, at 930, n. 5 (internal quotation marks omitted). Accordingly, the Court granted and decided petitions by both the Senate and the House, in addition to the Executive's petition. *Id.*, at 919, n.*. That the two Houses had standing to petition is not surprising: The Court of Appeals' decision in *Chadha*, by holding the one-house veto to be unconstitutional, had limited Congress' power to legislate. In discussing Article III standing, the Court suggested that Congress suffered a similar injury whenever federal legislation it had passed was struck down, noting that it had "long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id.*, at 940.

The United States attempts to distinguish *Chadha* on

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at 65 ("An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III" (internal quotation marks omitted)).

[2] H. Res. 5, 113th Cong., 1st Sess., §4(a)(1)(B) (2013) ("[BLAG] continues to speak for, and articulates the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States").

the ground that it "involved an unusual statute that vested the House and the Senate themselves each with special procedural rights—namely, the right effectively to veto Executive action." Brief for United States (jurisdiction) 36. But that is a distinction without a difference: just as the Court of Appeals decision that the *Chadha* Court affirmed impaired Congress' power by striking down the one-house veto, so the Second Circuit's decision here impairs Congress' legislative power by striking down an Act of Congress. The United States has not explained why the fact that the impairment at issue in *Chadha* was "special" or "procedural" has any relevance to whether Congress suffered an injury. Indeed, because legislating is Congress' central function, any impairment of that function is a more grievous injury than the impairment of a procedural add-on.

The Court's decision in *Coleman* v. *Miller*, 307 U. S. 433 (1939), bolsters this conclusion. In *Coleman*, we held that a group of state senators had standing to challenge a lower court decision approving the procedures used to ratify an amendment to the Federal Constitution. We reasoned that the senators' votes—which would otherwise have carried the day—were nullified by that action. See *id.,* at 438 ("Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes"); *id*., at 446 ("[W]e find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and

deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision"). By striking down §3 of DOMA as unconstitutional, the Second Circuit effectively "held for naught" an Act of Congress. Just as the state-senator-petitioners in *Coleman* were necessary parties to the amendment's ratification, the House of Representatives was a necessary party to DOMA's passage; indeed, the House's vote would have been sufficient to prevent DOMA's repeal if the Court had not chosen to execute that repeal judicially.

Both the United States and the Court-appointed *amicus* err in arguing that *Raines* v. *Byrd*, 521 U. S. 811 (1997), is to the contrary. In that case, the Court held that Members of Congress who had voted "nay" to the Line Item Veto Act did not have standing to challenge that statute in federal court. *Raines* is inapposite for two reasons. First, *Raines* dealt with individual Members of Congress and specifically pointed to the individual Members' lack of institutional endorsement as a sign of their standing problem: "We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." *Id.*, at 829; see also *ibid.*, n. 10 (citing cases to the effect that "members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take" (internal quotation marks omitted)).

Second, the Members in *Raines*—unlike the state senators in *Coleman*—were not the pivotal figures whose votes would have caused the Act to fail absent some challenged action. Indeed, it is telling that *Raines* characterized *Coleman* as standing "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nulli-

fied." 521 U. S., at 823. Here, by contrast, passage by the House was needed for DOMA to become law. U. S. Const., Art. I, §7 (bicameralism and presentment requirements for legislation).

I appreciate the argument that the Constitution confers on the President alone the authority to defend federal law in litigation, but in my view, as I have explained, that argument is contrary to the Court's holding in *Chadha*, and it is certainly contrary to the *Chadha* Court's endorsement of the principle that "Congress is the proper party to defend the validity of a statute" when the Executive refuses to do so on constitutional grounds. 462 U. S., at 940. See also 2 U. S. C. §288h(7) (Senate Legal Counsel shall defend the constitutionality of Acts of Congress when placed in issue).[3] Accordingly, in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.

II

Windsor and the United States argue that §3 of DOMA violates the equal protection principles that the Court has found in the Fifth Amendment's Due Process Clause. See Brief for Respondent Windsor (merits) 17–62; Brief for United States (merits) 16–54; cf. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). The Court rests its holding on related arguments. See *ante*, at 24–25.

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not

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[3] *Buckley* v. *Valeo*, 424 U. S. 1 (1976), is not to the contrary. The Court's statements there concerned enforcement, not defense.

guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court's holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," *ante*, at 25, suggests that substantive due process may partially underlie the Court's decision today. But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997); *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934) (referring to fundamental rights as those that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental"), as well as "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, *supra*, at 721 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937)).

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.[4]

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[4] Curry-Sumner, A Patchwork of Partnerships: Comparative Over-

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

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

We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.[5] There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. See, *e.g.,* S. Girgis, R. Anderson, & R. George, What is Marriage? Man and Woman: A Defense 53–58 (2012); Finnis, Marriage: A Basic and Exigent Good, 91 The Monist 388, 398

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view of Registration Schemes in Europe, in Legal Recognition of Same-Sex Partnerships 71, 72 (K. Boele-Woelki & A. Fuchs eds., rev. 2d ed., 2012).

[5]As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society. See generally J. Wallerstein, J. Lewis, & S. Blakeslee, The Unexpected Legacy of Divorce: The 25 Year Landmark Study (2000).

(2008).[6] Others think that recognition of same-sex marriage will fortify a now-shaky institution. See, *e.g.,* A. Sullivan, Virtually Normal: An Argument About Homosexuality 202–203 (1996); J. Rauch, Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America 94 (2004).

At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are

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[6] Among those holding that position, some deplore and some applaud this predicted development. Compare, *e.g.,* Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J. L. & Pub. Pol'y 771, 799 (2001) ("Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of 'anything goes' in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility") and Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U. St. Thomas L. J. 33, 58 (2005) ("If the idea of marriage really does matter—if society really does need a social institution that manages opposite-sex attractions in the interests of children and society—then taking an already weakened social institution, subjecting it to radical new redefinitions, and hoping that there are no consequences is probably neither a wise nor a compassionate idea"), with Brownworth, Something Borrowed, Something Blue: Is Marriage Right for Queers? in I Do/I Don't: Queers on Marriage 53, 58–59 (G. Wharton & I. Phillips eds. 2004) (Former President George W. "Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been") and Willis, Can Marriage Be Saved? A Forum, The Nation, p. 16 (2004) (celebrating the fact that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart").

certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.

III

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. They argue that §3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of "heightened" scrutiny, and that §3 cannot survive such scrutiny. They further maintain that the governmental interests that §3 purports to serve are not sufficiently important and that it has not been adequately shown that §3 serves those interests very well. The Court's holding, too, seems to rest on "the equal protection guarantee of the Fourteenth Amendment," *ante,* at 25—although the Court is careful not to adopt most of Windsor's and the United States' argument.

In my view, the approach that Windsor and the United States advocate is misguided. Our equal protection framework, upon which Windsor and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on

what marriage is.

Underlying our equal protection jurisprudence is the central notion that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed* v. *Reed*, 404 U. S. 71, 76 (1971) (quoting *F. S. Royter Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920)). The modern tiers of scrutiny—on which Windsor and the United States rely so heavily—are a heuristic to help judges determine when classifications have that "fair and substantial relation to the object of the legislation." *Reed*, *supra,* at 76.

So, for example, those classifications subject to strict scrutiny—*i.e.,* classifications that must be "narrowly tailored" to achieve a "compelling" government interest, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007) (internal quotation marks omitted)—are those that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Cleburne* v. *Cleburne Living Center*, *Inc.*, 473 U. S. 432, 440 (1985); cf. *id.*, at 452–453 (Stevens, J., concurring) ("It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right").

In contrast, those characteristics subject to so-called intermediate scrutiny—*i.e.,* those classifications that must be "'substantially related'" to the achievement of "important governmental objective[s]," *United States* v. *Virginia*, 518 U. S. 515, 524 (1996); *id.,* at 567 (SCALIA, J., dissenting)—are those that are *sometimes* relevant considerations to be taken into account by legislators, but "generally provid[e] no sensible ground for different treat-

ment," *Cleburne*, *supra*, at 440. For example, the Court has held that statutory rape laws that criminalize sexual intercourse with a woman under the age of 18 years, but place no similar liability on partners of underage men, are grounded in the very real distinction that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse." *Michael M.* v. *Superior Court, Sonoma Cty.*, 450 U. S. 464, 471 (1981) (plurality opnion). The plurality reasoned that "[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Ibid.* In other contexts, however, the Court has found that classifications based on gender are "arbitrary," *Reed*, *supra*, at 76, and based on "outmoded notions of the relative capabilities of men and women," *Cleburne*, *supra*, at 441, as when a State provides that a man must always be preferred to an equally qualified woman when both seek to administer the estate of a deceased party, see *Reed*, *supra*, at 76–77.

Finally, so-called rational-basis review applies to classifications based on "distinguishing characteristics relevant to interests the State has the authority to implement." *Cleburne*, *supra*, at 441. We have long recognized that "the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons." *Romer* v. *Evans*, 517 U. S. 620, 631 (1996). As a result, in rational-basis cases, where the court does not view the classification at issue as "inherently suspect," *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 218 (1995) (internal quotation marks omitted), "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should

be pursued." *Cleburne*, *supra*, at 441–442.

In asking the Court to determine that §3 of DOMA is subject to and violates heightened scrutiny, Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the "traditional" or "conjugal" view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. Brief for Respondent BLAG (merits) 2 (citing *Hernandez* v. *Robles*, 7 N. Y. 3d 338, 361, 855 N. E. 2d 1, 8 (2006) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex")). And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Brief for Respondent BLAG 44–46, 49. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, *e.g.*, Girgis, Anderson, & George, What is Marriage? Man and Woman:

A Defense, at 23–28. While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the "consent-based" vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore.[7] Because our consti-

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[7]The degree to which this question is intractable to typical judicial processes of decisionmaking was highlighted by the trial in *Hollingsworth* v. *Perry*, *ante,* p. ___. In that case, the trial judge, after

tutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

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receiving testimony from some expert witnesses, purported to make "findings of fact" on such questions as why marriage came to be, *Perry* v. *Schwarzenegger,* 704 F. Supp. 2d 921, 958 (ND Cal. 2010) (finding of fact no. 27) ("Marriage between a man and a woman was traditionally organized based on presumptions of division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family"), what marriage is, *id.*, at 961 (finding of fact no. 34) ("Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents"), and the effect legalizing same-sex marriage would have on opposite-sex marriage, *id.*, at 972 (finding of fact no. 55) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages").

At times, the trial reached the heights of parody, as when the trial judge questioned his ability to take into account the views of great thinkers of the past because they were unavailable to testify in person in his courtroom. See 13 Tr. in No. C 09–2292 VRW (ND Cal.), pp. 3038–3039.

And, if this spectacle were not enough, some professors of constitutional law have argued that we are bound to accept the trial judge's findings—including those on major philosophical questions and predictions about the future—unless they are "clearly erroneous." See Brief for Constitutional Law and Civil Procedure Professors as *Amici Curiae* in *Hollingsworth* v. *Perry*, O. T. 2012, No. 12–144, pp. 2–3 ("[T]he district court's factual findings are compelling and should be given significant weight"); *id.*, at 25 ("Under any standard of review, this Court should credit and adopt the trial court's findings because they result from rigorous and exacting application of the Federal Rules of Evidence, and are supported by reliable research and by the unanimous consensus of mainstream social science experts"). Only an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously.

Legislatures, however, have little choice but to decide between the two views. We have long made clear that neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution. See, *e.g., Rust* v. *Sullivan*, 500 U. S. 173, 192 (1991) ("[T]he government 'may make a value judgment favoring childbirth over abortion'" (quoting *Maher* v. *Rue*, 432 U. S. 464, 474 (1977))). Accordingly, both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage. And given the size of government and the degree to which it now regulates daily life, it seems unlikely that either Congress or the States could maintain complete neutrality even if they tried assiduously to do so.

