2014

Section 7: Same-Sex Marriage

Institute of Bill of Rights Law at The College of William & Mary School of Law

VII. Same-Sex Marriage

In This Section:

Bostic v. Shaefer

Ruling Below: Bostic v. Rainey, 970 F.Supp.2d 456 (E.D. Va. 2014).

Same-sex couples filed § 1983 action challenging constitutionality of Virginia statutes and constitutional provisions prohibiting same-sex couples from marrying and refusing to recognize same-sex marriages performed elsewhere. The United States District Court for the Eastern District of Virginia entered summary judgment in plaintiffs' favor and granted injunctive relief. State appealed. Plaintiffs in similar class action intervened.

Question Presented: Whether Virginia codes §§ 20-45.2 and 20-45.3, the Marshall/Newman Amendment, and any other Virginia law that bars same sex-marriages from other jurisdictions (collectively, the Virginia Marriage Laws) violate Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Timothy B. BOSTIC; Tony C. London; Carol Schall; Mary Townley, Plaintiffs—Appellees,

Joanne Harris; Jessica Duff; Christy Berghoff; Victoria Kidd, on behalf of themselves and all others similarly situated, Intervenors,

v.

George E. SHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court, Defendant—Appellant,

and

Janet M. Rainey in her official capacity as State Registrar of Vital Records; Robert F. McDonnell, in his official capacity as Governor of Virginia; Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, Defendants,

Michéle McQuigg, Intervenor/Defendant.

United States Court of Appeals, Fourth Circuit

Decided on July 28, 2014

[Excerpt; some footnotes and citations omitted.]

FLOYD, Circuit Judge:

Via various state statutes and a state constitutional amendment, Virginia prevents same-sex couples from marrying and refuses to recognize same-sex marriages performed elsewhere. Two same-sex couples filed suit to challenge the constitutionality of these laws, alleging that they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court granted the couples' motion for summary judgment and enjoined Virginia from enforcing the laws. This appeal followed.

Because we conclude that Virginia's same-sex marriage bans impermissibly infringe on its citizens' fundamental right to marry, we affirm.

I.

A.

This case concerns a series of statutory and constitutional mechanisms that Virginia employed to prohibit legal recognition for same-sex relationships in that state. Virginia enacted the first of these laws in 1975: Virginia Code section 20–45.2, which provides that "marriage between persons of the same sex is prohibited." After the Supreme Court of Hawaii took steps to legalize same-sex marriage in the mid–1990s, Virginia amended section 20–45.2 to specify that "[a]ny marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable." In 2004, Virginia added civil unions and similar arrangements to the list of prohibited same-sex relationships via the Affirmation of Marriage Act.

Virginia's efforts to ban same-sex marriage and other legally recognized same-sex relationships culminated in the Marshall/Newman Amendment to the Virginia Constitution:

> That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.
>
> This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

The Virginia Constitution imposes two hurdles that a potential amendment must jump before becoming law: the General Assembly must approve the amendment in two separate legislative sessions, and the people must ratify it. The General Assembly approved the Marshall/Newman Amendment in 2005 and 2006. In November 2006, Virginia's voters ratified it by a vote of fifty-seven percent to forty-three percent. In the aggregate, Virginia Code sections 20–45.2 and 20–45.3 and the Marshall/Newman Amendment prohibit same-sex marriage, ban other legally recognized same-sex relationships, and render same-sex marriages performed elsewhere legally meaningless under Virginia state law.

B.

Same-sex couples Timothy B. Bostic and Tony C. London and Carol Schall and Mary Townley (collectively, the Plaintiffs) brought this lawsuit to challenge the constitutionality of Virginia Code sections 20–45.2 and 20–45.3, the Marshall/Newman Amendment, and "any other Virginia law that bars same-sex marriage or prohibits the State's recognition of otherwise-lawful same-sex marriages from other jurisdictions" (collectively, the Virginia Marriage Laws). The Plaintiffs claim that the "inability to marry or have their relationship recognized by the

Commonwealth of Virginia with the dignity and respect accorded to married opposite-sex couples has caused them significant hardship ... and severe humiliation, emotional distress, pain, suffering, psychological harm, and stigma."

Bostic and London have been in a long-term, committed relationship with each other since 1989 and have lived together for more than twenty years. They "desire to marry each other under the laws of the Commonwealth in order to publicly announce their commitment to one another and to enjoy the rights, privileges, and protections that the State confers on married couples." On July 1, 2013, Bostic and London applied for a marriage license from the Clerk for the Circuit Court for the City of Norfolk. The Clerk denied their application because they are both men.

Schall and Townley are women who have been a couple since 1985 and have lived together as a family for nearly thirty years. They were lawfully married in California in 2008. In 1998, Townley gave birth to the couple's daughter, E. S.-T. Schall and Townley identify a host of consequences of their inability to marry in Virginia and Virginia's refusal to recognize their California marriage, including the following:

• Schall could not visit Townley in the hospital for several hours when Townley was admitted due to pregnancy-related complications.

• Schall cannot legally adopt E. S.-T., which forced her to retain an attorney to petition for full joint legal and physical custody.

• Virginia will not list both Schall and Townley as E. S.-T.'s parents on her birth certificate.

• Until February 2013, Schall and Townley could not cover one another on their employer-provided health insurance. Townley has been able to cover Schall on her insurance since then, but, unlike an opposite-sex spouse, Schall must pay state income taxes on the benefits she receives.

• Schall and Townley must pay state taxes on benefits paid pursuant to employee benefits plans in the event of one of their deaths.

• Schall and Townley cannot file joint state income tax returns, which has cost them thousands of dollars.

On July 18, 2013, Bostic and London sued former Governor Robert F. McDonnell, former Attorney General Kenneth T. Cuccinelli, and George E. Schaefer, III, in his official capacity as the Clerk for the Circuit Court for the City of Norfolk. The Plaintiffs filed their First Amended Complaint on September 3, 2013. The First Amended Complaint added Schall and Townley as plaintiffs, removed McDonnell and Cuccinelli as defendants, and added Janet M. Rainey as a defendant in her official capacity as the State Registrar of Vital Records. The Plaintiffs allege that the Virginia Marriage Laws are facially invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that Schaefer and Rainey violated 42 U.S.C. § 1983 by enforcing those laws.

The parties filed cross-motions for summary judgment. The Plaintiffs also requested a permanent injunction in connection with their motion for summary judgment and

moved, in the alternative, for a preliminary injunction in the event that the district court denied their motion for summary judgment. The district court granted a motion by Michele McQuigg-the Prince William County Clerk of Court-to intervene as a defendant on January 21, 2014. Two days later, new Attorney General Mark Herring-as Rainey's counsel-submitted a formal change in position and refused to defend the Virginia Marriage Laws, although Virginia continues to enforce them. McQuigg adopted Rainey's prior motion for summary judgment and the briefs in support of that motion.

The district court held that the Virginia Marriage Laws were unconstitutional on February 14, 2014. It therefore denied Schaefer's and McQuigg's motions for summary judgment and granted the Plaintiffs' motion. The district court also enjoined Virginia's employees-including Rainey and her employees-and Schaefer, McQuigg, and their officers, agents, and employees from enforcing the Virginia Marriage Laws. The court stayed the injunction pending our resolution of this appeal.

Rainey, Schaefer, and McQuigg timely appealed the district court's decision. We have jurisdiction pursuant to 28 U.S.C. § 1291. On March 10, 2014, we allowed the plaintiffs from *Harris v. Rainey*—a similar case pending before Judge Michael Urbanski in the Western District of Virginia-to intervene. Judge Urbanski had previously certified that case as a class action on behalf of "all same-sex couples in Virginia who have not married in another jurisdiction" and "all same-sex couples in Virginia who have married in another jurisdiction," excluding the Plaintiffs.

Our analysis proceeds in three steps. First, we consider whether the Plaintiffs possess standing to bring their claims. Second, we evaluate whether the Supreme Court's summary dismissal of a similar lawsuit in *Baker v. Nelson* remains binding. Third, we determine which level of constitutional scrutiny applies here and test the Virginia Marriage Laws using the appropriate standard. For purposes of this opinion, we adopt the terminology the district court used to describe the parties in this case. The Plaintiffs, Rainey, and the *Harris* class are the "Opponents" of the Virginia Marriage Laws. Schaefer and McQuigg are the "Proponents."

II.

Before we turn to the merits of the parties' arguments in this case, we consider Schaefer's contention that "[t]he trial court erred as a matter of law when it found all Plaintiffs had standing and asserted claims against all Defendants." We review the district court's disposition of cross-motions for summary judgment-including its determinations regarding standing-de novo, viewing the facts in the light most favorable to the non-moving party. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

To establish standing under Article III of the Constitution, a plaintiff must "allege (1) an injury that is (2) fairly traceable to the

defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief." The standing requirement applies to each claim that a plaintiff seeks to press. Schaefer premises his argument that the Plaintiffs lack standing to bring their claims on the idea that every plaintiff must have standing as to every defendant. However, the Supreme Court has made it clear that "the presence of one party with standing is sufficient to satisfy Article Ill's case-or-controversy requirement." The Plaintiffs' claims can therefore survive Schaefer's standing challenge as long as one couple satisfies the standing requirements with respect to each defendant.

Schaefer serves as the Clerk for the Circuit Court for the City of Norfolk. In Virginia, circuit court clerks are responsible for issuing marriage licenses and filing records of marriage. Although Schall and Townley did not seek a marriage license from Schaefer, the district court found that Bostic and London did so and that Schaefer denied their request because they are a same-sex couple. This license denial constitutes an injury for standing purposes. Bostic and London can trace this denial to Schaefer's enforcement of the allegedly unconstitutional Virginia Marriage Laws, and declaring those laws unconstitutional and enjoining their enforcement would redress Bostic and London's injuries. Bostic and London therefore possess Article III standing with respect to Schaefer. We consequently need not consider whether Schall and Townley have standing to sue Schaefer.

Rainey-as the Registrar of Vital Records-is tasked with developing Virginia's marriage license application form and distributing it to the circuit court clerks throughout Virginia. Neither Schaefer's nor Rainey's response to the First Amended Complaint disputes its description of Rainey's duties.

In addition to performing these marriage-related functions, Rainey develops and distributes birth certificate forms, oversees the rules relating to birth certificates, and furnishes forms relating to adoption so that Virginia can collect the information necessary to prepare the adopted child's birth certificate.

Rainey's promulgation of a marriage license application form that does not allow same-sex couples to obtain marriage licenses resulted in Schaefer's denial of Bostic and London's marriage license request. For the reasons we describe above, this license denial constitutes an injury. Bostic and London can trace this injury to Rainey due to her role in developing the marriage license application form in compliance with the Virginia Marriage Laws, and the relief they seek would redress their injuries. Bostic and London consequently have standing to sue Rainey.

Schall and Townley also possess standing to bring their claims against Rainey. They satisfy the injury requirement in two ways. First, in equal protection cases-such as this case—"[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, ... [t]he 'injury in fact' ... is the denial of equal treatment resulting from the imposition of

the barrier[.]" The Virginia Marriage Laws erect such a barrier, which prevents same-sex couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage. Second, Schall and Townley allege that they have suffered stigmatic injuries due to their inability to get married in Virginia and Virginia's refusal to recognize their California marriage. Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies "some concrete interest with respect to which [he or she] [is] personally subject to discriminatory treatment" and "[t]hat interest independently satisf[ies] the causation requirement of standing doctrine." Schall and Townley point to several concrete ways in which the Virginia Marriage Laws have resulted in discriminatory treatment. For example, they allege that their marital status has hindered Schall from visiting Townley in the hospital, prevented Schall from adopting E. S.-T., and subjected Schall and Townley to tax burdens from which married opposite-sex couples are exempt. Because Schall and Townley highlight specific, concrete instances of discrimination rather than making abstract allegations, their stigmatic injuries are legally cognizable.

Schall and Townley's injuries are traceable to Rainey's enforcement of the Virginia Marriage Laws. Because declaring the Virginia Marriage Laws unconstitutional and enjoining their enforcement would redress Schall and Townley's injuries, they satisfy standing doctrine's three requirements with respect to Rainey. In sum, each of the Plaintiffs has standing as to at least one defendant.

III.

We now turn to the merits of the Opponents' Fourteenth Amendment arguments. We begin with the issue of whether the Supreme Court's summary dismissal in *Baker v. Nelson* settles this case. *Baker* came to the Supreme Court as an appeal from a Minnesota Supreme Court decision, which held that a state statute that the court interpreted to bar same-sex marriages did not violate the Fourteenth Amendment's Due Process or Equal Protection Clauses. At the time, 28 U.S.C. § 1257 required the Supreme Court to accept appeals of state supreme court cases involving constitutional challenges to state statutes, such as *Baker*. The Court dismissed the appeal in a one-sentence opinion "for want of a substantial federal question."

Summary dismissals qualify as "votes on the merits of a case." They therefore "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided." However, the fact that *Baker* and the case at hand address the same precise issues does not end our inquiry. Summary dismissals lose their binding force when "doctrinal developments" illustrate that the Supreme Court no longer views a question as unsubstantial, regardless of whether the Court explicitly overrules the case. The district court determined that doctrinal developments stripped *Baker* of its status as binding precedent. Every federal court to consider this issue since the Supreme Court

decided *United States v. Windsor* has reached the same conclusion.

