

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

OBERGEFELL V. HODGES (2015)

View the case on the National Constitution Center's website [here](#).

SUMMARY

Jim Obergefell and others sued for recognition of their same-sex marriages, which were legal in the states where they were married but illegal in other states. The denial of marriage impedes many legal rights and privileges, such as adoptions, parental rights, and property transfer. The Supreme Court has long held that marriage is a fundamental right. Here, the Court held that states must allow and recognize same-sex marriages under the Due Process and Equal Protection Clauses of the 14th Amendment. In his majority opinion, Justice Kennedy concluded that the fundamental right to marry cannot be limited to heterosexual couples.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Kennedy

To identify and protect fundamental rights, the Court looks to history and tradition, but there's more to the Court's analysis than that; the Court can't let our past alone rule the present. 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." Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. . . . That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

We learn about new injustices over time; the generations who ratified the Bill of Rights and the Fourteenth Amendment knew as much and left it to future generations to read the Constitution's broad text in ways that apply to new injustices. 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. . . .

Looking at our past cases, we see four key principles that support a right to same-sex marriage. 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.

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The first principle is that the right to marry is connected with our constitutional commitment to personal choice and individual autonomy. 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. . . . 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. 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." . . .

The second principle is that the right to marry supports two-person unions. 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. . . .

Marriage saves us from loneliness and provides companionship. 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. . . .

The third principle is that the right to marry protects our children and families. 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. 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." 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. . . .

The fourth principle is that marriage is central to our social order. Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. . . . Marriage remains a building block of our national community. . . .

Same-sex marriage bans are unconstitutional; they violate the Fourteenth Amendment's Due Process and Equal Protection Clauses. [T]he 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. . . .

Same-sex couples aren't attacking marriage here; in fact, they respect marriage so much that they want to be able to get married, too; they seek equal dignity; the Constitution grants it to them. No union is more profound than marriage, for it embodies the highest ideals

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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.

Excerpt: Dissent, Chief Justice Roberts

There may be policy arguments that support same-sex marriage; but the Constitution doesn't stand in the way of state same-sex marriage bans; these bans are constitutional. 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.

The supporters of same-sex marriage have won numerous political battles in recent years, persuading their fellow citizens; but the Court's decision ends those political debates and imposes a single rule on the nation; this will make it more difficult for same-sex marriage opponents to accept this big social change. 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 Court's ruling isn't based on the Constitution's text or history, and it isn't consistent with the Court's precedent; this is judicial arrogance, not judicial humility. 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." 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?

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The Court shouldn't impose its own policy views on the American people. 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.” Accordingly, “courts are not concerned with the wisdom or policy of legislation.” The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.” I have no choice but to dissent.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**