Rather than fully embracing the arguments made by Windsor and the United States, the Court strikes down §3 of DOMA as a classification not properly supported by its objectives. The Court reaches this conclusion in part because it believes that §3 encroaches upon the States' sovereign prerogative to define marriage. See *ante,* at 21–22 ("As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was 'to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws'" (quoting *Massachusetts* v. *United States Dept. of Health and Human Servs.*, 682 F. 3d 1, 12–13 (CA1 2012))). Indeed, the Court's ultimate conclusion is that DOMA falls afoul of the Fifth Amendment because it "singles out a class of persons deemed *by a State* entitled to recognition and protection to enhance their own liberty" and "imposes a disability on the class by refusing to acknowledge a status *the State finds* to be dignified and

proper." *Ante*, at 25 (emphasis added).

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the today's opinion of the Court will soon be scattered to the wind.

In any event, §3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. Section 3 does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that §3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by §3, Congress has the power to define the category of persons to whom those laws apply.

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For these reasons, I would hold that §3 of DOMA does not violate the Fifth Amendment. I respectfully dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

OBERGEFELL ET AL. *v*. HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015*

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 3–28.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 3–10.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the pe-

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*Together with No. 14–562, *Tanco et al.* v. *Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al.* v. *Snyder, Governor of Michigan, et al.,* and No. 14–574, *Bourke et al.* v. *Beshear, Governor of Kentucky*, also on certiorari to the same court.

titioners' own experiences. Pp. 3–6.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers* v. *Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States* v. *Windsor*, 570 U. S. ___. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 6–10.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 10–27.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g., Eisenstadt* v. *Baird*, 405 U. S. 438, 453; *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving* v. *Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner* v. *Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship in-

volving opposite-sex partners, as did *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e.g., Lawrence*, *supra,* at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 10–12.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra,* at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence, supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g., Pierce* v. *Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra,* at ___. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Syllabus

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard* v. *Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 12–18.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving,* where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki* v. *Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g., Kirchberg* v. *Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, *e.g., M. L. B.* v. *S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 18–22.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protec-

Syllabus

tion Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker* v. *Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 22–23.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers,* in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 23–27.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow

persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.,* Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101.01 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer* v. *Snyder*, 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. ___ (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio,

Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

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

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures,

and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from

Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

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

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two

settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

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

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes.

Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H. Hartog, Man & Wife in America: A History (2000).

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

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil

Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer* v. *Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr* v. *Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is

defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U. S. C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States* v. *Windsor*, 570 U. S. ___ (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.,* at ___ (slip op., at 14).

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection* v. *Bruning*, 455 F. 3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many

thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State-by-State Supp. (2015).

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan* v. *Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g., Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradi-

tion guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki* v. *Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner* v. *Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e.g., M. L. B.* v. *S. L. J.*, 519 U. S. 102, 116 (1996); *Cleveland Bd. of Ed.* v. *LaFleur*, 414 U. S. 632, 639–640 (1974); *Griswold*, *supra*, at 486; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions,

has made assumptions defined by the world and time of which it is a part. This was evident in *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g., Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt*, *supra*, at 453–454; *Poe*, *supra*, at 542–553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra,* at 384 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would

be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki*, *supra*, at 386.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at ___– ___ (slip op., at 22–23). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra*, at 12 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U. S., at 485. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

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

> projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95–96. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra,* at ___ (slip op., at 14). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S., at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer*, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U. S., at 384

(quoting *Meyer*, *supra*, at 399). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra,* at ___ (slip op., at 23). Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.,* at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra,* at ___ (slip op., at 23).

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

precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" *Id.,* at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the

basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at ___ – ___ (slip op., at 15–16). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

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

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come

the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.,* at 789–792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566–567.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources

alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (KENNEDY, J., concurring in judgment); *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court

first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U. S., at 12. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U. S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.,* at 383–387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of cover-

ture, see *supra*, at 6, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed* v. *Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga. Code Ann. §53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e.g., Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142 (1980); *Califano* v. *Westcott*, 443 U. S. 76 (1979); *Orr* v. *Orr*, 440 U. S. 268 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199 (1977) (plurality opinion); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B.* v. *S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S., at 119–124. In *Eisenstadt* v. *Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S., at 446–454. And in *Skinner* v. *Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed steriliza-

tion of habitual criminals. See 316 U. S., at 538–543.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U. S., at 575. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.*, at 578.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g., Zablocki*, *supra*, at 383–388; *Skinner*, 316 U. S., at 541.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No

longer may this liberty be denied to them. *Baker* v. *Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See *DeBoer*, 772 F. 3d, at 409.

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. See Appendix A, *infra*. 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 reflected in the arguments now presented

for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette* v. *BAMN*, 572 U. S. ___ (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.*, at ___ – ___ (slip op., at 15–16). Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Id.,* at ___ (slip op., at 15). Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. *Id.,* at ___ (slip op., at 17). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid.*

It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U. S., at 186, 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.,* at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U. S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and

Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen* v. *Herbert*, 755 F. 3d 1193, 1223 (CA10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they

describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

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

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams* v. *North Carolina*, 317 U. S. 287, 299 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and pro-

mote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

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

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

APPENDICES
A
State and Federal Judicial Decisions Addressing Same-Sex Marriage

United States Courts of Appeals Decisions

Adams v. *Howerton*, 673 F. 2d 1036 (CA9 1982)
Smelt v. *County of Orange*, 447 F. 3d 673 (CA9 2006)
Citizens for Equal Protection v. *Bruning*, 455 F. 3d 859 (CA8 2006)
Windsor v. *United States*, 699 F. 3d 169 (CA2 2012)
Massachusetts v. *Department of Health and Human Services*, 682 F. 3d 1 (CA1 2012)
Perry v. *Brown*, 671 F. 3d 1052 (CA9 2012)
Latta v. *Otter*, 771 F. 3d 456 (CA9 2014)
Baskin v. *Bogan*, 766 F. 3d 648 (CA7 2014)
Bishop v. *Smith*, 760 F. 3d 1070 (CA10 2014)
Bostic v. *Schaefer*, 760 F. 3d 352 (CA4 2014)
Kitchen v. *Herbert*, 755 F. 3d 1193 (CA10 2014)
DeBoer v. *Snyder*, 772 F. 3d 388 (CA6 2014)
Latta v. *Otter*, 779 F. 3d 902 (CA9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

United States District Court Decisions

Adams v. *Howerton*, 486 F. Supp. 1119 (CD Cal. 1980)
Citizens for Equal Protection, Inc. v. *Bruning*, 290 F. Supp. 2d 1004 (Neb. 2003)
Citizens for Equal Protection v. *Bruning*, 368 F. Supp. 2d 980 (Neb. 2005)
Wilson v. *Ake*, 354 F. Supp. 2d 1298 (MD Fla. 2005)
Smelt v. *County of Orange*, 374 F. Supp. 2d 861 (CD Cal. 2005)
Bishop v. *Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239 (ND Okla. 2006)

Massachusetts v. *Department of Health and Human Services*, 698 F. Supp. 2d 234 (Mass. 2010)

Gill v. *Office of Personnel Management*, 699 F. Supp. 2d 374 (Mass. 2010)

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

Dragovich v. *Department of Treasury*, 764 F. Supp. 2d 1178 (ND Cal. 2011)

Golinski v. *Office of Personnel Management*, 824 F. Supp. 2d 968 (ND Cal. 2012)

Dragovich v. *Department of Treasury*, 872 F. Supp. 2d 944 (ND Cal. 2012)

Windsor v. *United States*, 833 F. Supp. 2d 394 (SDNY 2012)

Pedersen v. *Office of Personnel Management*, 881 F. Supp. 2d 294 (Conn. 2012)

Jackson v. *Abercrombie*, 884 F. Supp. 2d 1065 (Haw. 2012)

Sevcik v. *Sandoval*, 911 F. Supp. 2d 996 (Nev. 2012)

Merritt v. *Attorney General*, 2013 WL 6044329 (MD La., Nov. 14, 2013)

Gray v. *Orr*, 4 F. Supp. 3d 984 (ND Ill. 2013)

Lee v. *Orr*, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

Kitchen v. *Herbert*, 961 F. Supp. 2d 1181 (Utah 2013)

Obergefell v. *Wymyslo*, 962 F. Supp. 2d 968 (SD Ohio 2013)

Bishop v. *United States ex rel. Holder*, 962 F. Supp. 2d 1252 (ND Okla. 2014)

Bourke v. *Beshear*, 996 F. Supp. 2d 542 (WD Ky. 2014)

Lee v. *Orr*, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

Bostic v. *Rainey*, 970 F. Supp. 2d 456 (ED Va. 2014)

De Leon v. *Perry*, 975 F. Supp. 2d 632 (WD Tex. 2014)

Tanco v. *Haslam*, 7 F. Supp. 3d 759 (MD Tenn. 2014)

DeBoer v. *Snyder*, 973 F. Supp. 2d 757 (ED Mich. 2014)

Henry v. *Himes*, 14 F. Supp. 3d 1036 (SD Ohio 2014)

Latta v. *Otter*, 19 F. Supp. 3d 1054 (Idaho 2014)

Geiger v. *Kitzhaber*, 994 F. Supp. 2d 1128 (Ore. 2014)
Evans v. *Utah*, 21 F. Supp. 3d 1192 (Utah 2014)
Whitewood v. *Wolf*, 992 F. Supp. 2d 410 (MD Pa. 2014)
Wolf v. *Walker*, 986 F. Supp. 2d 982 (WD Wis. 2014)
Baskin v. *Bogan*, 12 F. Supp. 3d 1144 (SD Ind. 2014)
Love v. *Beshear*, 989 F. Supp. 2d 536 (WD Ky. 2014)
Burns v. *Hickenlooper*, 2014 WL 3634834 (Colo., July 23, 2014)
Bowling v. *Pence*, 39 F. Supp. 3d 1025 (SD Ind. 2014)
Brenner v. *Scott*, 999 F. Supp. 2d 1278 (ND Fla. 2014)
Robicheaux v. *Caldwell*, 2 F. Supp. 3d 910 (ED La. 2014)
General Synod of the United Church of Christ v. *Resinger*, 12 F. Supp. 3d 790 (WDNC 2014)
Hamby v. *Parnell*, 56 F. Supp. 3d 1056 (Alaska 2014)
Fisher-Borne v. *Smith*, 14 F. Supp. 3d 695 (MDNC 2014)
Majors v. *Horne*, 14 F. Supp. 3d 1313 (Ariz. 2014)
Connolly v. *Jeanes*, ___ F. Supp. 3d ___, 2014 WL 5320642 (Ariz., Oct. 17, 2014)
Guzzo v. *Mead*, 2014 WL 5317797 (Wyo., Oct. 17, 2014)
Conde-Vidal v. *Garcia-Padilla*, 54 F. Supp. 3d 157 (PR 2014)
Marie v. *Moser*, ___ F. Supp. 3d ___, 2014 WL 5598128 (Kan., Nov. 4, 2014)
Lawson v. *Kelly*, 58 F. Supp. 3d 923 (WD Mo. 2014)
McGee v. *Cole*, ___ F. Supp. 3d ___, 2014 WL 5802665 (SD W. Va., Nov. 7, 2014)
Condon v. *Haley*, 21 F. Supp. 3d 572 (S. C. 2014)
Bradacs v. *Haley*, 58 F. Supp. 3d 514 (S. C. 2014)
Rolando v. *Fox*, 23 F. Supp. 3d 1227 (Mont. 2014)
Jernigan v. *Crane*, ___ F. Supp. 3d ___, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)
Campaign for Southern Equality v. *Bryant*, ___ F. Supp. 3d ___, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)
Inniss v. *Aderhold*, ___ F. Supp. 3d ___, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

Rosenbrahn v. *Daugaard*, 61 F. Supp. 3d 862 (S. D., 2015)

Caspar v. *Snyder*, ___ F. Supp. 3d ___, 2015 WL 224741 (ED Mich., Jan. 15, 2015)

Searcey v. *Strange*, 2015 U. S. Dist. LEXIS 7776 (SD Ala., Jan. 23, 2015)

Strawser v. *Strange*, 44 F. Supp. 3d 1206 (SD Ala. 2015)

Waters v. *Ricketts*, 48 F. Supp. 3d 1271 (Neb. 2015)

State Highest Court Decisions

Baker v. *Nelson*, 291 Minn. 310, 191 N. W. 2d 185 (1971)

Jones v. *Hallahan*, 501 S. W. 2d 588 (Ky. 1973)