Windsor concerned whether section 3 of the federal Defense of Marriage Act (DOMA) contravened the Constitution's due process and equal protection guarantees. Section 3 defined "marriage" and "spouse" as excluding same-sex couples when those terms appeared in federal statutes, regulations, and directives, rendering legally married same-sex couples ineligible for myriad federal benefits. When it decided the case below, the Second Circuit concluded that *Baker* was no longer precedential over the dissent's vigorous arguments to the contrary. Despite this dispute, the Supreme Court did not discuss *Baker* in its opinion or during oral argument.

The Supreme Court's willingness to decide *Windsor* without mentioning *Baker* speaks volumes regarding whether *Baker* remains good law. The Court's development of its due process and equal protection jurisprudence in the four decades following *Baker* is even more instructive. On the Due Process front, *Lawrence v. Texas* and *Windsor* are particularly relevant. In *Lawrence*, the Court recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." These considerations led the Court to strike down a Texas statute that criminalized same-sex sodomy. The *Windsor* Court based its decision to invalidate section 3 of DOMA on the Fifth Amendment's Due Process Clause. The Court concluded that section 3 could not withstand constitutional scrutiny because "the principal purpose and the necessary effect of [section 3] are to demean those persons who are in a lawful same-sex marriage," who-like the unmarried same-sex couple in *Lawrence*—have a constitutional right to make "moral and sexual choices." These cases firmly position same-sex relationships within the ambit of the Due Process Clauses' protection.

The Court has also issued several major equal protection decisions since it decided *Baker*. The Court's opinions in *Craig v. Boren* and *Frontiero v. Richardson* identified sex-based classifications as quasi-suspect, causing them to warrant intermediate scrutiny rather than rational basis review. Two decades later, in *Romer v. Evans*, the Supreme Court struck down a Colorado constitutional amendment that prohibited legislative, executive, and judicial action aimed at protecting gay, lesbian, and bisexual individuals from discrimination. The Court concluded that the law violated the Fourteenth Amendment's Equal Protection Clause because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects," causing the law to "lack[ ] a rational relationship to legitimate state interests." Finally, the Supreme Court couched its decision in *Windsor* in both due process and equal protection terms. These cases demonstrate that, since *Baker*, the Court has meaningfully altered the way it

views both sex and sexual orientation through the equal protection lens.

In light of the Supreme Court's apparent abandonment of *Baker* and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case, we decline to view *Baker* as binding precedent and proceed to the meat of the Opponents' Fourteenth Amendment arguments.

IV.

A.

Our analysis of the Opponents' Fourteenth Amendment claims has two components. First, we ascertain what level of constitutional scrutiny applies: either rational basis review or some form of heightened scrutiny, such as strict scrutiny. Second, we apply the appropriate level of scrutiny to determine whether the Virginia Marriage Laws pass constitutional muster.

Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny. We therefore begin by assessing whether the Virginia Marriage Laws infringe on a fundamental right. Fundamental rights spring from the Fourteenth Amendment's protection of individual liberty, which the Supreme Court has described as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." This liberty includes the fundamental right to marry.

The Opponents and Proponents agree that marriage is a fundamental right. They strongly disagree, however, regarding whether that right encompasses the right to same-sex marriage.

Relying on *Washington v. Glucksberg*, the Proponents aver that the district court erred by not requiring "a careful description of the asserted fundamental liberty interest," which they characterize as the right to "marriage to another person of the same sex," not the right to marry. In *Glucksberg*, the Supreme Court described the right at issue as "a right to commit suicide with another's assistance." The Court declined to categorize this right as a new fundamental right because it was not, "objectively, deeply rooted in this Nation's history and tradition." The Proponents urge us to reject the right to same-sex marriage for the same reason.

We do not dispute that states have refused to permit same-sex marriages for most of our country's history. However, this fact is irrelevant in this case because *Glucksberg* 's analysis applies only when courts consider whether to recognize new fundamental rights. Because we conclude that the fundamental right to marry encompasses the right to same-sex marriage, *Glucksberg* 's analysis is inapplicable here.

Over the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms. Perhaps most notably, in *Loving v. Virginia*, the Supreme Court invalidated a Virginia law that prohibited white individuals from marrying individuals of other races. The Court explained that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free

men" and that no valid basis justified the Virginia law's infringement of that right. Subsequently, in *Zablocki v. Redhail*, the Supreme Court considered the constitutionality of a Wisconsin statute that required people obligated to pay child support to obtain a court order granting permission to marry before they could receive a marriage license. The statute specified that a court should grant permission only to applicants who proved that they had complied with their child support obligations and demonstrated that their children were not likely to become "public charges." The Court held that the statute impermissibly infringed on the right to marry. Finally, in *Turner v. Safley*, the Court determined that a Missouri regulation that generally prohibited prison inmates from marrying was an unconstitutional breach of the right to marry.

These cases do not define the rights in question as "the right to interracial marriage," "the right of people owing child support to marry," and "the right of prison inmates to marry." Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right. The Supreme Court's unwillingness to constrain the right to marry to certain subspecies of marriage meshes with its conclusion that the right to marry is a matter of "freedom of choice" that "resides with the individual." If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.

The Proponents point out that *Loving*, *Zablocki*, and *Turner* each involved opposite-sex couples. They contend that, because the couples in those cases chose to enter opposite-sex marriages, we cannot use them to conclude that the Supreme Court would grant the same level of constitutional protection to the choice to marry a person of the same sex. However, the Supreme Court's decisions in *Lawrence* and *Windsor* suggest otherwise. In *Lawrence*, the Court expressly refused to narrowly define the right at issue as the right of "homosexuals to engage in sodomy," concluding that doing so would constitute a "failure to appreciate the extent of the liberty at stake." Just as it has done in the right-to-marry arena, the Court identified the right at issue in *Lawrence* as a matter of choice, explaining that gay and lesbian individuals-like all people—enjoy the right to make decisions regarding their personal relationships. As we note above, the Court reiterated this theme in *Windsor*, in which it based its conclusion that section 3 of DOMA was unconstitutional, in part, on that provision's disrespect for the "moral and sexual choices" that accompany a same-sex couple's decision to marry. *Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships. We therefore have no reason to suspect that the Supreme Court would accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned. Accordingly, we decline the

Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry.

Of course, "[b]y reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." Strict scrutiny applies only when laws "significantly interfere" with a fundamental right. The Virginia Marriage Laws unquestionably satisfy this requirement: they impede the right to marry by preventing same-sex couples from marrying and nullifying the legal import of their out-of-state marriages. Strict scrutiny therefore applies in this case.

B.

Under strict scrutiny, a law "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." The Proponents bear the burden of demonstrating that the Virginia Marriage Laws satisfy this standard, and they must rely on the laws' "actual purpose[s]" rather than hypothetical justifications. The Proponents contend that five compelling interests undergird the Virginia Marriage Laws: (1) Virginia's federalism-based interest in maintaining control over the definition of marriage within its borders, (2) the history and tradition of opposite-sex marriage, (3) protecting the institution of marriage, (4) encouraging responsible procreation, and (5) promoting the optimal childrearing environment. We discuss each of these interests in turn.

1. Federalism

The Constitution does not grant the federal government any authority over domestic relations matters, such as marriage. Accordingly, throughout our country's history, states have enjoyed the freedom to define and regulate marriage as they see fit. States' control over marriage laws within their borders has resulted in some variation among states' requirements. For example, West Virginia prohibits first cousins from marrying, but the remaining states in this Circuit allow first cousin marriage. States' power to define and regulate marriage also accounts for their differing treatment of same-sex couples.

The *Windsor* decision rested in part on the Supreme Court's respect for states' supremacy in the domestic relations sphere. The Court recognized that section 3 of DOMA upset the status quo by robbing states of their ability to define marriage. Although states could legalize same-sex marriage, they could not ensure that the incidents, benefits, and obligations of marriage would be uniform within their borders. However, the Court did not lament that section 3 had usurped states' authority over marriage due to its desire to safeguard federalism. Its concern sprung from section 3's creation of two classes of married couples within states that had legalized same-sex marriage: opposite-sex couples, whose marriages the federal government recognized, and same-sex couples, whose marriages the federal government ignored. The resulting injury to same-sex couples served as the foundation for the Court's

conclusion that section 3 violated the Fifth Amendment's Due Process Clause.

Citing *Windsor,* the Proponents urge us to view Virginia's federalism-based interest in defining marriage as a suitable justification for the Virginia Marriage Laws. However, *Windsor* is actually detrimental to their position. Although the Court emphasized states' traditional authority over marriage, it acknowledged that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving* 's admonition that the states must exercise their authority without trampling constitutional guarantees. Virginia's federalism-based interest in defining marriage therefore cannot justify its encroachment on the fundamental right to marry.

The Supreme Court's recent decision in *Schuette v. Coalition to Defend Affirmative Action* does not change the conclusion that *Windsor* dictates. In *Schuette,* the Court refused to strike down a voter-approved state constitutional amendment that barred public universities in Michigan from using race-based preferences as part of their admissions processes. The Court declined to closely scrutinize the amendment because it was not "used, or ... likely to be used, to encourage infliction of injury by reason of race." Instead, the Court dwelled on the need to respect the voters' policy choice, concluding that "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds" and the judiciary's role was not to "disempower the voters from choosing which path to follow."

The Proponents emphasize that Virginia's voters approved the Marshall/Newman Amendment. Like the Michigan amendment at issue in *Schuette,* the Marshall/Newman Amendment is the codification of Virginians' policy choice in a legal arena that is fraught with intense social and political debate. Americans' ability to speak with their votes is essential to our democracy. But the people's will is not an independent compelling interest that warrants depriving same-sex couples of their fundamental right to marry.

Accordingly, neither Virginia's federalism-based interest in defining marriage nor our respect for the democratic process that codified that definition can excuse the Virginia Marriage Laws' infringement of the right to marry.

2. History and Tradition

The Proponents also point to the "history and tradition" of opposite-sex marriage as a compelling interest that supports the Virginia Marriage Laws. The Supreme Court has made it clear that, even under rational basis review, the "[a]ncient lineage of a legal concept does not give it immunity from attack." The closely linked interest of promoting moral principles is similarly infirm in light of *Lawrence:* "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice;

neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." Preserving the historical and traditional status quo is therefore not a compelling interest that justifies the Virginia Marriage Laws.

3. Safeguarding the Institution of Marriage

In addition to arguing that history and tradition are compelling interests in their own rights, the Proponents warn that deviating from the tradition of opposite-sex marriage will destabilize the institution of marriage. The Proponents suggest that legalizing same-sex marriage will sever the link between marriage and procreation: they argue that, if same-sex couples who cannot procreate naturally-are allowed to marry, the state will sanction the idea that marriage is a vehicle for adults' emotional fulfillment, not simply a framework for parenthood. According to the Proponents, if adults are the focal point of marriage, "then no logical grounds reinforce stabilizing norms like sexual exclusivity, permanence, and monogamy," which exist to benefit children.

We recognize that, in some cases, we owe "substantial deference to the predictive judgments" of the Virginia General Assembly, for whom the Proponents purport to speak. However, even if we view the Proponents' theories through rose-colored glasses, we conclude that they are unfounded for two key reasons. First, the Supreme Court rejected the view that marriage is about only procreation in *Griswold v. Connecticut*, in which it upheld married couples' right not to procreate and articulated a view of marriage that has nothing to do with children.

The fact that marriage's stabilizing norms have endured in the five decades since the Supreme Court made this pronouncement weakens the argument that couples remain in monogamous marriages only for the sake of their offspring.

Second, the primary support that the Proponents offer for their theory is the legacy of a wholly unrelated legal change to marriage: no-fault divorce. Although no-fault divorce certainly altered the realities of married life by making it easier for couples to end their relationships, we have no reason to think that legalizing same-sex marriage will have a similar destabilizing effect. In fact, it is more logical to think that same-sex couples want access to marriage so that they can take advantage of its hallmarks, including faithfulness and permanence, and that allowing loving, committed same-sex couples to marry and recognizing their out-of-state marriages will strengthen the institution of marriage. We therefore reject the Proponents' concerns.

4. Responsible Procreation

Next, the Proponents contend that the Virginia Marriage Laws' differentiation between opposite-sex and same-sex couples stems from the fact that unintended pregnancies cannot result from same-sex unions. By sanctioning only opposite-sex marriages, the Virginia Marriage Laws "provid[e] stability to the types of relationships that result in unplanned pregnancies, thereby avoiding or diminishing the negative outcomes often

associated with unintended children." The Proponents allege that children born to unwed parents face a "significant risk" of being raised in unstable families, which is harmful to their development. Virginia, "of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." However, the Virginia Marriage Laws are not appropriately tailored to further this interest.

If Virginia sought to ensure responsible procreation via the Virginia Marriage Laws, the laws are woefully underinclusive. Same-sex couples are not the only category of couples who cannot reproduce accidentally. For example, opposite-sex couples cannot procreate unintentionally if they include a post-menopausal woman or an individual with a medical condition that prevents unassisted conception.

