

Obergefell, *et al.* v. Hodges, *et al.* (576 U.S. __ 2015)¹

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. [...]

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. [...]

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. [...] 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?

“[C]ourts 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.

I

[...] The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. [...]

A

[Marriage] arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. [...]

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. [...]

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)[.] 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) .

¹Note: This dissenting opinion has been edited from the original text by Travis Braidwood for classroom use. The full case text can be found here: < http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf >

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. [...]

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). [...]

Over the last few years, public opinion on marriage has shifted rapidly. [...] 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 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. [...] 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 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[.]”

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. [...]

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. [...]

Dred Scott's holding was overruled[,] 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.” [...]

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents[.]

Eventually, the Court recognized its error and vowed not to repeat it. [...] 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 “objectively, deeply rooted in this Nation’s history and tradition[.]”

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

1

[...] 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. [...] 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). [...] Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. [...]

2

The majority suggests that “there are other, more instructive precedents” informing the right to marry. [T]his reference seems to correspond to a line of cases discussing an implied fundamental “right of privacy.” *Griswold*, 381 U. S., at 486. [...] 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. [...]

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. [...]

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.

[...] 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. [...]

Ultimately, only one precedent offers any support for the majority’s methodology: *Lochner v. New York*, 198 U.S. 45. [...] The majority later explains that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” *Ante*, at 12. This freewheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be free in his person and in his power to contract in relation to his own labor.” *Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. [...] 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.” [...]

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. [...] 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? [...]

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. [...]

[...] 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? [...] 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. [...]

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. [...]

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).

[...] 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

[...] 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. [...] The Court’s accumulation of power does not occur in a vacuum. It comes at the expense of the people. [...] Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. [...] Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. [...] Today’s decision, for example, creates serious questions about religious liberty. [...] 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. [...]

* * *

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.