Baehr v. *Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993)

Dean v. *District of Columbia*, 653 A. 2d 307 (D. C. 1995)

Baker v. *State*, 170 Vt. 194, 744 A. 2d 864 (1999)

Brause v. *State*, 21 P. 3d 357 (Alaska 2001) (ripeness)

Goodridge v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

Li v. *State*, 338 Or. 376, 110 P. 3d 91 (2005)

Cote-Whitacre v. *Department of Public Health*,446 Mass. 350, 844 N. E. 2d 623 (2006)

Lewis v. *Harris*, 188 N. J. 415, 908 A. 2d 196 (2006)

Andersen v. *King County*, 158 Wash. 2d 1, 138 P. 3d 963 (2006)

Hernandez v. *Robles*, 7 N. Y. 3d 338, 855 N. E. 2d 1 (2006)

Conaway v. *Deane*, 401 Md. 219, 932 A. 2d 571 (2007)

In re Marriage Cases, 43 Cal. 4th 757, 183 P. 3d 384 (2008)

Kerrigan v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

Strauss v. *Horton*, 46 Cal. 4th 364, 207 P. 3d 48 (2009)

Varnum v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)

Griego v. *Oliver*, 2014–NMSC–003, ___ N. M. ___, 316 P. 3d 865 (2013)

Garden State Equality v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

Ex parte State ex rel. Alabama Policy Institute, ___ So. 3d ___, 2015 WL 892752 (Ala., Mar. 3, 2015)

Appendix B to opinion of the Court

B

State Legislation and Judicial Decisions
Legalizing Same-Sex Marriage

Legislation

Del. Code Ann., Tit. 13, §129 (Cum. Supp. 2014)
D. C. Act No. 18–248, 57 D. C. Reg. 27 (2010)
Haw. Rev. Stat. §572 –1 (2006) and 2013 Cum. Supp.)
Ill. Pub. Act No. 98–597
Me. Rev. Stat. Ann., Tit. 19, §650–A (Cum. Supp. 2014)
2012 Md. Laws p. 9
2013 Minn Laws p. 404
2009 N. H. Laws p. 60
2011 N. Y Laws p. 749
2013 R. I. Laws p. 7
2009 Vt. Acts & Resolves p. 33
2012 Wash. Sess. Laws p. 199

Judicial Decisions

Goodridge v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

Kerrigan v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

Varnum v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)

Griego v. *Oliver*, 2014–NMSC–003, ___ N. M. ___, 316 P. 3d 865 (2013)

Garden State Equality v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the

past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

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

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

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante*, at 11, 23. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante*, at 19. I have no choice but to dissent.

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

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante*, at 4, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece* v. *Galloway*, 572 U. S. ___, ___ (2014) (slip op., at 8).

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante*, at 3. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ante*, at 4; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 13).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbi-

ans. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

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

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

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between

a man and a woman." *Ante*, at 6. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§78–79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." *Windsor*, 570 U. S., at ___ (slip op., at 17) (quoting *In re Burrus*, 136 U. S. 586, 593–594 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer* v. *Snyder*, 772 F. 3d 388, 396–399 (CA6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones* v. *Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the

maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy* v. *Ramsey*, 114 U. S. 15, 45 (1885), which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888). We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); see *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki* v. *Redhail*, 434 U. S. 374, 386 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court.

Loving, 388 U. S., at 6–7.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante*, at 6–7. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante*, at 6.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker* v. *Nelson*, 409 U. S. 810 (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has

shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based

almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante*, at 12. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* v. *New York*, 198 U. S. 45. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante*, at 3, 14. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno* v. *Flores*, 507 U. S. 292, 302 (1993). The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder* v. *Massachusetts*, 291

U. S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott* v. *Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." *Id.,* at 450. In a dissent that has outlasted the majority opinion, Justice Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical

opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.*, at 621.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner* v. *New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U. S., at 60, 61. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.,* at 58.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.,* at 72 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.,* at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embody-

ing them conflict with the Constitution." *Id.*, at 75–76.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a . . . legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963); see *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) ("we do not sit as a super-legislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). Our precedents have required that implied fundamental rights be "objec-

tively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U. S., at 720–721 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, *e.g., District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 72 (2009); *Flores*, 507 U. S., at 303; *United States* v. *Salerno*, 481 U. S. 739, 751 (1987); *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); see also *id.,* at 544 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel* v. *Granville*, 530 U. S. 57, 96–101 (2000) (KENNEDY, J., dissenting) (consulting "'[o]ur Nation's history, legal traditions, and practices'" and concluding that "[w]e owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting *Glucksberg*, 521 U. S., at 721)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante*, at 18. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins*, 503 U. S., at 125, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore*, 431 U. S., at 504, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identify-

ing fundamental rights, *ante*, at 10–11, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante*, at 3, 4, 6, 28. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner* v. *Safley*, 482 U. S. 78, 95 (1987); *Zablocki*, 434 U. S., at 383; see *Loving*, 388 U. S., at 12. These cases

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

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post*, at 11–12, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante*, at 11.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor*, 570 U. S., at ___ (ALITO, J., dissenting) (slip op., at 8) ("What Windsor and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a

single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante*, at 12. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold*, 381 U. S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.*, at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id.,* at 485. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454, n. 10 (1972) (internal quotation marks omitted); see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence* v. *Texas*, 539 U. S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneli-

ness" by the laws challenged in these cases—no one. *Ante*, at 28. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.,* at 542. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.*, at 546.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 35–37 (1973); *post*, at 9–13 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 18 (quoting 521 U. S., at 721). It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner* v. *New York*, 198 U. S. 45. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante*, at 1–2. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante*, at 12. This free-wheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante*, at 10, 11. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante*, at 19. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences

adopted in *Lochner*. See 198 U. S., at 61 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante*, at 25. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

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

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante*, at 13, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their

children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, at 15, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, at 22, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L. J. 1977 (2015).

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

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante*, at 27. This argument again echoes *Lochner*, which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U. S., at 57.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol'y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante*, at 11. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The

past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 20. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

> "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 19.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 22. Yet the majority fails to provide even a single sentence explaining how the Equal

Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 197 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U. S., at 585 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the

people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante*, at 7–9.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. *Ante*, at 9, 10, 23. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante*, at 19. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante*, at 8. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unre-

solved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette* v. *BAMN*, 572 U. S. ___, ___ –___ (2014) (slip op., at 16–17).

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

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." *Post,* at 2–3 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding

this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for

religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*, at 27. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante*, at 19. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ante*, at 19. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring defini-

tion of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante*, at 17, 19, 22, 25. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post*, at 6–7 (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante*, at 19.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

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

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

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14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

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

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance.

Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.[1] Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of govern-

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[1] Brief for Respondents in No. 14–571, p. 14.

ment is supposed to work.[2]

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts,"[3] denying "Full Faith and Credit" to the "public Acts" of other States,[4] prohibiting the free exercise of religion,[5] abridging the freedom of speech,[6] infringing the right to keep and bear arms,[7] authorizing unreasonable searches and seizures,[8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people"[9] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

> "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."[10]

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[2] Accord, *Schuette* v. *BAMN*, 572 U. S. ___, ___–___ (2014) (plurality opinion) (slip op., at 15–17).

[3] U. S. Const., Art. I, §10.

[4] Art. IV, §1.

[5] Amdt. 1.

[6] *Ibid.*

[7] Amdt. 2.

[8] Amdt. 4.

[9] Amdt. 10.

[10] *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 16) (internal quotation marks and citation omitted).

> "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."[11]

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.[12] We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.[13] That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its

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[11] *Id.,* at ___ (slip op., at 17).

[12] See *Town of Greece* v. *Galloway*, 572 U. S. ___, ___–___ (2014) (slip op., at 7–8).

[13] *Ante*, at 10.

dimensions . . . . "[14] One would think that sentence would continue: ". . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps ". . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[15] The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries."[16] Thus, rather than focusing on *the People's* understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, *in the majority's view*, prohibit States from defining marriage as an institution consisting of one man and one woman.[17]

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

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section

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[14] *Ante*, at 11.
[15] *Ibid*.
[16] *Ante*, at 10–11.
[17] *Ante,* at 12–18.

of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers[18] who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans[19]), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that

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[18] The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 1–5.

[19] See Pew Research Center, America's Changing Religious Landscape 4 (May 12, 2015).

every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.[20] They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago,[21] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[22] Of course the opinion's showy profundities are often

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[20] *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003).

[21] *Windsor*, 570 U. S., at ___ (ALITO, J., dissenting) (slip op., at 7).

[22] If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that

profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[23] (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[24] (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right."[25] (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court

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allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

[23] *Ante*, at 13.

[24] *Ante,* at 19.

[25] *Ibid*.

really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

* * *

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments."[26] With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

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[26]The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

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STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our

Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald* v. *Chicago*, 561 U. S. 742, 811–812 (2010) (THOMAS, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, §1. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental rights'" protected by that document. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 953, 965 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part) (quoting *Griswold* v. *Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue

that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of this Court, *ante,* at 25, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.[1]

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

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[1] The majority states that the right it believes is "part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Ante,* at 19. Despite the "synergy" it finds "between th[ese] two protections," *ante*, at 20, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

A

1

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

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See *Davidson* v. *New Orleans*, 96 U. S. 97, 101–102 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due proces of the common law." *Id.,* at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, *e.g., ibid.*, William Blackstone referred to this provision as protecting the "absolute rights

of every Englishman." 1 Blackstone 123. And he formulated those absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." *Id.,* at 125. He defined "the right of personal liberty" as "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.*, at 125, 130.[2]

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property."[3] State

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[2]The seeds of this articulation can also be found in Henry Care's influential treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of *England* . . . principally regards and taketh Care of," as "*Life*, *Liberty* and *Estate*," and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free-born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, *e.g., id.,* at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, *e.g., id.,* at 185, 200.

[3]Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.,* at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.,* at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Mass. Const., pt. I, Art. XII (1780), in 3 *id.,* at 1891; see also

decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.,* at 444–445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.,* at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado* v. *California*, 110 U. S. 516, 534–535 (1884). Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." *Ibid.* And this

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N. H. Const., pt. I, Art. XV (1784), in 4 *id.,* at 2455.

Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn* v. *Illinois*, 94 U. S. 113 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.,* at 123–124, and implicitly rejected the dissent's argument that "'liberty'" encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id.,* at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

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

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, §4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See

id., §97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." *Id.,* §22, at 13.[4]

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that "Liberty in the *State of Nature*" was the "inherent natural Right" "of each Man" "to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of," but that, "in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C.

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[4] Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature" and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained by human laws." 1 Blackstone 121–122. And in a "treatise routinely cited by the Founders," *Zivotofsky* v. *Kerry*, *ante,* at 5 (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." *Id.,* at 147–148.

Hyneman & D. Lutz, American Political Writing During the Founding Era 1760–1805, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L. J. 907, 918–919 (1993). As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power." J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the *absence of restraint*." R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

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

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They

have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader

definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between parents and children." Locke §77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall eds. 2007) (concluding "that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving* v. *Virginia*, 388 U. S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.,* at 2–3.[5] They were each sen-

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[5] The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between "'freeborne English women'" and "'Negro Sla[v]es'" was passed as part of the very act that authorized lifelong

tenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.,* at 3.[6] In a similar vein, *Zablocki* v. *Redhail*, 434 U. S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support obligations, *id.,* at 387; see *id.,* at 377–378. And *Turner* v. *Safley*, 482 U. S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.,* at 82. In *none* of those cases were individuals denied solely governmental

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slavery in the colony. *Id.,* at 19–20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire "to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world." *Id.,* at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

[6]The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment's Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving* v. *Virginia*, O.T. 1966, No. 395, pp. 12–16.

recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante,* at 2. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante,* at 19,—better informed, we must assume, than that of the people who ratified the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,'" *Reid* v. *Covert*, 354 U. S. 1, 9 (1957) (plurality opinion), not "Thou shalt provides."