The Proponents attempt to downplay the similarity between same-sex couples and infertile opposite-sex couples in three ways. First, they point out that sterile individuals could remedy their fertility through future medical advances. This potentiality, however, does not explain why Virginia should treat same-sex and infertile opposite-sex couples differently during the course of the latter group's infertility. Second, the Proponents posit that, even if one member of a man-woman couple is sterile, the other member may not be. They suggest that, without marriage's monogamy mandate, this fertile individual is more likely to have an unintended child with a third party. They contend that, due to this possibility, even opposite-sex couples who cannot procreate need marriage to channel their procreative activity in a way that same-sex couples do not. The Proponents' argument assumes that individuals in same-sex relationships never have opposite-sex sexual partners, which is simply not the case. Third, the Proponents imply that, by marrying, infertile opposite-sex couples set a positive example for couples who can have unintended children, thereby encouraging them to marry. We see no reason why committed same-sex couples cannot serve as similar role models. We therefore reject the Proponents' attempts to differentiate same-sex couples from other couples who cannot procreate accidentally. Because same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently.

Due to the Virginia Marriage Laws' underinclusivity, this case resembles *City of Cleburne v. Cleburne Living Center, Inc.* In *City of Cleburne*, the Supreme Court struck down a city law that required group homes for the intellectually disabled to obtain a special use permit. The city did not impose the same requirement on similar structures, such as apartment complexes and nursing homes. The Court determined that the permit requirement was so underinclusive that the city's motivation must have "rest[ed] on an irrational prejudice," rendering the law unconstitutional. In light of the Virginia Marriage Laws' extreme underinclusivity, we are forced to draw the same conclusion in this case.

The Proponents' responsible procreation argument falters for another reason as well. Strict scrutiny requires that a state's means further its compelling interest. Prohibiting same-sex couples from marrying and ignoring their out-of-state marriages does not serve Virginia's goal of preventing out-of-wedlock births. Although same-sex couples cannot procreate accidentally, they can and do have children via other methods. According to an amicus brief filed by Dr. Gary J. Gates, as of the 2010 U.S. Census, more than 2500 same-sex couples were raising more than 4000 children under the age of eighteen in Virginia. The Virginia Marriage Laws therefore increase the number of children raised by unmarried parents.

The Proponents acknowledge that same-sex couples become parents. They contend, however, that the state has no interest in channeling same-sex couples' procreative activities into marriage because same-sex couples "bring children into their relationship[s] only through intentional choice and pre-planned action." Accordingly, "[t]hose couples neither advance nor threaten society's public purpose for marriage"—stabilizing parental relationships for the benefit of children—"in the same manner, or to the same degree, that sexual relationships between men and women do."

In support of this argument, the Proponents invoke the Supreme Court's decision in *Johnson v. Robison*. *Johnson* concerned educational benefits that the federal government granted to military veterans who served on active duty. The government provided these benefits to encourage enlistment and make military service more palatable to existing service members. A conscientious objector-who refused to serve in the military for religious reasons-brought suit, contending that the government acted unconstitutionally by granting benefits to veterans but not conscientious objectors. The Court explained that, "[w]hen, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." Because offering educational benefits to conscientious objectors would not incentivize military service, the federal government's line-drawing was constitutional. The Proponents claim that treating opposite-sex couples differently from same-sex couples is equally justified because the two groups are not similarly situated with respect to their procreative potential.

Johnson applied rational basis review, so we strongly doubt its applicability to our strict scrutiny analysis. In any event, we can easily distinguish *Johnson* from the instant case. In *Johnson*, offering educational benefits to veterans who served on active duty promoted the government's goal of making military service more attractive. Extending those benefits to conscientious objectors, whose religious beliefs precluded military service, did not further that objective. By contrast, a stable marital relationship is attractive regardless of a couple's procreative ability. Allowing infertile opposite-sex couples to marry does

nothing to further the government's goal of channeling procreative conduct into marriage. Thus, excluding same-sex couples from marriage due to their inability to have unintended children makes little sense. *Johnson* therefore does not alter our conclusion that barring same-sex couples' access to marriage does nothing to further Virginia's interest in responsible procreation.

5. Optimal Childrearing

We now shift to discussing the merit of the final compelling interest that the Proponents invoke: optimal childrearing. The Proponents aver that "children develop best when reared by their married biological parents in a stable family unit." They dwell on the importance of "gender-differentiated parenting" and argue that sanctioning same-sex marriage will deprive children of the benefit of being raised by a mother and a father, who have "distinct parenting styles." In essence, the Proponents argue that the Virginia Marriage Laws safeguard children by preventing same-sex couples from marrying and starting inferior families.

The Opponents and their amici cast serious doubt on the accuracy of the Proponents' contentions. For example, as the American Psychological Association, American Academy of Pediatrics, American Psychiatric Association, National Association of Social Workers, and Virginia Psychological Association (collectively, the APA) explain in their amicus brief, "there is no scientific evidence that parenting effectiveness is related to parental sexual orientation," and "the same factors"—including family stability, economic resources, and the quality of parent-child relationships—"are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents." According to the APA, "the parenting abilities of gay men and lesbians—and the positive outcomes for their children—are *not* areas where most credible scientific researchers disagree," and the contrary studies that the Proponents cite "do not reflect the current state of scientific knowledge." In fact, the APA explains that, by preventing same-sex couples from marrying, the Virginia Marriage Laws actually harm the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters. The Supreme Court reached a similar conclusion in *Windsor,* in which it observed that failing to recognize same-sex marriages "humiliates tens of thousands of children now being raised by same-sex couples" and "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."

We find the arguments that the Opponents and their amici make on this issue extremely persuasive. However, we need not resolve this dispute because the Proponents' optimal childrearing argument falters for at least two other reasons. First, under heightened scrutiny, states cannot support a law using "overbroad generalizations about the different talents, capacities, or preferences of" the groups in question. The Proponents' statements regarding same-sex couples' parenting ability certainly qualify as overbroad generalizations. Second, as we

explain above, strict scrutiny requires congruity between a law's means and its end. This congruity is absent here. There is absolutely no reason to suspect that prohibiting same-sex couples from marrying and refusing to recognize their out-of-state marriages will cause same-sex couples to raise fewer children or impel married opposite-sex couples to raise more children. The Virginia Marriage Laws therefore do not further Virginia's interest in channeling children into optimal families, even if we were to accept the dubious proposition that same-sex couples are less capable parents.

Because the Proponents' arguments are based on overbroad generalizations about same-sex parents, and because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws. All of the Proponents' justifications for the Virginia Marriage Laws therefore fail, and the laws cannot survive strict scrutiny.

V.

For the foregoing reasons, we conclude that the Virginia Marriage Laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the extent that they prevent same-sex couples from marrying and prohibit Virginia from recognizing same-sex couples' lawful out-of-state marriages. We therefore affirm the district court's grant of the Plaintiffs' motion for summary judgment and its decision to enjoin enforcement of the Virginia Marriage Laws.

We recognize that same-sex marriage makes some people deeply uncomfortable. However, inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws. Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.

AFFIRMED

NIEMEYER, Circuit Judge, dissenting:

To be clear, this case is not about whether courts favor or disfavor same-sex marriage, or whether States recognizing or declining to recognize same-sex marriage have made good policy decisions. It is much narrower. It is about whether a State's decision not to recognize same-sex marriage violates the Fourteenth Amendment of the U.S. Constitution. Thus, the judicial response must be limited to an analysis applying established constitutional principles.

The Commonwealth of Virginia has always recognized that “marriage” is based on the “mutual agreement of a man and a woman to marry each other,” and that a marriage's purposes include “establishing a family, the continuance of the race, the propagation of children, and the general good of society.” In recent years, it codified that

understanding in several statutes, which also explicitly exclude from the definition of "marriage" the union of two men or two women. Moreover, in 2006 the people of Virginia amended the Commonwealth's Constitution to define marriage as only between "one man and one woman."

The plaintiffs, who are in long-term same-sex relationships, are challenging the constitutionality of Virginia's marriage laws under the Due Process and Equal Protection Clauses of the U.S. Constitution. The district court sustained their challenge, concluding that the plaintiffs have a *fundamental right* to marry each other under the Due Process Clause of the Fourteenth Amendment and therefore that any regulation of that right is subject to strict scrutiny. Concluding that Virginia's definition of marriage failed even "to display a rational relationship to a legitimate purpose and so must be viewed as constitutionally infirm," the court struck down Virginia's marriage laws as unconstitutional and enjoined their enforcement.

The majority agrees. It concludes that the fundamental right to marriage includes a right to same-sex marriage and that therefore Virginia's marriage laws must be reviewed under strict scrutiny. It holds that Virginia has failed to advance a compelling state interest justifying its definition of marriage as between only a man and a woman. In reaching this conclusion, however, the majority has failed to conduct the necessary constitutional analysis. Rather, it has simply declared syllogistically that because "marriage" is a fundamental right protected by the Due Process Clause and "same-sex marriage" is a form of marriage, Virginia's laws declining to recognize same-sex marriage infringe the fundamental right to marriage and are therefore unconstitutional.

Stated more particularly, the majority's approach begins with the parties' agreement that "marriage" is a fundamental right. From there, the majority moves to the proposition that "the right to marry is an expansive liberty interest," "that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." For support, it notes that the Supreme Court has struck down state restrictions prohibiting interracial marriage; prohibiting prison inmates from marrying without special approval; and prohibiting persons owing child support from marrying. It then declares, *ipse dixit*, that "the fundamental right to marry encompasses the right to same-sex marriage" and is thus protected by the substantive component of the Due Process Clause. In reaching this conclusion, the majority "decline[s] the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry." And in doing so, it explicitly bypasses the relevant constitutional analysis required by *Washington v. Glucksberg*, stating that a *Glucksberg* analysis is not necessary because no *new* fundamental right is being recognized.

This analysis is fundamentally flawed because it fails to take into account that the "marriage" that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly proposed

relationship of a "same-sex marriage." And this failure is even more pronounced by the majority's acknowledgment that same-sex marriage is a new notion that has not been recognized "for most of our country's history." Moreover, the majority fails to explain how this new notion became incorporated into the traditional definition of marriage except by linguistic manipulation. Thus, the majority never asks the question necessary to finding a fundamental right—whether same-sex marriage is a right that is "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 [it was] sacrificed."

At bottom, in holding that same-sex marriage is encompassed by the traditional right to marry, the majority avoids the necessary constitutional analysis, concluding simply and broadly that the fundamental "right to marry"—by everyone and to anyone—may not be infringed. And it does not anticipate or address the problems that this approach causes, failing to explain, for example, why this broad right to marry, as the majority defines it, does not also encompass the "right" of a father to marry his daughter or the "right" of any person to marry multiple partners.

If the majority were to recognize and address the distinction between the two relationships—the traditional one and the new one—as it must, it would simply be unable to reach the conclusion that it has reached.

I respectfully submit that Virginia was well within its constitutional authority to adhere to its traditional definition of marriage as the union of a man and a woman and to exclude from that definition the union of two men or two women. I would also agree that the U.S. Constitution does not prohibit a State from defining marriage to include same-sex marriage, as many States have done. Accordingly, I would reverse the judgment of the district court and uphold Virginia's marriage laws.

I

As the majority has observed, state recognition of same-sex marriage is a new phenomenon. Its history began in the early 2000s with the recognition in some States of civil unions. And the notion of same-sex marriage itself first gained traction in 2003, when the Massachusetts Supreme Judicial Court held that the Commonwealth's prohibition on issuing marriage licenses to same-sex couples violated the State's Constitution-the first decision holding that same-sex couples had a right to marry. In 2009, Vermont became the first State to enact legislation recognizing same-sex marriage, and, since then, 11 other States and the District of Columbia have also done so. Moreover, seven other States currently allow same-sex marriage as a result of court rulings. This is indeed a recent phenomenon.

Virginia only recognizes marriage as between one man and one woman, and, like a majority of States, it has codified this view. The bill originally proposing what would become § 20–45.3 noted the basis for Virginia's legislative decision:

> [H]uman marriage is a consummated two in one communion of male and female persons made possible by sexual differences which are reproductive in

> type, whether or not they are reproductive in effect or motivation. This present relationship recognizes the equality of male and female persons, and antedates recorded history.

The bill predicted that the recognition of same-sex marriage would "radically transform the institution of marriage with serious and harmful consequences to the social order." Virginia also amended its Constitution in 2006 to define marriage as only between "one man and one woman" and to prohibit "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage." The plaintiffs commenced this action to challenge the constitutionality of Virginia's marriage laws.

After the parties filed cross-motions for summary judgment, Virginia underwent a change in administrations, and the newly elected Attorney General of Virginia, Mark Herring, filed a notice of a change in his office's legal position on behalf of his client, defendant Janet Rainey. His notice stated that because, in his view, the laws at issue were unconstitutional, his office would no longer defend them on behalf of Rainey. He noted, however, that Rainey would continue to enforce the laws until the court's ruling. The other officials have continued to defend Virginia's marriage laws, and, for convenience, I refer to the defendants herein as "Virginia ."

Following a hearing, the district court, by an order and memorandum dated February 14, 2014, granted the plaintiffs' motion for summary judgment and denied Virginia's cross-motion. The court concluded that same-sex partners have a fundamental right to marry each other under the Due Process Clause of the Fourteenth Amendment, thus requiring that Virginia's marriage laws restricting that right be narrowly drawn to further a compelling state interest. It concluded that the laws did not meet that requirement and, indeed, "fail[ed] to display a rational relationship to a legitimate purpose, and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny." Striking down Virginia's marriage laws, the court also issued an order enjoining their enforcement but stayed that order pending appeal. This appeal followed.