III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke §99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.,* §22, at 13; see also Hey §§52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can

adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents of a State would agree. See Locke §98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14–571, pp. 1a–7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

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

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established

religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.,* at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.,* at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U. S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e.g.,* Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*; Conn. Gen. Stat. §52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh-Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.,* at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante,* at 27. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious

practice.[7]

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

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. *Ante,* at 3, 13, 26, 28.[8] The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal"

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[7] Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §20–60 (1960).

[8] The majority also suggests that marriage confers "nobility" on individuals. *Ante,* at 3. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible

understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

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

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.[1] The question in

[1] I use the phrase "recognize marriage" as shorthand for issuing mar-

these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U. S. 701, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (ALITO, J., dissenting) (slip op., at 7). Indeed:

> "In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass.

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riage licenses and conferring those special benefits and obligations provided under state law for married persons.

309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

"What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *Id.,* at ___ (slip op., at 7–8) (footnote omitted).

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States

encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.[2] This de-

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[2] See, *e.g.,* Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/

velopment undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

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

As I wrote in *Windsor*:

> "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.
>
> "We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some

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nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmartial Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf.

> time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.
>
> "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials." 570 U. S., at ___ (dissenting opinion) (slip op., at 8–10) (citations and footnotes omitted).

III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E.g.*, *ante*, at 11–13. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante*, at 26–27. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

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

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

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that

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

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

Public Health

§ 4201. Disposition of remains; responsibility therefor. 1. As used in this section, the following terms shall have the following meanings, unless the context otherwise requires:

(a) "Cremation" means the incineration of human remains.

(b) "Disposition" means the care, disposal, transportation, burial, cremation or embalming of the body of a deceased person, and associated measures.

(c) "Domestic partner" means a person who, with respect to another person:

(i) is formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of the United States or any state, local or foreign jurisdiction, or registered as the domestic partner of the person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction; or

(ii) is formally recognized as a beneficiary or covered person under the other person's employment benefits or health insurance; or

(iii) is dependent or mutually interdependent on the other person for support, as evidenced by the totality of the circumstances indicating a mutual intent to be domestic partners including but not limited to: common ownership or joint leasing of real or personal property; common householding, shared income or shared expenses; children in common; signs of intent to marry or become domestic partners under subparagraph (i) or (ii) of this paragraph; or the length of the personal relationship of the persons.

Each party to a domestic partnership shall be considered to be the domestic partner of the other party. "Domestic partner" shall not include a person who is related to the other person by blood in a manner that would bar marriage to the other person in New York state. "Domestic partner" shall also not include any person who is less than eighteen years of age or who is the adopted child of the other person or who is related by blood in a manner that would bar marriage in New York state to a person who is the lawful spouse of the other person.

(d) "Person" means a natural person eighteen years of age or older.

2. (a) The following persons in descending priority shall have the right to control the disposition of the remains of such decedent:

(i) the person designated in a written instrument executed pursuant to the provisions of this section;

(ii) the decedent's surviving spouse;

(ii-a) the decedent's surviving domestic partner;

(iii) any of the decedent's surviving children eighteen years of age or older;

(iv) either of the decedent's surviving parents;

(v) any of the decedent's surviving siblings eighteen years of age or older;

(vi) a guardian appointed pursuant to article seventeen or seventeen-A of the surrogate's court procedure act or article eighty-one of the mental hygiene law;

(vii) any person eighteen years of age or older who would be entitled to share in the estate of the decedent as specified in section 4-1.1 of the estates, powers and trusts law, with the person closest in relationship having the highest priority;

(viii) a duly appointed fiduciary of the estate of the decedent;

(ix) a close friend or relative who is reasonably familiar with the decedent's wishes, including the decedent's religious or moral beliefs, when no one higher on this list is reasonably available, willing, or competent to act, provided that such person has executed a written statement pursuant to subdivision seven of this section; or

(x) a chief fiscal officer of a county or a public administrator appointed pursuant to article twelve or thirteen of the surrogate's court procedure act, or any other person acting on behalf of the decedent, provided that such person has executed a written statement pursuant to subdivision seven of this section.

(b) If a person designated to control the disposition of a decedent's remains, pursuant to this subdivision, is not reasonably available, unwilling or not competent to serve, and such person is not expected to become reasonably available, willing or competent, then those persons of equal priority and, if there be none, those persons of the next succeeding priority shall have the right to control the disposition of the decedent's remains.

(c) The person in control of disposition, pursuant to this section, shall faithfully carry out the directions of the decedent to the extent lawful and practicable, including consideration of the financial capacity of the decedent's estate and other resources made available for disposition of the remains. The person in control of disposition shall also dispose of the decedent in a manner appropriate to the moral and individual beliefs and wishes of the decedent provided that such beliefs and wishes do not conflict with the directions of the decedent. The person in control of disposition may seek to recover any costs related to the disposition from the fiduciary of the decedent's estate in accordance with section eighteen hundred eleven of the surrogate's court procedure act.

(d) No funeral director, undertaker, embalmer or no person with an interest in, or who is an employee of any funeral firm, cemetery organization or business operating a crematory, columbarium or any other business, who also controls the disposition of remains in accordance with this section, shall receive compensation or otherwise receive financial benefit for disposing of the remains of a decedent.

(e) No person who: (1) at the time of the decedent's death, was the subject of an order of protection protecting the decedent; or (2) has been arrested or charged with any crime set forth in article one hundred twenty-five of the penal law as a result of any action allegedly causally related to the death of the decedent shall have the right to control the disposition of the remains of the decedent. However, the application of this paragraph in a particular case may be waived or modified in the interest of justice by order of (i) the court that issued the order of protection or in which the criminal action against the person is pending, or a superior court in which an action or proceeding under the domestic relations law or the family court act between the person and the decedent was pending at the time of the decedent's death, or (ii) if proceeding in that court would cause inappropriate delay, a court in a special proceeding.

3. The written instrument referred to in paragraph (a) of subdivision two of this section may be in substantially the following form, and must be signed and dated by the decedent and the agent and properly witnessed:

APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS

I, _____
(Your name and address)
being of sound mind, willfully and voluntarily make known my desire that, upon my death, the disposition of my remains shall be controlled by _____ .
(name of agent)
With respect to that subject only, I hereby appoint such person as my agent with respect to the disposition of my remains.

SPECIAL DIRECTIONS:

Set forth below are any special directions limiting the power granted to my agent as well as any instructions or wishes desired to be followed in the disposition of my remains:

_____
_____
_____
_____
_____

Indicate below if you have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law for funeral merchandise or service in advance of need:

[] No, I have not entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

[] Yes, I have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

_____
(Name of funeral firm with which you entered into a pre-funded pre-need funeral agreement to provide merchandise and/or services)

AGENT:
Name: _____
Address: _____
Telephone Number: _____

SUCCESSORS:

If my agent dies, resigns, or is unable to act, I hereby appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

1. First Successor
Name: _____
Address: _____
Telephone Number: _____

2. Second Successor
Name: _____
Address: _____
Telephone Number: _____

DURATION:

This appointment becomes effective upon my death.

PRIOR APPOINTMENT REVOKED:

I hereby revoke any prior appointment of any person to control the disposition of my remains.

Signed this day of , .

_____
(Signature of person making the appointment)

Statement by witness (must be 18 or older)

I declare that the person who executed this document is personally known to me and appears to be of sound mind and acting of his or her free will. He or she signed (or asked another to sign for him or her) this document in my presence.

Witness 1: _____
(signature)

Address: _____

Witness 2: _____
(signature)

Address: _____

ACCEPTANCE AND ASSUMPTION BY AGENT:

1. I have no reason to believe there has been a revocation of this appointment to control disposition of remains.

2. I hereby accept this appointment.

Signed this day of , .

_____
(Signature of agent)

4. (a) In the absence of a written instrument made pursuant to subdivision three of this section, the designation of a person for the disposition of one's remains or directions for the disposition of one's remains in a will executed pursuant to the laws of the state of New York prior to the effective date of this section, or otherwise executed pursuant to the laws of a jurisdiction outside the state of New York, shall be: (i) considered reflective of the intent of the decedent with respect to the disposition of the decedent's remains; and (ii) superseded by a written instrument subsequently executed pursuant to subdivision three of this section, or by any other subsequent act by the decedent evidencing a specific intent to supersede the designation or direction in such a will with respect to the disposition of the decedent's remains. All actions taken reasonably and in good faith based upon such authorizations and directions regarding the disposition of one's remains in such a will shall be deemed valid regardless of whether such a will is later probated or subsequently declared invalid.

(b) In the absence of a written instrument made pursuant to subdivision three of this section, the designation of a person for the disposition of one's remains or directions for the disposition of one's remains in a will executed pursuant to the laws of the state of New York on or after the effective date of this section, shall be considered a reflection of the intent of the decedent with respect to the disposition of the decedent's remains, provided that the person who represents that he or she is entitled to control the disposition of remains of the decedent has complied with subdivision five and paragraph (a) of subdivision seven of this section and signed a written statement in accordance with paragraph (b) of subdivision seven of this section.

4-a. A written instrument under this section may limit the disposition of remains agent's authority to consent to organ or tissue donation or designate another person to do so, under article forty-three of this chapter. Failure to state wishes or instructions shall not be construed to imply a wish not to donate.

5. A written instrument executed under this section shall be revoked upon the execution by the decedent of a subsequent written instrument, or by any other subsequent act by the decedent evidencing a specific

intent to revoke the prior written instrument and directions on disposition and agent designations in a will made pursuant to subdivision three of this section shall be superseded by a subsequently executed will or written instrument made pursuant to this section, or by any other subsequent act of the decedent evidencing a specific intent to supersede the direction or designation. The designation of the decedent's spouse or domestic partner as an agent in control of disposition of remains shall be revoked upon the divorce or legal separation of the decedent and spouse, or termination of the domestic partnership, unless the decedent specified in writing otherwise.

6. A person acting reasonably and in good faith, shall not be subject to any civil liability for:

(a) representing himself or herself to be the person in control of a decedent's disposition;

(b) disposing of a decedent's remains if done with the reasonable belief that such disposal is consistent with this section; or

(c) identifying a decedent.

7. No cemetery organization, business operating a crematory or columbarium, funeral director, undertaker, embalmer, or funeral firm shall be held liable for actions taken reasonably and in good faith to carry out the written directions of a decedent as stated in a will or in a written instrument executed pursuant to this section. No cemetery organization, business operating a crematory or columbarium, funeral director, undertaker, embalmer or funeral firm shall be held liable for actions taken reasonably and in good faith to carry out the directions of a person who represents that he or she is entitled to control of the disposition of remains, provided that such action is taken only after requesting and receiving written statement that such person:

(a) is the designated agent of the decedent designated in a will or written instrument executed pursuant to this section; or

(b) that he or she has no knowledge that the decedent executed a written instrument pursuant to this section or a will containing directions for the disposition of his or her remains and that such person is the person having priority under subdivision two of this section.

8. Every dispute relating to the disposition of the remains of a decedent shall be resolved by a court of competent jurisdiction pursuant to a special proceeding under article four of the civil practice law and rules. No person providing services relating to the disposition of the remains of a decedent shall be held liable for refusal to provide such services, when control of the disposition of such remains is contested, until such person receives a court order or other form of notification signed by all parties or their legal representatives to the dispute establishing such control.

9. This section does not supersede, alter or abridge any provision of section four hundred fifty-three of the general business law. In the event of a conflict or ambiguity, the provisions of section four hundred fifty-three of the general business law shall govern.

10. This section does not supersede, alter or abridge any provision of article forty-three of this chapter including, but not limited to, the persons authorized to execute an anatomical gift pursuant to section forty-three hundred one of this chapter.

11. This section does not diminish the enforceability of a contract or agreement in which a person controlling the disposition of the remains of a decedent agrees to pay for goods or services in connection with the disposition of such remains.

Matter of Brooke S.B. v Elizabeth A.C.C.

2016 NY Slip Op 05903 [28 NY3d 1]

August 30, 2016

Abdus-Salaam, J.

Court of Appeals

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, November 2, 2016

[*1]

In the Matter of Brooke S.B., Respondent,
v
Elizabeth A.C.C., Respondent. R. Thomas Rankin, Esq., Attorney for the Child, Appellant.

In the Matter of Estrellita A., Respondent, v Jennifer L.D., Appellant.

Argued June 2, 2016; decided August 30, 2016

Matter of Brooke S.B. v Elizabeth A.C.C., 129 AD3d 1578, reversed.

Matter of Estrellita A. v Jennifer L.D., 123 AD3d 1023, affirmed.

{**28 NY3d at 13} OPINION OF THE COURT

Abdus-Salaam, J.

These two cases call upon us to assess the continued vitality of the rule promulgated in *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991])—namely that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child's "parent" for purposes of standing to seek custody or visitation under Domestic Relations Law § 70 (a), notwithstanding their "established relationship with the child" {**28 NY3d at 14}(77 NY2d at 655). Petitioners in these cases, who similarly lack any biological or adoptive connection to the subject children, argue that they should have standing to seek custody and visitation pursuant to Domestic Relations Law § 70 (a). We agree that, in light of more recently delineated legal principles, the definition of "parent" established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships. Accordingly, today, we overrule *Alison D.* and hold that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.

I.

Matter of Brooke S.B. v Elizabeth A.C.C.

Petitioner and respondent entered into a relationship in 2006 and, one year later, announced their engagement.[FN1] At the time, however, this was a purely symbolic gesture; same-sex couples could not legally marry in New York. Petitioner and respondent lacked the resources to travel to another jurisdiction to enter into a legal arrangement comparable to marriage, and it was then unclear whether New York would recognize an out-of-state same-sex union.

Shortly thereafter, the couple jointly decided to have a child and agreed that respondent would carry the child. In 2008, respondent became pregnant through artificial insemination. During respondent's pregnancy, petitioner regularly attended prenatal doctor's appointments, remained involved in respondent's care, and joined respondent in the emergency [*2]room when she had a complication during the pregnancy. Respondent went into labor in June 2009. Petitioner stayed by her side and, when the subject child, a baby boy, was born, petitioner cut the umbilical cord. The couple gave the child petitioner's last name.

The parties continued to live together with the child and raised him jointly, sharing in all major parental responsibilities. Petitioner stayed at home with the child for a year while respondent returned to work. The child referred to petitioner as "Mama B."

{**28 NY3d at 15}In 2010, the parties ended their relationship. Initially, respondent permitted petitioner regular visits with the child. In late 2012, however, petitioner's relationship with respondent deteriorated and, in or about July 2013, respondent effectively terminated petitioner's contact with the child.

Subsequently, petitioner commenced this proceeding seeking joint custody of the child and regular visitation. Family Court appointed an attorney for the child. That attorney determined that the child's best interests would be served by allowing regular visitation with petitioner.

Respondent moved to dismiss the petition, asserting that petitioner lacked standing to seek visitation or custody under Domestic Relations Law § 70 as interpreted in *Alison D.* because, in the absence of a biological or adoptive connection to the child, petitioner was not a "parent" within the meaning of the statute. Petitioner and the attorney for the child opposed the motion, contending that, in light of the legislature's enactment of the Marriage Equality Act (*see* L 2011, ch 95; Domestic Relations Law § 10-a) and other changes in the law, *Alison D.* should no longer be followed. They further argued that petitioner's long-standing parental relationship with the child conferred standing to seek custody and visitation under principles of equitable estoppel.

After hearing argument on the motion, Family Court dismissed the petition. While commenting on the "heartbreaking" nature of the case, Family Court noted that petitioner did not adopt the child and

therefore granted respondent's motion to dismiss on constraint of *Alison D*. The attorney for the child appealed.[FN2]

The Appellate Division unanimously affirmed (*see* 129 AD3d 1578, 1578-1579 [4th Dept 2015]). The Court concluded that, because petitioner had not married respondent, had not adopted the child, and had no biological relationship to the child, *Alison D.* prohibited Family Court from ruling that petitioner had standing to seek custody or visitation (*see id.* at 1579). We granted the attorney for the child leave to appeal (*see* 26 NY3d 901 [2015]).

Matter of Estrellita A. v Jennifer L.D.

Petitioner and respondent entered into a relationship in 2003 and moved in together later that year. In 2007, petitioner and {**28 NY3d at 16} respondent registered as domestic partners, and thereafter, they agreed to have a child. The couple jointly decided that respondent would bear the child and that the donor should share petitioner's ethnicity. In February 2008, respondent became pregnant through artificial insemination. During the pregnancy, petitioner attended medical appointments with respondent. In November 2008, respondent gave birth to a baby girl. Petitioner cut the umbilical cord. The couple agreed that the child should call respondent "Mommy" and petitioner "Mama."

The child resided with the couple in their home and, over the next three years, the parties shared a complete range of parental responsibilities. However, in May 2012, petitioner and respondent ended their relationship, and petitioner moved out in September 2012. Afterward, petitioner continued to have contact with the child.

In October 2012, respondent commenced a proceeding in Family Court seeking child support from petitioner. Petitioner denied liability. While the support case was pending, petitioner filed a petition in Family Court that, as later amended, sought visitation with the child. The court appointed an attorney for the child.

After a hearing, Family Court granted respondent's child support petition and remanded the matter to a support magistrate to determine petitioner's support obligation. The court held that "the uncontroverted facts establish[ed]" that petitioner was "a parent" to the child and, as such, "chargeable with the support of the child." Petitioner then amended her visitation petition to indicate that she "ha[d] been adjudicated the parent" of the child and therefore was a legal parent for visitation purposes.

Thereafter, respondent moved to dismiss the visitation petition on the ground that petitioner did not have standing to seek custody or visitation under Domestic Relations Law § 70 as interpreted in *Alison D*. The attorney for the child supported visitation and opposed respondent's motion to dismiss. Petitioner also opposed respondent's motion to dismiss, asserting that *Alison D.* and our decision in *Debra H. v Janice R.* (14 NY3d 576 [2010]) did not foreclose a finding of standing based on judicial

estoppel, as the prior judgment in the support proceeding determined that petitioner was a legal parent to the subject child. Respondent contended that the prerequisites for judicial estoppel had not been met. {**28 NY3d at 17}

Family Court denied respondent's motion to dismiss the visitation petition (*see* 40 Misc 3d 219, 219-225 [Fam Ct, Suffolk County 2013]). Citing *Alison D.* and *Debra H.*, the court acknowledged that petitioner did not have standing to petition for visitation based on equitable estoppel or her general status as a de facto parent (*see id.* at 225). However, given respondent's successful support petition, the court concluded that the doctrine of judicial estoppel conferred standing on petitioner to request visitation with the child (*see id.* at 225). The court distinguished *[*3]Alison D.* and *Debra H.*, reasoning that, in those cases, the Court "did not address the situation . . . where one party has asserted inconsistent positions" (*id.*). Here, in light of respondent's initial claim that petitioner was the child's legal parent in the support proceeding, the court "ma[de] a finding that respondent [wa]s judicially estopped from asserting that petitioner [wa]s not a parent based upon her sworn petition and testimony in a prior court proceeding where she took a different position because her interest in that case was different" (*id.*). Respondent filed an interlocutory appeal, which was dismissed by the Appellate Division.

Subsequently, Family Court held a hearing on the petition. The court found that petitioner's regular visitation and consultation on matters of import with respect to the child would serve the child's best interests. Respondent appealed.

Family Court's order was unanimously affirmed (*see* 123 AD3d 1023, 1023-1027 [2d Dept 2014]). The Appellate Division determined that, while Domestic Relations Law § 70, as interpreted in *Alison D.*, confers standing to seek custody or visitation only on a biological or adoptive parent, *Alison D.* does not preclude recognition of standing based upon the doctrine of judicial estoppel. Under that doctrine, the Court found, "a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed" (*id.* at 1026 [internal quotation marks and citations omitted]). The Appellate Division agreed with Family Court that the requirements of judicial estoppel had been met: respondent's position in the support proceeding was inconsistent with her position in the visitation proceeding; respondent had won a favorable judgment based on her earlier position; and allowing respondent to maintain an inconsistent position in the visitation proceeding would prejudice petitioner (*see id.* at 1026). Accordingly, the {**28 NY3d at 18} Appellate Division concluded that respondent was judicially estopped from denying petitioner's standing as a "parent" of the child within the meaning of Domestic Relations Law § 70 (*see id.* at 1026-1027). We granted respondent leave to appeal (*see* 26 NY3d 901 [2015]).

II.

Domestic Relations Law § 70 provides:

> "Where a minor child is residing within this state, *either parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the *best interest of the child, and what will best promote its welfare and happiness*, and make award accordingly"[*4] (Domestic Relations Law § 70 [a] [emphases added]).

Only a "parent" may petition for custody or visitation under Domestic Relations Law § 70, yet the statute does not define that critical term, leaving it to be defined by the courts.[FN3]

In *Alison D.* (77 NY2d 651), we supplied a definition. In that case, Alison D. and Virginia M. were in a long-term relationship and decided to have a child (*see Alison D.*, 77 NY2d at 655). They agreed that Virginia M. would carry the baby and that they would jointly raise the child, sharing parenting responsibilities (*see id.*). After the child was born, Alison D. acted as a parent in all major respects, providing financial, emotional and practical support (*see id.*). Even after the couple ended their relationship and moved out of their shared home, Alison D. continued to regularly visit the child until he was about six years old, at which point Virginia M. terminated contact between them (*see id.*). {**28 NY3d at 19}

Alison D. petitioned for visitation pursuant to Domestic Relations Law § 70 (*see id.* at 656). In support of the petition, Alison D. argued that, although Virginia M. was concededly a fit parent, Alison D. nonetheless had standing to seek visitation with the child (*see id.*). The lower courts dismissed Alison D.'s petition for lack of standing, ruling that only a biological parent—and not a de facto parent—is a legal "parent" with standing to seek visitation under Domestic Relations Law § 70 (*see id.*; *see also Matter of Alison D. v Virginia M.*, 155 AD2d 11, 13-16 [2d Dept 1990]).

We affirmed the lower courts' dismissal of Alison D.'s petition for lack of standing (*see Alison D.*, 77 NY2d at 655, 657). We decided that the word "parent" in Domestic Relations Law § 70 should be interpreted to preclude standing for a de facto parent who, under a theory of equitable estoppel, might otherwise be recognized as the child's parent for visitation purposes (*see id.* at 656-657). Specifically, we held that "a biological stranger to a child who is properly in the custody of his biological mother" has no "standing to seek visitation with the child under Domestic Relations Law § 70" (*id.* at 654-655).

We rested our determination principally on the need to preserve the rights of biological parents (*see id.* at 656-657). Specifically, we reasoned that, "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child" (*id.* at 656). We therefore determined that the statute should not be read to permit a de facto parent to seek visitation of

a child in a manner that "would necessarily impair the parents' right to custody and control" (*id.* at 656-657).

Additionally, we suggested that, because the legislature expressly allowed certain [*5]non-parents —namely, grandparents and siblings—to seek custody or visitation (*see* Domestic Relations Law §§ 71-72), it must have intended to exclude de facto parents or parents by estoppel (*see Alison D.*, 77 NY2d at 657). And so, because Alison D. had no biological or adoptive connection to the subject child, she had no standing to seek visitation and "no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interests" (*id.*).

Judge Kaye dissented on the ground that a person who "stands in loco parentis" should have standing to seek visitation under Domestic Relations Law § 70 (*see id.* at 657-662 {**28 NY3d at 20} [Kaye, J., dissenting]). Observing that the Court's decision would "fall[ ] hardest" on the millions of children raised in nontraditional families—including families headed by same-sex couples, unmarried opposite-sex couples, and stepparents—the dissent argued that the majority had "turn[ed] its back on a tradition of reading section 70 so as to promote the welfare of the children" (*id.* at 658-660). The dissent asserted that, because Domestic Relations Law § 70 did not define "parent"—and because the statute made express reference to the "best interest of the child"—the Court was free to craft a definition that accommodated the welfare of the child (*id.*). According to the dissent, well-established principles of equity—namely, "Supreme Court's equitable powers that complement" Domestic Relations Law § 70—supplied jurisdiction to act out of "concern for the welfare of the child" (*id.* at 660; *see Matter of Bachman v Mejias*, 1 NY2d 575, 581 [1956]; *Finlay v Finlay*, 240 NY 429, 433-434 [1925]; *Langerman v Langerman*, 303 NY 465, 471 [1952]).