II

The plaintiffs contend that, as same-sex partners, they have a fundamental right to marry that is protected by the substantive component of the Due Process Clause of the U.S. Constitution, and that Virginia's laws defining marriage as only between a man and a woman and excluding same-sex marriage infringe on that right. The constitutional analysis for adjudging their claim is well established.

The Constitution contains no language directly protecting the right to same-sex marriage or even traditional marriage. Any right to same-sex marriage, therefore, would have to be found, through court interpretation, as a substantive component of the Due Process Clause.

The substantive component of the Due Process Clause only protects "fundamental" liberty interests. And the Supreme Court has held that liberty interests are only

fundamental if they are, "objectively, '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.' " When determining whether such a fundamental right exists, a court must always make "a *'careful* description' of the asserted fundamental liberty interest." This "careful description" involves characterizing the right asserted *in its narrowest terms*. Thus, in *Glucksberg*, where the Court was presented with a due process challenge to a state statute banning assisted suicide, the Court narrowly characterized the right being asserted in the following manner:

> The Court of Appeals stated that "[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," or, in other words, "[i]s there a right to die?" Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," and describe the asserted liberty as "the right to choose a humane, dignified death," and "the liberty to shape death ." As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases.... The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide," and, *thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.*

Under this formulation, because the Virginia laws at issue prohibit "marriage between persons of the same sex," "the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right" to same-sex marriage.

When a fundamental right is so identified, then any statute restricting the right is subject to strict scrutiny and must be "narrowly tailored to serve a compelling state interest." Such scrutiny is extremely difficult for a law to withstand, and, as such, the Supreme Court has noted that courts must be extremely cautious in recognizing fundamental rights because doing so ordinarily removes freedom of choice from the hands of the people.

The plaintiffs in this case, as well as the majority, recognize that narrowly defining the asserted liberty interest would require them to demonstrate a *new* fundamental right to same-sex marriage, which they cannot do. Thus, they have made no attempt to argue that same-sex marriage is, "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." Indeed, they have acknowledged that recognition of same-sex marriage is a recent development.

Instead, the plaintiffs and the majority argue that the fundamental right to marriage that has *previously* been recognized by the Supreme Court is a broad right that should apply to the plaintiffs without the need to recognize a new fundamental right to same-sex marriage. They argue that this approach is supported by the fact that the Supreme Court did not narrowly define the right to marriage in its decisions in *Loving*; *Turner*; or *Zablocki*.

It is true that, in those cases, the Court did not recognize new, separate fundamental rights to fit the factual circumstances in each case. For example, in *Loving*, the Court did not examine whether interracial marriage was, objectively, deeply rooted in our Nation's history and tradition. But it was not required to do so. Each of those cases involved a couple asserting a right to enter into a traditional marriage of the type that has always been recognized since the beginning of the Nation-a union between one man and one woman. While the context for asserting the right varied in each of those cases, it varied only in ways irrelevant to the concept of marriage. The type of relationship sought was always the traditional, man-woman relationship to which the term "marriage" was theretofore always assumed to refer. Thus, none of the cases cited by the plaintiffs and relied on by the majority involved the assertion of a brand new liberty interest. To the contrary, they involved the assertion of one of the oldest and most fundamental liberty interests in our society.

To now define the previously recognized fundamental right to "marriage" as a concept that includes the new notion of "same-sex marriage" amounts to a dictionary jurisprudence, which defines terms as convenient to attain an end.

Because there exist deep, fundamental differences between traditional and same-sex marriage, the plaintiffs and the majority err by conflating the two relationships under the loosely drawn rubric of "the right to marriage." Rather, to obtain constitutional protection, they would have to show that the right to same-sex marriage is itself deeply rooted in our Nation's history. They have not attempted to do so and could not succeed if they were so to attempt.

In an effort to bridge the obvious differences between the traditional relationship and the new same-sex relationship, the plaintiffs argue that the fundamental right to marriage "has always been based on, and defined by, the constitutional liberty to *select the partner of one's choice.*" They rely heavily on *Loving* to assert this claim. In *Loving*, the Court held that a state regulation restricting interracial marriage infringed on the fundamental right to marriage. But nowhere in *Loving* did the Court suggest that the fundamental right to marry includes the unrestricted right to marry whomever one chooses, as the plaintiffs claim. Indeed, *Loving* explicitly relied on *Skinner* and *Murphy*, and both of those cases discussed marriage in traditional, procreative terms.

This reading of *Loving* is fortified by the Court's summary dismissal of *Baker v. Nelson* just five years after *Loving* was decided. In *Baker*, the Minnesota Supreme Court interpreted a state statute's use of the term "marriage" to be one of common usage meaning a union "between persons of the opposite sex" and thus not including same-sex marriage. On appeal, the Supreme Court dismissed the case summarily "for want of a substantial federal question." The Court's action in context indicates that the Court did not view *Loving* or the cases that preceded it as providing a fundamental right to an unrestricted choice of marriage partner. Otherwise, the state court's decision

in *Baker* would indeed have presented a substantial federal question.

The plaintiffs also largely ignore the problem with their position that if the fundamental right to marriage is based on "the constitutional liberty to select the partner of one's choice," as they contend, then that liberty would also extend to individuals seeking state recognition of other types of relationships that States currently restrict, such as polygamous or incestuous relationships. Such an extension would be a radical shift in our understanding of marital relationships. Laws restricting polygamy are foundational to the Union itself, having been a condition on the entrance of Arizona, New Mexico, Oklahoma, and Utah into statehood. At bottom, the fundamental right to marriage does not include a right to same-sex marriage. Under the *Glucksberg* analysis that we are thus bound to conduct, there is no new fundamental right to same-sex marriage. Virginia's laws restricting marriage to man-woman relationships must therefore be upheld if there is *any rational basis* for the laws.

III

Under rational-basis review, courts are required to give heavy deference to legislatures. The standard

> simply requires courts to determine whether the classification in question is, at a minimum, *rationally related to legitimate governmental goals.* In other words, the fit between the enactment and the public purposes behind it need not be mathematically precise. As long as [the legislature] has a reasonable basis for adopting the classification, which can include "rational speculation unsupported by evidence or empirical data," the statute will pass constitutional muster. The rational basis standard thus embodies an idea critical to the continuing vitality of our democracy: that courts are not empowered to "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."
>
> Statutes subject to rational-basis review "bear[ ] a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden *'to negative every conceivable basis* which might support [them].' "

In contending that there is a rational basis for its marriage laws, Virginia has emphasized that children are born only to one man and one woman and that marriage provides a family structure by which to nourish and raise those children. It claims that a biological family is a more stable environment, and it renounces any interest in encouraging same-sex marriage. It argues that the purpose of its marriage laws "is to channel the presumptive procreative potential of man-woman relationships into enduring marital unions so that if any children are born, they are more likely to be raised in stable family units." Virginia highlights especially marriage's tendency to promote stability in the event of unplanned pregnancies, asserting that it has "a compelling interest in addressing the particular concerns associated with the birth of unplanned children.... [C]hildren born from unplanned pregnancies where their mother and father are not married to each other are at significant risk of being raised

outside stable family units headed by their mother and father jointly."

Virginia states that its justifications for promoting traditional marriage also explain its lack of interest in promoting same-sex marriage. It maintains that a traditional marriage is "exclusively [an] opposite-sex institution ... inextricably linked to procreation and biological kinship," and that same-sex marriage prioritizes the emotions and sexual attractions of the two partners without any necessary link to reproduction. It asserts that it has no interest in "licensing adults' love."

The plaintiffs accept that family stability is a legitimate state goal, but they argue that licensing same-sex relationships will not burden Virginia's achievement of that goal. They contend that "there is simply no evidence or reason to believe that prohibiting gay men and lesbians from marrying will increase 'responsible procreation' among heterosexuals."

But this argument does not negate any of the rational justifications for Virginia's legislation. States are permitted to selectively provide benefits to only certain groups when providing those same benefits to other groups would not further the State's ultimate goals.

The plaintiffs reply that even if this is so, such "line-drawing" only makes sense if the resources at issue are scarce, justifying the State's limited provision of those resources. They argue that because "[m]arriage licenses ... are not a remotely scarce commodity," the line-drawing done by Virginia's marriage laws is irrational. But this fundamentally misunderstands the nature of marriage *benefits.* When the Commonwealth grants a marriage, it does not simply give the couple a piece of paper and a title. Rather, it provides a substantial subsidy to the married couple—economic benefits that, the plaintiffs repeatedly assert, are being denied them. For example, married couples are permitted to file state income taxes jointly, lowering their tax rates. Although indirect, such benefits are clearly subsidies that come at a cost to the Commonwealth. Virginia is willing to provide these subsidies because they encourage opposite-sex couples to marry, which tends to provide children from unplanned pregnancies with a more stable environment. Under *Johnson,* the Commonwealth is not obligated to similarly subsidize same-sex marriages, since doing so could not possibly further its interest. This is no different from the subsidies provided in other cases where the Supreme Court has upheld line-drawing, such as Medicare benefits or veterans' educational benefits.

As an additional argument, Virginia maintains that marriage is a "[c]omplex social institution[ ]" with a "set of norms, rules, patterns, and expectations that powerfully (albeit often unconsciously) affect people's choices, actions, and perspectives." It asserts that discarding the traditional definition of marriage will have far-reaching consequences that cannot easily be predicted, including "sever[ing] the inherent link between procreation ... and marriage ... [and] in turn ... powerfully convey [ing] that marriage exists to advance

adult desires rather than [to] serv[e] children's needs."

The plaintiffs agree that changing the definition of marriage may have unforeseen social effects, but they argue that such predictions should not be enough to save Virginia's marriage laws because similar justifications were rejected in *Loving*. The *Loving* Court, however, was not applying rational-basis review. We are on a different footing here. Under rational-basis review, legislative choices "may be based on rational speculation unsupported by evidence or empirical data." "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." And the legislature "is far better equipped than the judiciary" to make these evaluations and ultimately decide on a course of action based on its predictions. In enacting its marriage laws, Virginia predicted that changing the definition of marriage would have a negative effect on children and on the family structure. Although other States do not share those concerns, such evaluations were nonetheless squarely within the province of the Commonwealth's legislature and its citizens, who voted to amend Virginia's Constitution in 2006.

Virginia has undoubtedly articulated sufficient rational bases for its marriage laws, and I would find that those bases constitutionally justify the laws. Those laws are grounded on the biological connection of men and women; the potential for their having children; the family order needed in raising children; and, on a larger scale, the political order resulting from stable family units. Moreover, I would add that the traditional marriage relationship encourages a family structure that is intergenerational, giving children not only a structure in which to be raised but also an identity and a strong relational context. The marriage of a man and a woman thus rationally promotes a correlation between biological order and political order. Because Virginia's marriage laws are rationally related to its legitimate purposes, they withstand rational-basis scrutiny under the Due Process Clause.

IV

The majority does not substantively address the plaintiffs' second argument—that Virginia's marriage laws invidiously discriminate on the basis of sexual orientation, in violation of the Equal Protection Clause—since it finds that the laws infringe on the plaintiffs' fundamental right to marriage. But because I find no fundamental right is infringed by the laws, I also address discrimination under the Equal Protection Clause.

The Equal Protection Clause, which forbids any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws," prohibits invidious discrimination among classes of persons. Any laws based on "suspect" classifications are subject to strict scrutiny. In a similar vein, classifications based on gender are "quasisuspect" and call for "intermediate scrutiny" because they "frequently bear[ ] no relation to ability to perform or contribute to society" and thus "generally provide[ ] no

sensible ground for differential treatment .” Laws subject to intermediate scrutiny must be substantially related to an important government objective.

But when a regulation adversely affects members of a class that is not suspect or quasi-suspect, the regulation is “presumed to be valid and will be sustained if the classification drawn by the statute is *rationally related* to a legitimate state interest.” Moreover, the Supreme Court has made it clear that

> where individuals in the group affected by a law have *distinguishing characteristics relevant to interests the State has the authority to implement*, 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. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

This is based on the understanding that “equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”

The plaintiffs contend that Virginia's marriage laws should be subjected to some level of heightened scrutiny because they discriminate on the basis of *sexual orientation.* Yet they concede that neither the Supreme Court nor the Fourth Circuit has ever applied heightened scrutiny to a classification based on sexual orientation. They urge this court to do so for the first time. Governing precedent, however, counsels otherwise.

And the Supreme Court made no change as to the appropriate level of scrutiny in its more recent decision in *Windsor,* which held Section 3 of the Defense of Marriage Act unconstitutional. The Court was presented an opportunity to alter the *Romer* standard but did not do so. Although it did not state the level of scrutiny being applied, it did explicitly rely on rational-basis cases like *Romer* and *Department of Agriculture v. Moreno.* In his dissenting opinion in *Windsor*, Justice Scalia thus noted, “As nearly as I can tell, the Court agrees [that rational-basis review applies]; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like Moreno.”

Finally, we have concluded that rational-basis review applies to classifications based on sexual orientation. In *Veney,* a prisoner filed a § 1983 action alleging that he had been discriminated against on the basis of sexual preference and gender. We noted that the plaintiff “[did] not allege that he [was] a member of a suspect class. Rather, he claim[ed] that he ha[d] been discriminated against on the basis of sexual preference and gender.” Outside the prison context, the former is subject to rational basis review.

The vast majority of other courts of appeals have reached the same conclusion.

Thus, following Supreme Court and Fourth Circuit precedent, I would hold that Virginia's marriage laws are subject to rational-basis review. Applying that standard, I conclude that there is a rational

basis for the laws, as explained in Part III, above.

V

Whether to recognize same-sex marriage is an ongoing and highly engaged political debate taking place across the Nation, and the States are divided on the issue. The majority of courts have struck down statutes that deny recognition of same-sex marriage, doing so almost exclusively on the idea that same-sex marriage is encompassed by the fundamental right to marry that is protected by the Due Process Clause. While I express no viewpoint on the merits of the policy debate, I do strongly disagree with the assertion that same-sex marriage is subject to the same constitutional protections as the traditional right to marry.

Because there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it, just as there are rational reasons *for* recognizing it, I conclude that we, in the Third Branch, must allow the States to enact legislation on the subject in accordance with their political processes. The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.

I would reverse the district court's judgment and defer to Virginia's political choice in defining marriage as only between one man and one woman.

Kitchen v. Herbert

Ruling Below: Kitchen v. Herbert, 961 F.Supp.2d 1181 (D. Utah 2013).

Three gay and lesbian couples who either desired to be married in Utah or, having already married elsewhere, wished to have their marriage recognized in Utah, brought action against Utah's Governor, Attorneys General, and county clerk, seeking to challenge amendment to Utah's Constitution, as well as two statutes, that prohibited same-sex marriage as violative of same-sex couples' due process and equal protection rights under Fourteenth Amendment. The United States District Court for the District of Utah granted summary judgment for plaintiffs. The Governor and Attorney General appealed.

Question Presented: Whether § 30–1–4.1 or the amendment to the Constitution of Utah, known as Amendment 3, violate Plaintiffs' right to due process under the Fourteenth Amendment by depriving them of the fundamental liberty to marry the person of their choice and to have such a marriage recognized.

Derek KITCHEN; Moudi Sbeity; Karen Archer; Kate Call; Laurie Wood; Kody Partridge, individually, Plaintiffs-Appelles,
v.
Gary R. HERBERT, in his official capacity as Governor of Utah; Sean Reyes, in his official capacity as Attorney General of Utah, Defendants-Appellants,
and
Sherrie Swensen, in her official capacity as Clerk of Salt Lake County, Defendant.

United States Court of Appeals, Tenth Circuit

Decided on June 25, 2014

[Excerpt; some footnotes and citations omitted.]

LUCERO, Circuit Judge.

Our commitment as Americans to the principles of liberty, due process of law, and equal protection of the laws is made live by our adherence to the Constitution of the United States of America. Historical challenges to these principles ultimately culminated in the adoption of the Fourteenth Amendment nearly one-and-a-half centuries ago. This Amendment extends the guarantees of due process and equal protection to every person in every State of the Union. Those very principles are at issue yet again in this marriage equality appeal brought to us by the Governor and Attorney General of the State of Utah from an adverse ruling of the district court.

We are told that because they felt threatened by state-court opinions allowing same-sex marriage, Utah legislators and—by legislature—initiated action—the citizens of the State of Utah amended their statutes and state constitution in 2004 to ensure that the State "will not recognize, enforce, or give

legal effect to any law" that provides "substantially equivalent" benefits to a marriage between two persons of the same sex as are allowed for two persons of the opposite sex. These laws were also intended to assure non-recognition irrespective of how such a domestic union might be denominated, or where it may have been performed. Plaintiffs challenged the constitutionality of these laws and the district court agreed with their position. Under 28 U.S.C. § 1291, we entertain the appeal of that ruling.

Our Circuit has not previously considered the validity of same-sex marriage bans. When the seed of that question was initially presented to the United States Supreme Court in 1972, the Court did not consider the matter of such substantial moment as to present a justiciable federal question. Since that date, the seed has grown, however. Last year the Court entertained the federal aspect of the issue in striking down § 3 of the Defense of Marriage Act ("DOMA"), yet left open the question presented to us now in full bloom: May a State of the Union constitutionally deny a citizen the benefit or protection of the laws of the State based solely upon the sex of the person that citizen chooses to marry?

I

Utah residents Derek Kitchen and Moudi Sbeity have been in a loving, committed relationship for several years. The couple lives together in Salt Lake City, where they jointly own and operate a business. Kitchen declares that Sbeity "is the man with whom I have fallen in love, the man I want to marry, and the man with whom I want to spend the rest of my life." In March 2013, Kitchen and Sbeity applied for a marriage license from the Salt Lake County Clerk's office, but were denied because they are both men. Being excluded from the institution of marriage has caused Kitchen and Sbeity to undertake a burdensome process of drawing up wills and other legal documents to enable them to make important decisions for each other. Even with these protections, however, the couple cannot access various benefits of marriage, including the ability to file joint state tax returns and hold marital property. Sbeity also states that the legal documents the couple have obtained "do not and cannot provide the dignity, respect, and esteem" of marriage. The inability to "dignify [his] relationship" though marriage, Kitchen explains, communicates to him that his relationship with Sbeity is unworthy of "respect, equal treatment, and social recognition."

Laurie Wood and Kody Partridge are also Utah residents who wish to "confirm [their] life commitment and love" through marriage. They applied for a marriage license from the Salt Lake County Clerk's office in March 2013, but were denied because they are both women. This denial made Wood "feel like a second class citizen." The couple's inability to marry carries financial consequences. Because Partridge will be unable to obtain benefits under Wood's pension, the couple has procured additional life insurance policies. Partridge states that she and Wood face "risks and stigmas that none of [her] heterosexual married friends and family ever have to face." She points to the example of her parents, who were married for fifty-five

years, observing that her father never had to worry about his ability to be present or make medical decisions when his wife became terminally ill. Wood hopes that marriage to Partridge will allow "both society and our families [to] recognize the life commitment and love we feel for each other."

Karen Archer and Kate Call are also Utah residents in a loving, committed relationship. Archer, who suffers from chronic health problems, fears that the legal documents the couple has prepared will be subject to challenge if she passes away. Her past experience surviving other partners informs this fear. Although the documents she prepared in a prior relationship served their purpose when her former partner passed, Archer was ineligible to receive her partner's military pension benefits. Seeking the security enjoyed by other married couples, Archer and Call travelled to Iowa in July 2011, where they were wed. Because they could not be married in their home state, financial constraints dictated a modest wedding unattended by family and friends. "Despite the inconvenience and sad pragmatism of our Iowa marriage," Call explains, "we needed whatever protections and security we could get for our relationship" because of Archer's failing health. However, Utah does not recognize Archer and Call's marriage.

In March 2013, Kitchen, Sbeity, Wood, Partridge, Archer, and Call filed suit against the Governor and Attorney General of Utah and the Clerk of Salt Lake County (all in their official capacities). Plaintiffs challenged three provisions of Utah law relating to same-sex marriage. Utah Code § 30–1–2(5) includes among the marriages that are "prohibited and declared void" those "between persons of the same sex." In 2004, the Utah Legislature passed § 30–1–4.1, which provides:

> (1)(a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
>
> (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.
>
> (2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section.

The Legislature also referred a proposed constitutional amendment, known as Amendment 3, to Utah's voters. It states:

> (1) Marriage consists only of the legal union between a man and a woman.
>
> (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

The State's official voter pamphlet described rulings by courts in other states striking down statutory prohibitions on same-sex marriage as inconsistent with state constitutional provisions. In the "arguments

for" section, written by a state representative and a state senator, the proponents argued that the Amendment was necessary to protect against a similar state-court ruling. They posited that the proposed amendment would not "promote intolerance, hatred, or bigotry" but would instead "preserve[an] historic understanding of marriage" rooted in "government's strong interest in maintaining public morality, the justified preference for heterosexual marriage with its capacity to perpetuate the human race and the importance of raising children in that preferred relationship." Opponents of the amendment argued that it "singles out one specific group—people who are our relatives, neighbors, and co-workers—to deny them hundreds of rights and protections that other Utahns enjoy." Amendment 3 passed with approximately 66% of the vote and became § 29 of Article I of the Utah Constitution. This opinion will refer to both of the foregoing statutes, along with the constitutional amendment, collectively as "Amendment 3."

Plaintiffs allege that Amendment 3 violates their right to due process under the Fourteenth Amendment by depriving them of the fundamental liberty to marry the person of their choice and to have such a marriage recognized. They also claim that Amendment 3 violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs asserted their claims under 42 U.S.C. § 1983, seeking both a declaratory judgment that Amendment 3 is unconstitutional and an injunction prohibiting its enforcement.

On cross motions for summary judgment, the district court ruled in favor of the plaintiffs. It concluded that "[a]ll citizens, regardless of their sexual identity, have a fundamental right to liberty, and this right protects an individual's ability to marry and the intimate choices a person makes about marriage and family." The court further held that Amendment 3 denied plaintiffs equal protection because it classified based on sex and sexual orientation without a rational basis. It declared Amendment 3 unconstitutional and permanently enjoined enforcement of the challenged provisions.

Utah's Governor and Attorney General filed a timely notice of appeal and moved to stay the district court's decision. Both the district court and this court denied a stay. The Supreme Court, however, granted a stay of the district court's injunction pending final disposition of the appeal by this court.

II

We first consider the issue of standing, although it was not raised by the parties. To possess Article III standing, a plaintiff must "establish (1) that he or she has suffered an injury in fact; (2) that the injury is fairly traceable to the challenged action of the defendant; and[ ](3) that it is likely that the injury will be redressed by a favorable decision."

Plaintiffs suing public officials can satisfy the causation and redressability requirements of standing by demonstrating "a meaningful nexus" between the defendant and the asserted injury. "[T]he causation element of standing requires the named defendants to possess authority to enforce

the complained-of provision," and "[t]he redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute." "Whether the Defendants have enforcement authority is related to whether, under *Ex parte Young*, they are proper state officials for suit." Under *Ex parte Young*, a state defendant sued in his official capacity must "have some connection with the enforcement" of a challenged provision. "An officer need not have a special connection to the allegedly unconstitutional statute; rather, he need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty."

We have no doubt that at least four of the plaintiffs possessed standing to sue the Salt Lake County Clerk based on their inability to obtain marriage licenses from the Clerk's office. Plaintiffs have identified several harms that flow from this denial, including financial injury. Because county clerks are responsible under Utah law for issuing marriage licenses and recording marriage certificates, these plaintiffs' injuries were caused by the Clerk's office and would be cured by an injunction prohibiting the enforcement of Amendment 3. Accordingly, the Salt Lake County Clerk possessed the requisite nexus to plaintiffs' injuries.

The Salt Lake County Clerk, however, has not appealed from the district court's order. We must therefore consider whether the Governor and Attorney General are proper appellants absent the County Clerk. In *Bishop v. Oklahoma ex rel. Edmondson*, we held that Oklahoma's Governor and Attorney General were not proper defendants in a challenge to that state's prohibition on same-sex marriage. Because of the legal and factual differences between that case and this one, we reach the opposite conclusion as to Utah's Governor and Attorney General.

Our holding in *Bishop* turned on the conclusion that marriage licensing and recognition in Oklahoma were "within the administration of the judiciary." The district court clerk charged with various duties related to marriage " 'is judicial personnel and is an arm of the court ... subject to the control of the Supreme Court and the supervisory control that it has passed down to the Administrative District Judge in the clerk's administrative district.' " Accordingly, we concluded that "the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage."

In Utah, marriage licenses are issued not by court clerks but by county clerks. The Governor and Attorney General have explicitly taken the position in this litigation that they "have ample authority to ensure that" the Salt Lake County Clerk "return[s] to her former practice of limiting marriage licenses to man-woman couples in compliance with Utah law." This assertion is supported by the Utah Code. The Governor is statutorily charged with "supervis[ing] the official conduct of all executive and ministerial officers" and "see[ing] that all offices are filled and the duties thereof performed." In addition, he "may require the attorney general to aid any county attorney or district attorney in the discharge of his

duties." Utah law allows an action for the removal of a county officer for "malfeasance in office" to be brought by a "county attorney, or district attorney for the county in which the officer was elected or appointed, or by the attorney general."

The Attorney General is required to "exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices" and "when required by the public service or directed by the governor, assist any county, district, or city attorney in the discharge of his duties." A clerk who "knowingly issues a license for any prohibited marriage is guilty of a class A misdemeanor." Such charges would be filed by a county or district attorney under the supervision of the Attorney General. And the Governor could order the Attorney General to assist in such prosecution.

The Governor and Attorney General have also demonstrated a "willingness to exercise" their duty to ensure clerks and other state officials enforce Amendment 3.