At the same time, Judge Kaye in her dissent recognized that

> "there must be some limitation on who can petition for visitation. Domestic Relations Law § 70 specifies that the person must be the child's 'parent,' and the law additionally recognizes certain rights of biological and legal parents. . . .
>
> "It should be required that the relationship with the child came into being with the consent of the biological or legal parent" (*Alison D.*, 77 NY2d at 661-662 [Kaye, J., dissenting] [citations omitted]).

The dissent also noted that a properly constituted test should likely include other factors as well, to ensure that all relevant interests are protected (*see id.* at 661-662 [Kaye, J., dissenting]). Judge Kaye further stated in the dissent that she would have remanded *Alison D.* so that the lower court could engage in a two-part inquiry: first, to determine whether Alison D. stood "in loco parentis" under whatever test the Court devised; and then, "if so, whether it is in the child's best interest to allow her the visitation rights she claims" (*id.* at 662).

In 1991, same-sex partners could not marry in this state. Nor could a biological parent's unmarried partner adopt the child. As a result, a partner in a same-sex relationship not biologically related to a child was entirely precluded from obtaining standing to seek custody or visitation of that child under our definition of "parent" supplied in *Alison D.*

{**28 NY3d at 21}Four years later, in *Matter of Jacob* (86 NY2d 651 [1995]), we had occasion to decide whether "the unmarried partner of a child's biological mother, whether heterosexual or [*6]homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption" (*id.* at 656). We held that the adoptions sought in *Matter of Jacob* —"one by an unmarried heterosexual couple, the other by the lesbian partner of the child's mother"— were "fully consistent with the adoption statute" (*id.*). We reasoned that, while the adoption statute "must be strictly construed," our "primary loyalty must be to the statute's legislative purpose—the child's best interest" (*id.* at 657-658). The outcome in *Matter of Jacob* was to confer standing to seek custody or visitation upon unmarried, non-biological partners—including a partner in a same-sex relationship—who adopted the child, even under our restrictive definition of "parent" set forth in *Alison D.* (*id.* at 659).

Thereafter, in *Matter of Shondel J. v Mark D.* (7 NY3d 320 [2006]), we applied a similar analysis, holding that a "man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment" (*id.* at 324). We based our decision on "the best interests of the child," emphasizing "[t]he potential damage to a child's psyche caused by suddenly ending established parental support" (*id.* at 324, 330).[FN4]

Despite these intervening decisions that sought a means to take into account the best interests of the child in adoption and support proceedings, we declined to revisit *Alison D.* when confronted with a nearly identical situation almost 20 years later. *Debra H.*, as did *Alison D.*, involved an unmarried same-sex couple. Petitioner alleged that they agreed to have a child, and to that end, Janice R. was artificially inseminated and bore the child. Debra H. never adopted the child. After the couple ended their relationship, Debra H. petitioned for custody and visitation (*Debra H.*, 14 NY3d at 586-588). We declined to expand the definition of "parent" for purposes of Domestic Relations{**28 NY3d at 22} Law § 70, noting that "*Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups" (*id.* at 593).

Nonetheless, in *Debra H.*, we arrived at a different result than in *Alison D*. Ultimately, we invoked the common-law doctrine of comity to rule that, because the couple had entered into a civil union in Vermont prior to the child's birth—and because the union afforded Debra H. parental status under Vermont law—her parental status should be recognized under [*7]New York law as well (*see id.* at 598-601). Seeing no obstacle in New York's public policy or comity doctrine to the recognition of the

non-biological mother's standing, we declared that "New York will recognize parentage created by a civil union in Vermont," thereby granting standing to Debra H. to petition for custody and visitation of the subject child (*id.* at 600-601).

In a separate discussion, we also "reaffirm[ed] our holding in *Alison D.*" (*id.* at 589). We acknowledged the apparent tension in our decision to authorize parentage by estoppel in the support context (*see Shondel J.*, 7 NY3d 320) and yet deny it in the visitation and custody context (*see Alison D.*, 77 NY2d 651), but we decided that this incongruity did not fatally undermine *Alison D.* (*see Debra H.*, 14 NY3d at 592-593).

Chief Judge Lippman and Judge Ciparick concurred in the result, agreeing with the majority's comity analysis but asserting that *Alison D.* should be overruled (*see id.* at 606-609 [Ciparick, J., concurring]). This concurrence asserted that *Alison D.* had indeed caused the widespread harm to children predicted by Judge Kaye's dissent (*see id.* at 606-607). Noting the inconsistency between *Alison D.* and the Court's ruling in *Shondel J.*, the concurrence concluded that "[s]upport obligations flow from parental rights; the duty to support and the rights of parentage go hand in hand and it is nonsensical to treat the two things as severable" (*id.* at 607). According to the concurrence, Supreme Court had "inherent equity powers and authority pursuant to Domestic Relations Law § 70 to determine who is a parent and what will serve the child's best interests" (*id.* at 609). Echoing the dissent in *Alison D.*, and "taking into consideration the social changes" that occurred since that decision, the concurrence called for a "flexible, multi-factored" approach to determine whether a parental relationship had been established (*id.* at 608).

A separate concurrence by Judge Smith in that case acknowledged the same social changes and proposed that, in the interest{**28 NY3d at 23} of insuring that "each child begins life with two parents," an appropriate test would focus on whether "a child is conceived through [artificial insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other" (*id.* at 611-612). Judge Smith observed that "[e]ach of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced" (*id*. at 611).

III.

We must now decide whether, as respondents claim, the doctrine of stare decisis warrants retention of the rule established in *Alison D.* Under stare decisis, a court's decision on an issue of law should generally bind the court in future cases that present the same issue (*see People v Rodriguez*, 25 NY3d 238, 243 [2015]; *People v Taylor*, 9 NY3d 129, 148-149 [2007]). The doctrine "promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of this Court" (*People v Peque*, 22 [*8]NY3d 168, 194 [2013]). But in the

rarest of cases, we may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of our prior decision (*see People v Rudolph*, 21 NY3d 497, 500-503 [2013]; *see id.* at 505-507 [Graffeo, J., concurring]; *People v Reome*, 15 NY3d 188, 191-195 [2010]; *People v Feingold*, 7 NY3d 288, 291-296 [2006]).

Long before our decision in *Alison D.*, New York courts invoked their equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child (*see Finlay*, 240 NY at 433; *Wilcox v Wilcox*, 14 NY 575, 578-579 [1856]; *see generally Guardian Loan Co. v Early*, 47 NY2d 515, 520 [1979]; *People ex rel. Lemon v Supreme Ct. of State of N.Y.*, 245 NY 24, 28 [1927]; *De Coppet v Cone*, 199 NY 56, 63 [1910]). Consistent with these broad equitable powers, our courts have historically exercised their "inherent equity powers and authority" in order to determine "who is a parent and what will serve a child's best interests" (*Debra H.*, 14 NY3d at 609 [Ciparick, J., concurring]; *see also* NY Const, art VI, § 7 [a]).

Domestic Relations Law § 70 evolved in harmony with these equitable practices. The statute expanded in scope from a law narrowly conferring standing in custody and visitation matters {**28 NY3d at 24} upon a legally separated, resident "husband and wife" pair (L 1909, ch 19) to a broader measure granting standing to "either parent" without regard to separation (L 1964, ch 564). The legislature made many of these changes to conform to the courts' preexisting equitable practices (*see* L 1964, ch 564, § 1; Mem of Joint Legis Comm on Matrimonial and Family Laws, Bill Jacket, L 1964, ch 564 at 6). Tellingly, the statute has never mentioned, much less purported to limit, the court's equitable powers, and even after its original enactment, courts continued to employ principles of equity to grant custody, visitation or related extra-statutory relief (*see People ex rel. Meredith v Meredith*, 272 App Div 79, 82-90 [2d Dept 1947], *affd* 297 NY 692 [1947]; *Matter of Rich v Kaminsky*, 254 App Div 6, 7-9 [1st Dept 1938]; *cf. Langerman*, 303 NY at 471-472; *Finlay*, 240 NY at 430-434).

Departing from this tradition of invoking equity, in *Alison D.*, we narrowly defined the term "parent," thereby foreclosing "all inquiry into the child's best interest" in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child (*Alison D.*, 77 NY2d at 659 [Kaye, J., dissenting]). And, in the years that followed, lower courts applying *Alison D.* were "forced to . . . permanently sever strongly formed bonds between children and adults with whom they have parental relationships" (*Debra H.*, 14 NY3d at 606 [Ciparick, J., concurring]). By "limiting their opportunity to maintain bonds that may be crucial to their development," the rule of *Alison D.* has "fall[en] hardest on the children" (*Alison D.*, 77 NY2d at 658 [Kaye, J., dissenting]).

As a result, in the 25 years since *Alison D.* was decided, this Court has gone to great lengths to escape the inequitable results dictated by a needlessly narrow interpretation of [*9]the term "parent." Now, we find ourselves in a legal landscape wherein a non-biological, non-adoptive "parent" may be estopped from disclaiming parentage and made to pay child support in a filiation proceeding (*Shondel*

J., 7 NY3d 320), yet denied standing to seek custody or visitation (*Alison D.*, 77 NY2d at 655). By creating a disparity in the support and custody contexts, *Alison D.* has created an inconsistency in the rights and obligations attendant to parenthood. Moreover, *Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court's holding in{**28 NY3d at 25} *Obergefell v Hodges* (576 US —, 135 S Ct 2584 [2015]), which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.

Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child (*see Alison D.*, 77 NY2d at 656). By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption. It is this context that informs the Court's determination of a proper test for standing that ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.

The Supreme Court has emphasized the stigma suffered by the "hundreds of thousands of children [who] are presently being raised by [same-sex] couples" (*Obergefell*, 576 US at —, 135 S Ct at 2600-2601). By "fixing biology as the key to visitation rights" (*Alison D.*, 77 NY2d at 657-658 [Kaye, J., dissenting]), the rule of *Alison D.* has inflicted disproportionate hardship on the growing number of nontraditional families across our state. At the time *Alison D.* was decided, estimates suggested that "more than 15.5 million children [did] not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent" (*id.*). Demographic changes in the past 25 years have further transformed the elusive concept of the "average American family" (*Troxel v Granville*, 530 US 57, 63-64 [2000]); recent census statistics reflect the large number of same-sex couples residing in New York, and that many of New York's same-sex couples are raising children who are related to only one partner by birth or adoption (*see* Gary J. Gates & Abigail M. Cooke, The Williams Institute, *New York Census Snapshot: 2010* at 1-3).

Relatedly, legal commentators have taken issue with *Alison D.* for its negative impact on children. A growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children (*see* Amanda Barfield, Note, *The Intersection of Same-Sex and Stepparent Visitation*, 23 JL & Pol'y 257, 259-260 [2014]; Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 Duke J Gender L [*10]& Pol'y 1, *{**28 NY3d at 26}*7 [2009]; Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v Virginia M.*, 17 Colum J Gender & L 307 [2008]; Mary Ellen Gill, Note, *Third Party Visitation in New York: Why the Current Standing Statute Is Failing Our Families*, 56 Syracuse L

Rev 481, 488-489 [2006]; Joseph G. Arsenault, Comment, *"Family" but not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 Alb L Rev 813, 834, 836 [1995]; *see also* brief for National Association of Social Workers as amicus curiae at 13-17 [collecting articles]).

We must, however, protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children (*see Alison D.*, 77 NY2d at 656-657; *Troxel v Granville*, 530 US 57, 65 [2000]). For certainly, "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests," and any infringement on that right "comes with an obvious cost" (*Troxel*, 530 US at 64-65). But here we do not consider whether to allow a third party to contest or infringe on those rights; rather, the issue is who qualifies as a "parent" with coequal rights. Nevertheless, the fundamental nature of those rights mandates caution in expanding the definition of that term and makes the element of consent of the biological or adoptive parent critical.