State agencies with responsibility for the recognition of out-of-state marriages are being directed by the Governor in consultation with the Attorney General. These officials' authority over such agencies is confirmed by Utah law. For example, Plaintiffs Archer and Call, who were married in Iowa, specifically seek to file joint Utah tax returns. Although the Utah State Tax Commission is charged in the first instance with the duty "to administer and supervise the tax laws of the state," the Attorney General in his constitutional role as "the legal adviser of the State officers," is required by statute to offer his "opinion in writing ... to any state officer, board, or commission." The Attorney General considers his opinions to the Utah State Tax Commission, even informal ones, to be "authoritative for the purposes" of the Commission "with respect to the specific questions presented." The Attorney General is empowered to direct the Tax Commission to recognize Archer and Call's Iowa wedding, and the Commission would be legally obligated to follow that instruction and accept a joint tax return. Accordingly, Archer and Call had standing to sue the Attorney General for the injuries caused by Amendment 3's nonrecognition provisions.

The same is true with respect to the Governor. Utah's "executive power" is "vested in the Governor." In the exercise of that power, the Governor appoints the state's tax commissioners and has the power to initiate proceedings to remove them from office. Shortly after the Governor sent the above-quoted message to state agencies, the Tax Commission issued a Tax Notice stating that "[s]ame-sex couples who are eligible to file a joint federal income tax return and who elect to file jointly, may also file a joint 2013 Utah Individual Income Tax return." The Tax Notice refers to the district court's injunction, noting that a stay of that order had not been granted as of December 31, 2013. Thus, one of the injuries explicitly cited by plaintiffs Archer and Call has been at least temporarily redressed by the district court's decision and actions taken in response to it by the Governor after consultation with the Attorney General.

We conclude that the Governor's and the Attorney General's actual exercise of supervisory power and their authority to compel compliance from county clerks and other officials provide the requisite nexus between them and Amendment 3. Although "it does not suffice if the injury complained of is the result of the independent action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else." And a state official is a proper defendant if he is "responsible for general supervision of the administration by the local ... officials" of a challenged provision. This is so even if the state officials are "not specifically empowered to ensure compliance with the statute at issue," if they "clearly have assisted or currently assist in giving effect to the law."

We thus conclude that standing issues do not prevent us from considering this appeal.

III

In 1972, the Supreme Court summarily "dismissed for want of substantial federal question" an appeal from the Minnesota Supreme Court upholding a ban on same-sex marriage. The state court considered "whether a marriage of two persons of the same sex is authorized by state statutes and, if not, whether state authorization is constitutionally compelled." It concluded that the statute used the term "marriage" as "one of common usage, meaning the state of union between persons of the opposite sex." The state court further reasoned that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis" and that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [the institution of marriage] by judicial legislation." As to the Equal Protection Clause, the court ruled that "[t]here is no irrational or invidious discrimination" because "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."

The Supreme Court has held that "summary dismissals are, of course, to be taken as rulings on the merits, in the sense that they rejected the specific challenges presented in the statement of jurisdiction and left undisturbed the judgment appealed from." Summary dismissals

> do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, necessarily reflect our agreement with the opinion of the court whose judgment is appealed.

"Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction." And "[t]hey do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." "[I]f the Court has branded a question as unsubstantial, it

remains so except when doctrinal developments indicate otherwise." The district court concluded that "doctrinal developments" had superseded *Baker*. We agree.

Two landmark decisions by the Supreme Court have undermined the notion that the question presented in *Baker* is insubstantial. *Baker* was decided before the Supreme Court held that "intimate conduct with another person ... can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." The decision in *Baker* also pre-dates the Court's opinion in *Windsor*. Several courts held prior to *Windsor* that *Baker* controlled the same-sex marriage question. However, since *Windsor* was decided, nearly every federal court to have considered the issue—including the district court below—has ruled that *Baker* does not control.

We acknowledge that the question presented in *Windsor* is not identical to the question before us. DOMA interfered with New York's decision "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," a decision designed to "correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood." The "State used its historic and essential authority to define the marital relation in this way," and "its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community." Because DOMA used this "state-defined class for the opposite purpose—to impose restrictions and disabilities," the Court framed the dispositive question as "whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment." Although it is true that *Windsor* resolved tension between a state law permitting same-sex marriage and a federal non-recognition provision, the Court's description of the issue indicates that its holding was not solely based on the scope of federal versus state powers.

Appellants stress the presence of these federalism concerns in *Windsor*, which, as the Chief Justice noted in dissent, "come into play on the other side of the board in ... cases about the constitutionality of state" bans on same-sex marriage. The *Windsor* majority stated repeatedly that the regulation of marriage has traditionally been a state function. Appellants urge us to conclude that the "principles of federalism that *Windsor* would later reaffirm" require us to adhere to the Court's summary affirmance in *Baker*.

However, the *Windsor* Court also explained that the federal government "in enacting discrete statutes, can make determinations that bear on marital rights and privileges." The *Windsor* Court concluded it was "unnecessary to decide whether" DOMA "is a violation of the Constitution because it disrupts the federal balance."

Rather than relying on federalism principles, the Court framed the question presented as whether the "injury and indignity" caused by

DOMA "is a deprivation of an essential part of the liberty protected by the Fifth Amendment." And the Court answered that question in the affirmative:

> 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. 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 history of DOMA's enactment and its own text," the Court concluded, "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." DOMA "impose[d] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages...." The statute "undermine[d] both the public and private significance of state-sanctioned same-sex marriages" by telling "those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition." And it "humiliate[d] tens of thousands of children now being raised by same-sex couples" by making "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." Because DOMA's "differentiation demeans [same-sex] couple[s], whose moral and sexual choices the Constitution protects, and whose relationship[s] the State has sought to dignify," the Court held that the statute violated the Fifth Amendment.

The *Windsor* majority expressly cabined its holding to state-recognized marriages, and is thus not directly controlling. But the similarity between the claims at issue in *Windsor* and those asserted by the plaintiffs in this case cannot be ignored. This is particularly true with respect to plaintiffs Archer and Call, who seek recognition by Utah of a marriage that is valid in the state where it was performed. More generally, all six plaintiffs seek equal dignity for their marital aspirations. All claim that the state's differential treatment of them as compared to opposite-sex couples demeans and undermines their relationships and their personal autonomy. Although reasonable judges may disagree on the merits of the same-sex marriage question, we think it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial.

IV

We turn now to the merits of the issue before us. We must first decide whether the liberty interest protected in this case includes the right to marry, and whether that right is limited, as appellants contend, to those who would wed a person of the opposite sex.

The district court granted summary judgment in favor of the plaintiffs. We review a grant of summary judgment de novo. A party is entitled to summary

judgment only if, viewing the evidence in the light most favorable to the non-moving party, the movant is entitled to judgment as a matter of law.

"We review the decision to grant a permanent injunction for abuse of discretion." To obtain a permanent injunction, a plaintiff must show: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." Because appellants have challenged only the merits aspect of the district court's decision, we do not consider the remaining factors.

A

"[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." The doctrine of substantive due process extends protections to fundamental rights "in addition to the specific freedoms protected by the Bill of Rights." To qualify as "fundamental," a right must be "objectively, 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 [it] were sacrificed."

1

There can be little doubt that the right to marry is a fundamental liberty.

The Court has long recognized that marriage is "the most important relation in life." "Without doubt," the liberty protected by the Fourteenth Amendment includes the freedom "to marry, establish a home[,] and bring up children."

Appellants contend that these precedents and others establish only that opposite-sex marriage is a fundamental right. They highlight the Court's admonition to undertake a "careful description of the asserted fundamental liberty interest." "This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review." A right to same-sex marriage cannot be deeply rooted in our tradition, appellants argue, because "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."

But "the right to marry is of fundamental importance for all individuals." In numerous cases, the Court has discussed the right to marry at a broader level of generality than would be consistent with appellants' argument. The *Loving* Court concluded that a state statute voiding marriages between white and non-white participants violated the Due Process Clause.

As the Court later explained, "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia.*" Thus the question as stated in *Loving,* and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition

of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was "the freedom of choice to marry."

Similarly, *Zablocki* considered an equal protection challenge to a state law barring individuals in arrearage of child support obligations from marrying. Because "the right to marry is of fundamental importance" and "the classification at issue ... significantly interfere[d] with the exercise of that right," the Court determined that "critical examination of the state interests advanced in support of the classification [wa]s required." It cautioned that not "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." But the statute at issue was impermissible because it constituted a "serious intrusion into [the] freedom of choice in an area in which we have held such freedom to be fundamental" and could not "be upheld unless it [wa]s supported by sufficiently important state interests and [wa]s closely tailored to effectuate only those interests." The right at issue was characterized as the right to marry, not as the right of child-support debtors to marry.

2

It is true that both *Loving* and *Zablocki* involved opposite-sex couples. Such pairings, appellants remind us, may be naturally procreative—a potentially meaningful consideration given that the Court has previously discussed marriage and procreation together.

But the Court has also described the fundamental right to marry as separate from the right to procreate, including in *Glucksberg* itself, the case upon which appellants' fundamental-right argument turns. Appellants' contention that the right to marriage is fundamental because of its procreative potential is also undercut by *Turner v. Safley*.

As the *Turner* opinion highlights, the importance of marriage is based in great measure on "personal aspects" including the "expression[ ] of emotional support and public commitment." This conclusion is consistent with the Court's other pronouncements on the freedom to marry, which focus on the freedom to choose one's spouse. The *Turner* Court also highlighted the role of marriage in allowing its participants to gain access to legal and financial benefits they would otherwise be denied.

We must reject appellants' efforts to downplay the importance of the personal elements inherent in the institution of marriage, which they contend are "not the principal interests the State pursues by regulating marriage." Rather than being "[m]utually exclusive" of the procreative potential of marriage, these freedoms—to choose one's spouse, to decide whether to conceive or adopt a child, to publicly proclaim an enduring commitment to remain together through thick and thin—reinforce the childrearing family structure. Further, such freedoms support the dignity of each

person, a factor emphasized by the *Windsor* Court.

Of course, the *Windsor* decision dealt with federal recognition of marriages performed under state law. But with respect to plaintiffs Archer and Call, who were married in Iowa and whose marriage Utah will not recognize under Amendment 3, the analogy to *Windsor* is particularly apt. Amendment 3's non-recognition provision, like DOMA,

> contrives to deprive some couples married under the laws of [another] State, but not other couples, of both rights and responsibilities.... By this dynamic [Amendment 3] 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 [Utah's] recognition.... The differentiation demeans the couple, whose moral and sexual choices the Constitution protects.

In light of *Windsor*, we agree with the multiple district courts that have held that the fundamental right to marry necessarily includes the right to remain married.

And although we acknowledge that state recognition serves to "enhance[ ]" the interests at stake, surely a great deal of the dignity of same-sex relationships inheres in the loving bonds between those who seek to marry and the personal autonomy of making such choices. As the Court held in *Lawrence*, several years before discussing the state recognition issues present in *Windsor*,

> adults may choose to enter upon [an intimate] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When 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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Appellants' assertion that the right to marry is fundamental because it is linked to procreation is further undermined by the fact that individuals have a fundamental right to choose against reproduction. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The Court has repeatedly referenced the raising of children—rather than just their creation—as a key factor in the inviolability of marital and familial choices. Although cohabitating same-sex couples are prohibited from jointly adopting children under Utah law as a result of the same-sex marriage ban, the record shows that nearly 3,000 Utah children are being raised by same-sex couples. Thus childrearing, a liberty closely related to the right to marry, is one exercised by same-sex and opposite-sex couples alike, as well as by single individuals.

Appellants urge us to conclude that a court cannot determine whether there is a right to marriage without first defining the institution. They also say that the term "marriage" by its nature excludes same-sex couples. *Glucksberg* requires us to develop a "careful description of the asserted

fundamental liberty interest," relying on "[o]ur Nation's history, legal traditions, and practices [to] provide the crucial guideposts for responsible decisionmaking." But we cannot conclude that the fundamental liberty interest in this case is limited to the right to marry a person of the opposite sex. As we have discussed, the Supreme Court has traditionally described the right to marry in broad terms independent of the persons exercising it. The Court's other substantive due process cases similarly eschew a discussion of the right-holder in defining the scope of the right. In *Glucksberg,* for example, the Court framed the question presented as "whether the 'liberty' specially protected in the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." The Court's formulation implicitly rejected respondents' framing of the claimed liberty as exercised by a specific class of persons: "Whether the Fourteenth Amendment's guarantee of liberty protects the decision of a mentally competent, *terminally ill* adult to bring about impending death in a certain, humane, and dignified manner."

Prior to the *Windsor* decision, several courts concluded that the well-established right to marry *eo ipso* cannot be exercised by those who would choose a spouse of the same sex. We nonetheless agree with plaintiffs that in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right. "Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them." Plaintiffs seek to enter into legally recognized marriages, with all the concomitant rights and responsibilities enshrined in Utah law. They desire not to redefine the institution but to participate in it.

Appellants' assertion that plaintiffs are excluded from the institution of marriage by definition is wholly circular. Nothing logically or physically precludes same-sex couples from marrying, as is amply demonstrated by the fact that many states now permit such marriages. Appellants' reliance on the modifier "definitional" does not serve a meaningful function in this context. To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so. One might just as easily have argued that interracial couples are by definition excluded from the institution of marriage. But "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."