[1] While "parents and families have fundamental liberty interests in preserving" intimate family-like bonds, "so, too, do children have these interests" (*Troxel*, 530 US at 88-89 [Stevens, J., dissenting]), which must also inform the definition of "parent," a term so central to the life of a child. The "bright-line" rule of *Alison D.* promotes the laudable goals of certainty and predictability in the wake of domestic disruption (*Debra H.*, 14 NY3d at 593-594). But bright lines cast a harsh light on any injustice and, as predicted by Judge Kaye, there is little doubt by whom that injustice has been most finely felt and most finely perceived (*see Alison D.*, 77 NY2d at 658 [Kaye, J., dissenting]). We will no longer engage in the "deft legal maneuvering" necessary to read fairness into an overly-restrictive definition of "parent" that sets too high a bar for reaching a child's best interest and does not take into account equitable principles (*see Debra H.*, 14 NY3d at 606-608 [Ciparick, J., concurring]). Accordingly, we overrule *Alison D.*{**28 NY3d at 27}

IV.

Our holding that Domestic Relations Law § 70 permits a non-biological, non-adoptive parent to achieve standing to petition for custody and visitation requires us to specify the limited circumstances in which such a person has standing as a "parent" under Domestic Relations Law § 70 (*see Alison D.*, 77 NY2d at 661 [Kaye, J., dissenting]; *Troxel*, 530 US at 67). Because of the fundamental rights to which biological and adoptive parents are undeniably entitled, any encroachment on the rights of such parents and, especially, any test to expand who is a parent, must be, as Judge Kaye acknowledged in her dissent in *Alison D.*, appropriately narrow.

Petitioners and some of the amici urge that we endorse a functional test for [*11]standing, which has been employed in other jurisdictions that recognize parentage by estoppel in the custody and/or visitation context (*see In re Custody of H.S.H-K.*, 193 Wis 2d 649, 694-695, 533 NW2d 419, 435-436 [1995] [visitation only]; *see also Conover v Conover*, 448 Md 548, 576-577, 141 A3d 31, 47-48 [2016]

[collecting cases from other jurisdictions that have adopted the functional test in contexts of custody or visitation]). The functional test considers a variety of factors, many of which relate to the post-birth relationship between the putative parent and the child. Amicus Sanctuary for Families proposes a different test that hinges on whether petitioner can prove, by clear and convincing evidence, that a couple "jointly planned and explicitly agreed to the conception of a child with the intention of raising the child as co-parents" (brief for Sanctuary for Families as amicus curiae at 39).

Although the parties and amici disagree as to what test should be applied, they generally urge us to adopt a test that will apply in determining standing as a parent for all non-biological, non-adoptive, non-marital "parents" who are raising children. We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered.

[2] Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We hold that these allegations, if proved by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple{**28 NY3d at 28} did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.

Inasmuch as the conception test applies here, we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. We simply conclude that, where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child. Whether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record.

Additionally, we stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether those rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child.

V.

We conclude that a person who is not a biological or adoptive parent may obtain [*12]standing to petition for custody or visitation under Domestic Relations Law § 70 (a) in accordance with the test

outlined above.

[3] In *Brooke S.B.*, our decision in *Alison D.* prevented the courts below from determining standing because the petitioner was not the biological or adoptive parent of the child. That decision no longer poses any obstacle to those courts' consideration of standing by equitable estoppel here, if Brooke S.B. proves by clear and convincing evidence her allegation that a pre-conception agreement existed. Accordingly, in *Brooke S.B.*, the order of the Appellate Division should be reversed, without costs, and the matter remitted to Family Court for further proceedings in accordance with this opinion.

[4] In *Estrellita A.*, the courts below correctly resolved the question of standing by recognizing petitioner's standing based on judicial estoppel. In the child support proceeding, respondent{**28 NY3d at 29} obtained an order compelling petitioner to pay child support based on her successful argument that petitioner was a parent to the child. Respondent was therefore estopped from taking the inconsistent position that petitioner was not, in fact, a parent to the child for purposes of visitation. Under the circumstances presented here, Family Court properly invoked the doctrine of judicial estoppel to recognize petitioner's standing to seek visitation as a "parent" under Domestic Relations Law § 70 (a). Accordingly, in *Estrellita A.*, the order of the Appellate Division should be affirmed, without costs.

Pigott, J. (concurring).

While I agree with the application of judicial estoppel in *Matter of Estrellita A. v Jennifer L.D.*, and that the Appellate Division's decision in *Matter of Brooke S.B. v Elizabeth A.C.C.* should be reversed and the case remitted to Supreme Court for a hearing, I cannot join the majority's opinion overruling *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]). The definition of "parent" that we applied in that case was consistent with the legislative history of Domestic Relations Law § 70 and the common law, and despite several opportunities to do so, the legislature has never altered our conclusion. Rather than craft a new definition to achieve a result the majority perceives as more just, I would retain the rule that parental status under New York law derives from marriage, biology or adoption and decide *Brooke S.B.* on the basis of extraordinary circumstances. As we have said before, "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent" (*Debra H. v Janice R.*, 14 NY3d 576, 596 [2010]).

It has long been the rule in this state that, absent extraordinary circumstances, only parents have the right to seek custody or visitation of a minor child (*see* Domestic Relations Law § 70 [a] ["Where a minor child is residing within this state, either parent may apply to the . . . court for a writ of habeas

corpus to have such minor child brought before such court; and on the return thereof, the court . . . may award the natural guardianship, charge and custody of such child to either parent"]). The legislature has not seen the need to define that term, and in the absence of a statutory definition, our Court has consistently interpreted it in the most obvious and [*13]colloquial sense to mean a child's natural parents or parents by adoption (*see e.g. People ex rel. Portnoy v Strasser*, 303 NY 539, 542 [1952] ["No court can, for any but the gravest reasons, transfer a child from its{**28 NY3d at 30} natural parent to any other person"]; *People ex rel. Kropp v Shepsky*, 305 NY 465, 470 [1953]; *see also* Domestic Relations Law § 110 [defining adoption as a legal act whereby an adult acquires the rights and responsibilities of a parent with respect to the adoptee]). Thus, in *Matter of Ronald FF. v Cindy GG.*, we held that a man who lacked biological or adoptive ties to a child born out of wedlock could not interfere with a fit biological mother's right to determine who may associate with her child because he was not a "parent" within the meaning of Domestic Relations Law § 70 (70 NY2d 141, 142 [1987]).

We applied the same rule to a same-sex couple in *Matter of Alison D. v Virginia M.*, holding that a biological stranger to a child who neither adopted the child nor married the child's biological mother before the child's birth lacked standing to seek visitation (77 NY2d 651, 656-657 [1991]). The petitioner in that case conceded she was not the child's "parent" within the meaning of Domestic Relations Law § 70 but argued that her relationship with the child, as a *nonparent*, entitled her to seek visitation over the objection of the child's indisputably fit biological mother. Framed in those terms, the answer was easy: the petitioner's concession that she was not a parent of the child, coupled with the statutory language in Domestic Relations Law § 70 "giv[ing] *parents* the right to bring proceedings to ensure their proper exercise of [a child's] care, custody and control," deprived the petitioner of standing to seek visitation (*id.* at 657).

Notwithstanding the fact that it may be "beneficial to a child to have continued contact with a nonparent" in some cases (*id.*), we declined to expand the word "parent" in section 70 to include individuals like the petitioner who were admittedly nonparents but who had developed a close relationship with the child. Our reasoning was that, where the legislature had intended to allow other categories of persons to seek visitation, it had expressly conferred standing on those individuals and given courts the power to determine whether an award of visitation would be in the child's best interest (*see id.*). Specifically, the legislature had previously provided that "[w]here circumstances show that conditions exist which equity would see fit to intervene," a brother, sister or grandparent of a child may petition to have such child brought before the court to "make such directions as the best interest of the child may require, for visitation rights for such brother or sister [or grandparent or grandparents] in respect to such child" {**28 NY3d at 31}(Domestic Relations Law §§ 71, 72 [1]). The legislature had also codified the common-law marital presumption of legitimacy for children conceived by artificial reproduction, so that any child born to a married woman by means of artificial insemination was deemed the legitimate, birth child of both spouses (*see* Domestic Relations Law § 73 [1]). In the absence of further legislative action defining the term "parent" or giving other nonparents the right to

petition for visitation, we determined that a non-biological, non-adoptive parent who had not [*14]married the child's biological mother lacked standing under the law (77 NY2d at 657).

Our Court reaffirmed *Alison D.*'s core holding just six years ago in *Debra H. v Janice R.* (14 NY3d 576 [2010]). Confronting many of the same arguments petitioners raise in these appeals, we rejected the impulse to judicially enlarge the term "parent" beyond marriage, biology or adoption. We observed that in the nearly 20 years that had passed since our decision in *Alison D.*, other states had *legislatively* expanded the class of individuals who may seek custody and/or visitation of a child (*see id.* at 596-597, citing Ind Code Ann §§ 31-17-2-8.5, 31-9-2-35.5; Colo Rev Stat Ann § 14-10-123; Tex Fam Code Ann § 102.003 [a] [9]; Minn Stat Ann § 257C.08 [4]; DC Code Ann § 16-831.01 [1]; Or Rev Stat Ann § 109.119 [1]; Wyo Stat Ann § 20-7-102 [a]). Our State had not—and has not, to this day. In the face of such legislative silence, we refused to undertake the kind of policy analysis reserved for the elected representatives of this State, who are better positioned to "conduct hearings and solicit comments from interested parties, evaluate the voluminous social science research in this area . . . , weigh the consequences of various proposals, and make the tradeoffs needed to fashion the rules that best serve the population of our state" (*id.* at 597).

The takeaway from *Debra H.* is that *Alison D.* didn't break any new ground or retreat from a broader understanding of parenthood. It showed respect for the role of the legislature in defining who a parent is, and held, based on the legislative guidance before us, that the term was intended to include a child's biological mother and father, a child's adoptive parents, and, pursuant to a statute enacted in 1974, the spouse of a woman to whom a child was born by artificial insemination. Although many have complained that this standard "is formulaic, or too rigid, or out of step with the times" (*id.* at 594), such criticism is properly directed at the legislature, who{**28 NY3d at 32} in the 107 years since Domestic Relations Law § 70 was enacted has chosen not to amend that section or define the term "parent" to include persons who establish a loving parental bond with a child, though they lack a biological or adoptive tie.

To be sure, there was a time when our interpretation of "parent" put same-sex couples on unequal footing with their heterosexual counterparts. When *Alison D.* was decided, for example, it was impossible for both members of a same-sex couple to become the legal parents of a child born to one partner by artificial insemination, because same-sex couples were not permitted to marry or adopt. Our Court eventually held that the adoption statute permitted unmarried same-sex partners to obtain second-parent adoptions (*see Matter of Jacob*, 86 NY2d 651, 656 [1995]), but it was not until 2011 that the legislature put an end to all sex-based distinctions in the law (*see* Domestic Relations Law § 10-a).

The legislature's passage of the Marriage Equality Act granted same-sex couples the right to marry and made clear that "[n]o government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage . . . shall differ based on the parties to the marriage

being or having been of the same sex rather than a different sex" (Domestic Relations Law § 10-a [2]). Having mandated gender neutrality with respect to every legal benefit and obligation arising from marriage, and eliminated every sex-based distinction in the law and common law, the legislature has formally declared its intention that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage" (L 2011, ch 95, § 2).

Same-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent-child relationships that the law had previously disallowed. Today, a child born to a married person by means of artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple's sexual orientation (2-22 NY Civil Practice: Family Court Proceedings § 22.08 [1] [Matthew Bender]; *Laura WW. v Peter WW.*, 51 AD3d 211, 217-218 [3d Dept 2008] [holding that a child born to a married woman is the legitimate child of both parties and that, absent evidence to the contrary, the spouse of the married woman is presumed{**28 NY3d at 33} to have consented to such status]; *Matter of Kelly S. v Farah M.*, 139 AD3d 90, 103-104 [2d Dept 2016] [finding that the failure to strictly comply with the requirements of Domestic Relations Law § 73 did not preclude recognition of a biological mother's former same-sex partner as a parent to the child conceived by artificial insemination during the couple's domestic partnership]; *Wendy G-M. v Erin G-M.*, 45 Misc 3d 574, 593 [Sup Ct, Monroe County 2014] [applying the marital presumption to a child born of a same-sex couple married in Connecticut]). And if two individuals of the same sex choose not to marry but later conceive a child by artificial insemination, the non-biological parent may now adopt the child through a second-parent adoption.

The Marriage Equality Act and *Matter of Jacob* have erased any obstacles to living within the rights and duties of the Domestic Relations Law. The corollary is, absent further legislative action, an unmarried individual who lacks a biological or adoptive connection to a child conceived after 2011 does not have standing under Domestic Relations Law § 70, regardless of gender or sexual orientation. Unlike the majority, I would leave it to the legislature to determine whether a broader category of persons should be permitted to seek custody or visitation under the law. I remain of the view, as I was in *Debra H.*, that we should not "preempt our Legislature by sidestepping section 70 of the Domestic Relations Law as presently drafted and interpreted in *Alison D.* to create an additional category of parent . . . through the exercise of our common-law and equitable powers" (14 NY3d at 597).

I do agree, however, with the results the majority has reached in these cases. The Marriage Equality Act did not benefit the same-sex couples before us in these appeals, who entered into committed relationships and chose to rear children before they were permitted to exercise what our legislature and the Supreme Court of the United States have now declared a fundamental human right (*see generally Obergefell v Hodges*, 576 US —, 135 S Ct 2584 [2015]). That [*15]Brooke and Elizabeth did not have the same opportunity to marry one another before they decided to have a family means that the couple (and the child born to them through artificial insemination) did not receive the

same legal protection our laws would have provided a child born to a heterosexual couple under similar circumstances. That is, the law did not presume—as it would have for a married heterosexual couple—that any child {**28 NY3d at 34}born to one of the women during their relationship was the legitimate child of both.

In my view, this inequality and the substantial changes in the law that have occurred since our decision in *Debra H.* constitute extraordinary circumstances that give these petitioners standing to seek visitation (*see Ronald FF.*, 70 NY2d at 144-145 [barring the State from interfering with a parent's " (fundamental) right . . . to choose those with whom her child associates" unless it "shows some compelling State purpose which furthers the child's best interest"]). Namely, each couple agreed to conceive a child by artificial insemination at a time when they were not allowed to marry in New York and intended to raise the child in the type of relationship the couples would have formalized by marriage had our State permitted them to exercise that fundamental human right. On the basis of these facts, I would remit the matter in *Brooke S.B.* to Supreme Court for a hearing to determine whether it would be in the child's best interest to have regular visitation with petitioner. As the majority correctly concludes, the petitioner in *Estrellita A.* has standing by virtue of judicial estoppel (majority op at 29).

Matter of Brooke S.B. v Elizabeth A.C.C.: Order reversed, without costs, and matter remitted to Family Court, Chautauqua County, for further proceedings in accordance with the opinion herein.

Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey taking no part.

Matter of Estrellita A. v Jennifer L.D.: Order affirmed, without costs.

Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey taking no part.

Footnotes

Footnote 1: The parties in both cases before us dispute the relevant facts. Given the procedural posture of these cases, our summary of the facts is derived from petitioners' allegations in court filings and relevant decisions of the courts below.

Footnote 2: Petitioner appealed but, citing her financial condition, proceeded without an attorney. Her appeal was subsequently dismissed.

Footnote 3: We note that by the use of the term "either," the plain language of Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time.

Footnote 4: Furthermore, in *Matter of H.M. v E.T.* (14 NY3d 521 [2010]), for purposes of child support proceedings, we construed Family Ct Act § 413 (1) (a) in a manner consistent with principles of equitable estoppel by interpreting the term "parents" to include a biological parent's former same-sex partner, notwithstanding the lack of a biological or adoptive connection to the child (*H.M.*, 14 NY3d at 526-527).

Section 4-1.3

Inheritance by children conceived after the death of a genetic parent (a) When used in this article, unless the context or subject matter...

Estates, Powers & Trusts (EPT)

Inheritance by children conceived after the death of a genetic

parent

(a) When used in this article, unless the context or subject matter manifestly requires a different interpretation:

(1) "Genetic parent" shall mean a man who provides sperm or a woman who provides ova used to conceive a child after the death of the man or woman.

(2) "Genetic material" shall mean sperm or ova provided by a genetic parent.

(3) "Genetic child" shall mean a child of the sperm or ova provided by a genetic parent, but only if and when such child is born.

(b) For purposes of this article, a genetic child is the child of his or her genetic parent or parents and, notwithstanding paragraph (c) of section 4-1.1 of this part, is a distributee of his or her genetic parent or parents and, notwithstanding subparagraph (2) of paragraph (a) of section 2-1.3 of this chapter, is included in any disposition of property to persons described in any instrument of which a genetic parent of the genetic child was the creator as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator if

it is established that:

(1) the genetic parent in a written instrument executed pursuant to the provisions of this section not more than seven years before the death of the genetic parent:

(A) expressly consented to the use of his or her genetic material to posthumously conceive his or her genetic child, and

(B) authorized a person to make decisions about the use of the genetic parent's genetic material after the death of the genetic parent;

(2) the person authorized in the written instrument to make decisions about the use of the genetic parent's genetic material gave written notice, by certified mail, return receipt requested, or by personal delivery, that the genetic parent's genetic material was available for the purpose of conceiving a genetic child of the genetic parent, and such written notice was given;

(A) within seven months from the date of the issuance of letters testamentary or of administration on the estate of the genetic parent, as the case may be, to the person to whom such letters have issued, or, if no letters have been issued within four months of the death of the genetic parent, and

(B) within seven months of the death of the genetic parent to a distributee of the genetic parent;

(3) the person authorized in the written instrument to make decisions about the use of the genetic parent's genetic material recorded the written instrument within seven months of the genetic parent's death in the office of the surrogate granting letters on the genetic parent's estate, or, if no such letters have been granted, in the office of the surrogate having jurisdiction to grant them; and

(4) the genetic child was in utero no later than twenty-four months after the genetic parent's death or born no later than thirty-three months after the genetic parent's death.

(c) The written instrument referred to in subparagraph (1) of paragraph (b) of this section:

(1) must be signed by the genetic parent in the presence of two witnesses who also sign the instrument, both of whom are at least eighteen years of age and neither of whom is a person authorized under the instrument to make decisions about the use of the genetic parent's genetic material;

(2) may be revoked only by a written instrument signed by the genetic parent and executed in the same manner as the instrument it revokes;

(3) may not be altered or revoked by a provision in the will of the genetic parent;

(4) may authorize an alternate to make decisions about the use of the genetic parent's genetic material if the first person so designated dies before the genetic parent or is unable to exercise the authority granted; and

(5) may be substantially in the following form and must be signed and dated by the genetic parent and properly witnessed: I,
_____,

(Your name and address) consent to the use of my (sperm or ova) (referred to below as my "genetic material") to conceive a child or children of mine after my death, and I authorize
_____

(Name and address of person) to decide whether and how my genetic material is to be used to conceive a child or children of mine after my death. In the event that the person authorized above dies before me or is unable to exercise the authority granted I designate
_____

(Name and address of person) to decide whether and how my genetic material is to be used to conceive a child or children of mine after my death. I understand that, unless I revoke this consent and authorization in a written document signed by me in the presence of two witnesses who also sign the document, this consent and authorization will remain in effect for seven years from this day and that I cannot revoke or modify this consent and designation by any provision in my will. Signed this day of , _____ (Your signature)

Statement of witnesses: I declare that the person who signed this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed this document in my presence. I am not the person authorized in this document to control the use of the genetic material of the person who signed this document. Witness: Address: Date: Witness: Address: Date:

(d) Any authority granted in a written instrument authorized by this section to a person who is the spouse of the genetic parent at the time of execution of the written instrument is revoked by a final decree or judgment of divorce or annulment, or a final decree, judgment or order declaring the nullity of the marriage between the genetic parent and the spouse or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, or a final decree or judgment of separation, recognized as valid under the law of this state, which was rendered against the spouse.

(e) Process shall not issue to a genetic child who is a distributee of a genetic parent under sections one thousand three and one thousand four hundred three of the surrogate's court procedure act unless the child is in being at the time process issues.

(f) Except as provided in paragraph (b) of this section with regard to any disposition of property in any instrument of which the genetic parent of a genetic child is the creator, for purposes of section 2-1.3 of this chapter a genetic child who is entitled to inherit from a genetic parent under this section is a child of the genetic parent for purposes of a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another. This paragraph shall apply to the wills of persons dying on or after September first, two thousand fourteen, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

(g) For purposes of section 3-3.3 of this chapter the terms "issue", "surviving issue" and "issue surviving" include a genetic child if he or she is entitled to inherit from his or her genetic parent under this section.

(h) Where the validity of a disposition under the rule against perpetuities depends

on the ability of a person to have a child at some future time, the possibility that such person may have a genetic child shall be disregarded. This provision shall not apply for any purpose other than that of determining the validity of a disposition under the rule against perpetuities where such validity depends on the ability of a person to have a child at some future time. A determination of validity or invalidity of a disposition under the rule against perpetuities by the application of this provision shall not be affected by the later birth of a genetic child disregarded under this provision.

(i) The use of a genetic material after the death of the person providing such material is subject exclusively to the provisions of this section and to any valid and binding contractual agreement between such person and the facility providing storage of the genetic material and may not be the subject of a disposition in an instrument created by the person providing such material or by any other person.

PREV
SECTION 4-1.2
Inheritance By Non-Marital Children (A) For The Purposes Of This Article: (1) A Non-Marital Child Is The Legitimate Child Of His Mother S... (/Legislation/Laws/EPT/4-1.2/)

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SECTION 4-1.4
Disqualification Of Parent To Take Intestate Share (A) No Distributive Share In The Estate Of A Deceased Child Shall Be Allowed To A Pare... (/Legislation/Laws/EPT/4-1.4/)

Section 11-1.5

Payment of testamentary dispositions or distributive shares (a) Subject to his or her duty to retain sufficient assets to pay administrat...

Estates, Powers & Trusts (EPT)

Payment of testamentary dispositions or distributive shares

(a) Subject to his or her duty to retain sufficient assets to pay administration and reasonable funeral expenses, debts of the decedent and all taxes for which the estate is liable, a personal representative may, but, except as directed by will or court decree or order, shall not be required to, pay any testamentary disposition or distributive share before the completion of the publication of notice to creditors or, if no such notice is published, before the expiration of seven months from the time letters testamentary or of administration are granted, or, if notice of the availability of genetic material of the decedent has been given under section 4-1.3, before the birth of a genetic child who is entitled to inherit from the decedent under section 4-1.3.

(b) Whenever a disposition is directed by will to be paid in advance of such publication of notice or the expiration of such seven month period or the birth of a genetic child entitled to inherit from the decedent under section 4-1.3, the personal representative may require a bond, conditioned as follows:

(1) That if debts of the decedent appear, and the assets of the estate are insufficient to pay them or to pay other testamentary dispositions entitled, under section 13-1.3, to payment equally with or prior to that of the disposition paid in advance, the beneficiary to whom advance payment was made will refund it, or the value thereof,

together with interest thereon and any costs incurred by reason of such payment, or such ratable portion thereof, as is necessary to pay such debts or to satisfy the rights, if any, of other beneficiaries under the will.

(2) That if the will, under which the disposition was paid, is denied probate, on appeal or otherwise, such beneficiary will refund the entire advance payment, together with interest and costs as described in subparagraph (1), to the personal representative entitled thereto.

(c) If, after the expiration of seven months from the time letters are granted or the birth of a genetic child entitled to inherit from the decedent under section 4-1.3, as the case may be, the personal representative refuses upon demand to pay a disposition or distributive share, the person entitled thereto may maintain an appropriate action or proceeding against such representative. But, for the purpose of computing the time limited for its commencement, the cause of action does not accrue until the personal representative's account is judicially settled.

PREV
SECTION 11-1.4
Validity Of Execution Of Power To Sell, Mortgage Or Lease Real Property By Less Than All Qualifying Executors Any Deed, Mortgage Or Lease... (/Legislation/Laws/EPT/11-1.4/)

NEXT
SECTION 11-1.6
Property Held As Fiduciary To Be Kept Separate (A) Every Fiduciary Shall Keep Property Received As Fiduciary Separate From His Individual... (/Legislation/Laws/EPT/11-1.6/)