Our conclusion that we are not required to defer to Utah's characterization of its ban on same-sex marriage as a "definition" is reinforced by the Court's opinion in *Windsor.* Section 3 of DOMA, which the Court invalidated, "amend [ed] the Dictionary Act ... of the United States Code to provide a federal definition of 'marriage' and 'spouse.' " In relevant part, the statute read: " '[T]he 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.' " Appellants repeatedly assert that Amendment 3 simply defines marriage, at

one point contrasting "the traditional definition of marriage" with "the anti-miscegenation laws invalidated in *Loving.*" They contend that "Utah's marriage laws merely define marriage within its borders." The Court's holding in *Windsor* demonstrates that a provision labeled a "definition" is not immune from constitutional scrutiny. We see no reason to allow Utah's invocation of its power to "define the marital relation," to become "a talisman, by whose magic power the whole fabric which the law had erected ... is at once dissolved."

Although courts may be tempted "to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.... such a view would be inconsistent with our law." "A prime part of the history of our Constitution ... is the story of the extension of constitutional rights and protections to people once ignored or excluded."

3

The Supreme Court's sexual orientation jurisprudence further precludes us from defining the fundamental right at issue in the manner sought by the appellants. In *Lawrence,* the Court struck down as violative of due process a statute that prohibited sexual conduct between individuals of the same sex. The Court reversed *Bowers v. Hardwick,* which in upholding a similar statute had framed the question as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." The *Lawrence* Court held that this framing "fail[ed] to appreciate the extent of the liberty at stake" and "misapprehended the claim of liberty there presented to it."

The Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," but held that its obligation was "to define the liberty of all, not to mandate our own moral code." "[B]efore 1961 all 50 States had outlawed sodomy," yet "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." The Court firmly rejected *Bowers'* characterization of the liberty at issue: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."

The Court's rejection of the manner in which *Bowers* described the liberty interest involved is applicable to the framing of the issue before us. There was clearly no history of a protected right to "homosexual sodomy," just as there is no lengthy tradition of same-sex marriage. But the *Lawrence* opinion indicates that the approach urged by appellants is too narrow. Just as it was improper to ask whether there is a right to engage in homosexual sex, we do not ask whether there is a right to participate in same-sex marriage.

We must also note that *Lawrence* itself alluded to marriage, stating that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." The Court quoted *Casey's* holding that matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment" and ruled that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

The drafters of the Fifth and Fourteenth Amendments "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." A generation ago, recognition of the fundamental right to marry as applying to persons of the same sex might have been unimaginable. A generation ago, the declaration by gay and lesbian couples of what may have been in their hearts would have had to remain unspoken. Not until contemporary times have laws stigmatizing or even criminalizing gay men and women been felled, allowing their relationships to surface to an open society. As the district court eloquently explained, "it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." Consistent with our constitutional tradition of recognizing the liberty of those previously excluded, we conclude that plaintiffs possess a fundamental right to marry and to have their marriages recognized.

B

The Due Process Clause "forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." By the same token, if a classification "impinge[s] upon the exercise of a fundamental right," the Equal Protection Clause requires "the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." Having persuaded us that the right to marry is a fundamental liberty, plaintiffs will prevail on their due process and equal protection claims unless appellants can show that Amendment 3 survives strict scrutiny.

A provision subject to strict scrutiny "cannot rest upon a generalized assertion as to the classification's relevance to its goals." "The purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate." Only "the most exact connection between justification and classification" survives.

Appellants advance four justifications for Amendment 3. They contend it furthers the state's interests in: (1) "fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children"; (2) "children being raised by their biological mothers and

fathers—or at least by a married mother and father—in a stable home"; (3) "ensuring adequate reproduction"; and (4) "accommodating religious freedom and reducing the potential for civic strife."

1

We will assume that the first three rationales asserted by appellants are compelling. These justifications falter, however, on the means prong of the strict scrutiny test. Each rests on a link between marriage and procreation. Appellants contend that Utah has "steadfastly sought to reserve unique social recognition for man-woman marriage so as to guide as many procreative couples as possible into the optimal, conjugal childrearing model"; that "children suffer when procreation and childrearing occur outside stable man-woman marriages"; and that "[b]y providing special privileges and status to couples that are uniquely capable of producing offspring without biological assistance from third parties, the State sends a clear if subtle message to all of its citizens that natural reproduction is healthy, desirable and highly valued." The common thread running through each of appellants' first three arguments is the claim that allowing same-sex couples to marry "would break the critical conceptual link between marriage and procreation."

The challenged restrictions on the right to marry and on recognition of otherwise valid marriages, however, do not differentiate between procreative and non-procreative couples. Instead, Utah citizens may choose a spouse of the opposite sex regardless of the pairing's procreative capacity. The elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah, apparently without breaking the "conceptual link between marriage and procreation." The only explicit reference to reproduction in Utah's marriage law is a provision that allows first cousins to marry if "both parties are 65 years of age or older; or ... if both parties are 55 years of age or older, upon a finding by the district court ... that either party is unable to reproduce." This statute thus extends marriage rights to certain couples based on a showing of *inability* to reproduce.

Such a mismatch between the class identified by a challenged law and the characteristic allegedly relevant to the state's interest is precisely the type of imprecision prohibited by heightened scrutiny. Utah's ban on polygamy, for example, is justified by arguments against polygamy. Similarly, barring minors from marriage may be justified based on arguments specific to minors as a class. But appellants fail to advance any argument against same-sex marriage that is based specifically on its alleged intrinsic ills.

Instead of explaining why same-sex marriage qua same-sex marriage is undesirable, each of the appellants' justifications rests fundamentally on a sleight of hand in which same-sex marriage is used as a proxy for a different characteristic shared by both same-sex and some opposite-sex couples. Same-sex marriage must be banned, appellants argue, because same-sex couples are not naturally procreative. But the state permits many

other types of non-procreative couples to wed. Same-sex marriage cannot be allowed, appellants assert, because it is better for children to be raised by biological parents. Yet adoptive parents, who have the full panoply of rights and duties of biological parents, are free to marry. As are opposite-sex couples who choose assisted reproduction.

The Supreme Court has similarly eschewed such means-ends mismatches. For example, in *Bernal v. Fainter*, the Court concluded that a Texas statute prohibiting resident aliens from becoming notaries failed strict scrutiny. The state argued that the provision was justified by the state's interest in licensing notaries familiar with state law. But the Court rejected the state's attempt to justify a classification based on alienage with an explanation based on knowledge.

Just as a state cannot justify an alienage classification by reference to a separate characteristic such as familiarity with state law, appellants cannot assert procreative potential as a basis to deny marriage rights to same-sex couples. Under strict scrutiny, the state must justify the specific means it has chosen rather than relying on some other characteristic that correlates loosely with the actual restriction at issue.

Utah law sanctions many marriages that share the characteristic—inability to procreate—ostensibly targeted by Amendment 3. The absence of narrow tailoring is often revealed by such under-inclusiveness. In *Zablocki*, the state attempted to defend its prohibition on marriage by child-support debtors on the ground that the statute "prevent[ed] the applicants from incurring new support obligations." "But the challenged provisions," the Court explained, "are grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage." Similarly, in *Eisenstadt*, the Court rejected the argument that unmarried individuals might be prohibited from using contraceptives based on the view that contraception is immoral. The Court held that "the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious."

A state may not impinge upon the exercise of a fundamental right as to some, but not all, of the individuals who share a characteristic urged to be relevant.

A hypothetical state law restricting the institution of marriage to only those who are able and willing to procreate would plainly raise its own constitutional concerns. That question is not before us, and we do not address it. We merely observe that a state may not satisfy the narrow tailoring requirement by pointing to a trait shared by those on both sides of a challenged classification.

Among the myriad types of non-procreative couples, only those Utahns who seek to marry a partner of the same sex are categorically excluded from the institution of marriage. Only same-sex couples, appellants claim, need to be excluded to

further the state's interest in communicating the link between unassisted biological procreation and marriage. As between non-procreative opposite-sex couples and same-sex couples, we can discern no meaningful distinction with respect to appellants' interest in fostering biological reproduction within marriages.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." Extending the benefits and protections of a civil society to some but not all similarly situated families violates this critical guarantee.

2

Appellants argue that procreative couples must be channeled into committed relationships in order to promote the State's interests in childbearing and optimal childrearing. This argument fails because the prohibition on same-sex marriage has an insufficient causal connection to the State's articulated goals.

It is urged upon us that permitting same-sex couples to marry would have far-reaching and drastic consequences for Utah's opposite-sex couples. Appellants contend that the recognition of same-sex marriage would result in a parade of horribles, causing: "parents to raise their existing biological children without the other biological parent"; "couples conceiving children without the stability that marriage would otherwise bring"; "a substantial decline in the public's interest in marriage"; "adults to [forgo] or severely limit the number of their children based on concerns for their own convenience"; and "a busy or irresponsible parent to believe it's appropriate to sacrifice his child's welfare to his own needs for independence, free time, etc."

In some instances, courts "must accord substantial deference to the predictive judgments" of legislative authorities. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." But even under more relaxed forms of scrutiny, a challenged classification "must find some footing in the realities of the subject addressed by the legislation" based on a "reasonably conceivable state of facts."

We emphatically agree with the numerous cases decided since *Windsor* that it 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. As the district court held, "[t]here is no reason to believe that Amendment 3 has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples." This was the first of several federal court decisions reaching the same conclusion.

A state's interest in developing and sustaining committed relationships between childbearing couples is simply not connected to its recognition of same-sex marriages. Regardless of whether some individuals are denied the right to choose their spouse, the same set of duties, responsibilities, and benefits set forth under

Utah law apply to those naturally procreative pairings touted by appellants. We cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child. We agree with the district court that such decisions, among "the most intimate and personal ... a person may make in a lifetime, choices central to personal dignity and autonomy," are unrelated to the government's treatment of same-sex marriage. To the extent that they are related, the relation exists because the State of Utah has chosen to burden the ability of one class of citizens to make such intimate and personal choices.

3

Appellants also argue that Utah's ban on same-sex marriage is justified by gendered parenting preferences. They contend that even for families that are not biologically connected, the state has an interest in limiting marriage to opposite-sex couples because "men and women parent children differently."

But a prohibition on same-sex marriage is not narrowly tailored toward the goal of encouraging gendered parenting styles. The state does not restrict the right to marry or its recognition of marriage based on compliance with any set of parenting roles, or even parenting quality. Instead, every same-sex couple, regardless of parenting style, is barred from marriage and every opposite-sex couple, irrespective of parenting style, is permitted to marry.

The state's child custody regime also belies adherence to a rigidly gendered view of parents' abilities. As with appellants' asserted procreation rationale, we are offered no coherent explanation for the state's decision to impose disabilities upon only one subclass of those sharing a claimed deficiency.

The Supreme Court has previously rejected state attempts to classify parents with such a broad brush. In *Stanley v. Illinois*, the Court considered the validity of a state law that made children of unwed parents wards of the state upon death of the mother. The state defended this provision by asserting that "unmarried fathers can reasonably be presumed to be unqualified to raise their children." "But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." Just as the state law at issue in *Stanley* "needlessly risk[ed] running roughshod over the important interests of both parent and child," Amendment 3 cannot be justified by the impermissibly overbroad assumption that any opposite-sex couple is preferable to any same-sex couple.

Appellants have retreated from any categorical conclusions regarding the quality of same-sex parenting. Although they presented to the district court voluminous scholarship addressing various parenting issues, they now take the position that the social science is unsettled. At oral argument, counsel for appellants stated that "the bottom line" regarding the consequences of same-sex parenting "is that the science is inconclusive."

Although we assume that the State's asserted interest in biological parenting is compelling, this assumption does not require us to accept appellants' related arguments on faith. We cannot embrace the contention that children raised by opposite-sex parents fare better than children raised by same-sex parents—to the extent appellants continue to press it—in light of their representations to this court. Appellants' only reasoning in this regard is that there might be advantages in one parenting arrangement that are lacking in the other. On strict scrutiny, an argument based only on pure speculation and conjecture cannot carry the day. Appellants' tepid defense of their parenting theory further highlights the looseness of the fit between the State's chosen means and appellants' asserted end.

Against the State's claim of uncertainty we must weigh the harm Amendment 3 currently works against the children of same-sex couples. If appellants cannot tell us with any degree of confidence that they believe opposite-sex parenting produces better outcomes on the whole—and they evidently cannot—they fail to justify this palpable harm that the Supreme Court has unequivocally condemned. The *Windsor* majority, stressing the same detrimental impacts of DOMA, explained that the refusal to recognize same-sex marriages brings "financial harm to children of same-sex couples" and makes "it even more difficult for the children [of same-sex couples] 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* thus indicates that same-sex marriage restrictions communicate to children the message that same-sex parents are less deserving of family recognition than other parents. Appellants rely heavily on their predictions that Amendment 3 will encourage adults to make various decisions that benefit society. But regardless of the signals the law sends to adults, Amendment 3, like DOMA, conveys a harmful message to the children of same-sex couples. These collateral consequences further suggest that the fit between the means and the end is insufficient to survive strict scrutiny.

4

Appellants' fourth and final justification for Amendment 3, "accommodating religious freedom and reducing the potential for civic strife," fails for reasons independent of the foregoing. Appellants contend that a prohibition on same-sex marriage "is essential to preserving social harmony in the State" and that allowing same-sex couples to marry "would create the potential for religion-related strife."

Even assuming that appellants are correct in predicting that some substantial degree of discord will follow state recognition of same-sex marriage, the Supreme Court has repeatedly held that public opposition cannot provide cover for a violation of fundamental rights. In *Watson v. City of Memphis*, for example, the Court rejected a city's claim that "community confusion and turmoil" permitted it to delay desegregation of its public parks. And in *Cleburne*, the Court held that negative attitudes toward the class at issue (intellectually impaired individuals) "are not permissible bases for

treating a home for the mentally retarded differently." "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic."

Appellants acknowledge that a state may not "invoke concerns about religious freedom or religion-related social strife as a basis for denying rights otherwise guaranteed by the Constitution." But they argue that the social and religious strife argument qualifies as legitimate because a fundamental right is not at issue in this case. Because we have rejected appellants' contention on this point, their fourth justification necessarily fails.

We also emphasize, as did the district court, that today's decision relates solely to civil marriage. Plaintiffs must be accorded the same legal status presently granted to married couples, but religious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit. We respect the views advanced by members of various religious communities and their discussions of the theological history of marriage. And we continue to recognize the right of the various religions to define marriage according to their moral, historical, and ethical precepts. Our opinion does not intrude into that domain or the exercise of religious principles in this arena. The right of an officiant to perform or decline to perform a religious ceremony is unaffected by today's ruling.

C

Appellants raise a number of prudential concerns in addition to the four legal justifications discussed above. They stress the value of democratic decision-making and the benefits of federalism in allowing states to serve as laboratories for the rules concerning marriage. As a matter of policy, it might well be preferable to allow the national debate on same-sex marriage to play out through legislative and democratic channels. Some will no doubt view today's decision as "robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat."

But the judiciary is not empowered to pick and choose the timing of its decisions. "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants." Plaintiffs in this case have convinced us that Amendment 3 violates their fundamental right to marry and to have their marriages recognized. We may not deny them relief based on a mere preference that their arguments be settled elsewhere. Nor may we defer to majority will in dealing with matters so central to personal autonomy. The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Similarly, the experimental value of federalism cannot overcome plaintiffs' rights

to due process and equal protection. Despite *Windsor's* emphasis on state authority over marriage, the Court repeatedly tempered its pronouncements with the caveat that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." Our federalist structure is designed to "secure[ ] to citizens the liberties that derive from the diffusion of sovereign power" rather than to limit fundamental freedoms.

Appellants also suggest that today's ruling will place courts on a slippery slope towards recognizing other forms of currently prohibited marriages. Although we have no occasion to weigh in on the validity of laws not challenged in this case, same-sex marriage prohibitions differ in at least one key respect from the types of marriages the appellants identify: Unlike polygamous or incestuous marriages, the Supreme Court has explicitly extended constitutional protection to intimate same-sex relationships, and to the public manifestations of those relationships. Our holding that plaintiffs seek to exercise a fundamental right turns in large measure on this jurisprudential foundation that does not exist as to the hypothetical challenges identified by appellants.

V

In summary, we hold that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex, and that Amendment 3 and similar statutory enactments do not withstand constitutional scrutiny. We AFFIRM the judgment of the district court.

In consideration of the Supreme Court's decision to stay the district court's injunction pending the appeal to our circuit, we conclude it is appropriate to STAY our mandate pending the disposition of any subsequently filed petition for writ of certiorari.

It is so ordered.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I concur with the court's result that Plaintiffs have standing to challenge the provisions at issue, that the Salt Lake County Clerk, Governor, and Attorney General were proper Defendants, and that the appeal may proceed despite the absence of the Salt Lake County Clerk. I disagree with this court's conclusions that (1) *Baker v. Nelson* need not be followed and that (2) the liberty guaranteed by the Fourteenth Amendment includes a fundamental right which requires Utah to extend marriage to same-gender couples and recognize same-gender marriages from other states. Because I conclude that there is no such fundamental right, it is unnecessary to consider whether Utah's justifications for retaining its repeatedly-enacted concept of marriage pass heightened scrutiny. In my view, the provisions should be analyzed under traditional equal protection analysis and upheld as rationally related to (1) responsible procreation, (2) effective parenting, and (3) the desire to proceed cautiously in this evolving area.

For the following reasons, I respectfully dissent.

A. *Baker v. Nelson*

The petitioners in *Baker* argued that Minnesota's marriage scheme violated due process and equal protection. The Minnesota Supreme Court unambiguously rejected the notion that same-gender marriage was a fundamental right, interpreting *Loving v. Virginia* as resting upon the Constitution's prohibition of race discrimination. Absent irrational or invidious discrimination, a "theoretically imperfect" marriage classification does not offend equal protection or due process under the Fourteenth Amendment. The import of *Baker* to this case is clear: neither due process nor equal protection bar states from defining marriage as between one man and one woman, or require states to extend marriage to same-gender couples.

A summary dismissal is a merits determination and a lower federal court should not come to an opposite conclusion on the issues presented. The district court relied upon a statement in *Hicks v. Miranda* that a question remains unsubstantial unless "doctrinal developments" may suggest otherwise. On this point, *Miranda* held that a summary dismissal could not be disregarded. Were there any doubt, the "doctrinal developments" exception was followed by a statement that summary decisions are binding on lower courts until the Court notifies otherwise.

The rule is clear: if a Supreme Court case is directly on point, a lower federal court should rely on it so the Supreme Court may exercise "the prerogative of overruling its own decisions." The Supreme Court is certainly free to re-examine its precedents, but it discourages lower courts from concluding it has overruled earlier precedent by implication. The majority construes the unequivocal statement in *Rodriguez de Quijas* (and presumably *Agostini*) as inapplicable because it appeared in a merits disposition and accordingly did not "overrule" the "doctrinal developments rule" as to summary dispositions. But that is just another way of stating that a summary disposition is not a merits disposition, which is patently incorrect. Though the Supreme Court may not accord *Baker* the same deference as an opinion after briefing and argument, it is nonetheless precedential for this court. Summary dismissals are merits rulings as to those questions raised in the jurisdictional statement.

Plaintiffs argue that *Baker* did not address the precise issues here because "[t]he judgment affirmed in *Baker* addressed whether same-sex couples were denied equal protection and due process by Minnesota's marriage statute—a measure that did not indicate on its face whether same-sex couples could marry and that had not been enacted for the express purpose of excluding same-sex couples from marriage." They further argue that Utah's non-recognition of Plaintiffs Archer and Call's Iowa marriage distinguishes this case from *Baker*. Neither reason is persuasive. The fact remains that the Minnesota Supreme Court interpreted the state statute (at the time) to not require same-gender marriage and decided largely the same

federal constitutional questions presented here. To the extent there is no right to same-gender marriage emanating from the Fourteenth Amendment, a state should not be compelled to recognize it.

Regardless, subsequent doctrinal developments have not undermined the Court's traditional deference to the States in the field of domestic relations. To be sure, the district court concluded otherwise based upon the following Supreme Court developments: (1) gender becoming a quasi-suspect class, (2) invalidation of a state law repealing and barring sexual-orientation protection, (3) invalidation of a statute that proscribed same-gender sexual relations insofar as private conduct among consenting adults, (4) declaring the Defense of Marriage Act's ("DOMA") definition of "marriage" and "spouse" to exclude same-gender marriages as violative of Fifth Amendment due process and equal protection principles. This court relies on *Lawrence* and *Windsor* as justification for not deferring to *Baker*. As discussed below, none of these developments can override our obligation to follow (rather than lead) on the issue of whether a state is required to extend marriage to same-gender couples. At best, the developments relied upon are ambiguous and certainly do not compel the conclusion that the Supreme Court will interpret the Fourteenth Amendment to require every state to extend marriage to same-gender couples, regardless of contrary state law.

B. Equal Protection–Gender Discrimination

Plaintiffs argue that defining marriage to exclude same-gender unions is based upon gender stereotyping where "the law presumed women to be legally, socially, and financially dependent upon men." But this case involves no disparate treatment based upon gender that might invite intermediate scrutiny. Utah's constitutional and statutory provisions, Utah Const. art. I, § 29 and Utah Code §§ 30–1–2(5), 30–1–4.1, enacted in 1977 and 2004, simply define marriage as the legal union of a man and a woman and do not recognize any other domestic union, i.e., same-gender marriage. They apply to same-gender male couples and same-gender female couples alike.

C. Equal Protection–Sexual Orientation

Plaintiffs argue that defining marriage to exclude same-gender unions is a form of sexual orientation discrimination triggering heightened scrutiny. The Supreme Court has yet to decide the level of scrutiny attendant to classifications based upon sexual orientation, but this court has rejected heightened scrutiny. Although Plaintiffs argue that our precedent does not justify such a position, one panel of this court may not overrule another absent superseding en banc review or a Supreme Court decision invalidating our precedent. Neither has occurred here.

D. Due Process–Fundamental Right

The Plaintiffs contend that they are not relying upon a fundamental right to same-gender marriage, but instead a fundamental right to marriage simpliciter. They contend that freedom to marry is self-defining and without reference to those who assert it or have been excluded from it. Of course, the difficulty with this is that marriage does not

exist in a vacuum; it is a public institution, and states have the right to regulate it. That right necessarily encompasses the right to limit marriage and decline to recognize marriages which would be prohibited; were the rule as the Plaintiffs contend, that marriage is a freestanding right, Utah's prohibition on bigamy would be an invalid restriction. That proposition has been soundly rejected. Likewise, were marriage a freestanding right without reference to the parties, Utah would be hard-pressed to prohibit marriages for minors under 15 and impose conditions for other minors.

As noted, the Court has recognized a fundamental right to marriage protected by substantive due process. As such, restrictions on the right are subject to strict scrutiny: they must be narrowly tailored to further compelling state interests. But it is a stretch to cast those cases in support of a fundamental right to same-gender marriage.

Here's why. First, same-gender marriage is a very recent phenomenon; for centuries "marriage" has been universally understood to require two persons of opposite gender. Indeed, this case is better understood as an effort to extend marriage to persons of the same gender by redefining marriage. Second, nothing suggests that the term "marriage" as used in those cases had any meaning other than what was commonly understood for centuries. Courts do not decide what is not before them. That the Court did not refer to a "right to interracial marriage," or a "right to inmate marriage" cannot obscure what was decided; the Supreme Court announced a right with objective meaning and contours. Third, given the ephemeral nature of substantive due process, recognition of fundamental rights requires a right deeply rooted in United States history and tradition, and a careful and precise definition of the right at issue. Thus, contrary to Plaintiffs' contention, it is entirely appropriate for the State to characterize the right sought as one of "same-gender marriage" and focus attention on its recent development. Perhaps someday same-gender marriage will become part of this country's history and tradition, but that is not a choice this court should make.

Much of this court's opinion is dedicated to finding otherwise by separating marriage from procreation and expounding on how other substantive due process and privacy concepts, including personal autonomy, dignity, family relationships, reproductive rights, and the like, are the antecedents and complements of same-gender marriage. But we should be reluctant to announce a fundamental right by implication. Not only is that beyond our power, it is completely arbitrary and impractical; as in this case, a state should be allowed to adopt change if desired and implement it. As these proceedings demonstrate, the State has a much better handle on what statutory and administrative provisions are involved, and what is necessary to implement change, than we do.

E. Equal Protection–Rational Basis

Plaintiffs contend and the district court so found that the provisions cannot be sustained under rational basis review. The State offered several rationales including (1) encouraging responsible procreation given

the unique ability of opposite-gender couples to conceive, (2) effective parenting to benefit the offspring, and (3) proceeding with caution insofar as altering and expanding the definition of marriage. The district court rejected these rationales based on a lack of evidence and/or a lack of a rational connection between excluding same-gender couples from marriage and the asserted justification.

Equal protection "is essentially a direction that all persons similarly situated should be treated alike." Given the provisions in this case, we should look at the definition of marriage and the exclusion of same-gender couples and inquire whether "the classification ... is rationally related to a legitimate state interest."

To the extent the district court thought that the State had any obligation to produce evidence, surely it was incorrect. Though the State is not precluded from relying upon evidence, rational basis analysis is a legal inquiry. The district court seems to have misunderstood the essence of rational basis review: extreme deference, the hallmark of judicial restraint. The State could rely upon any plausible reason and contend that the classification might arguably advance that reason. Plaintiffs had the burden of refuting all plausible reasons for the challenged amendment and statutes.

Whether a reason actually motivated the electorate or the legislature is irrelevant; neither is required to state its reason for a choice. Legislative choices involve line-drawing, and the fact that such line-drawing may result in some inequity is not determinative. Accordingly, an enactment may be over-inclusive and/or under-inclusive yet still have a rational basis. The fact that the classification could be improved or is ill-advised is not enough to invalidate it; the political process is responsible for remedying perceived problems.

Judged against these standards, Utah should prevail on a rational basis analysis. Plaintiffs have not overcome their "heavy burden" of demonstrating that the provisions are "arbitrary and irrational," that no electorate or legislature could reasonably believe the underlying legislative facts to be true. It is biologically undeniable that opposite-gender marriage has a procreative potential that same-gender marriage lacks. The inherent differences between the biological sexes are permissible legislative considerations, and indeed distinguish gender from those classifications that warrant strict scrutiny. In *Nguyen v. I.N.S.*, for example, the Court upheld a legislative scheme imposing more onerous burdens on unwed fathers than unwed mothers to prove the citizenship of their foreign-born children because of the opportunity for mothers to develop a relationship with their child at childbirth. The Court recognized important government interests in ensuring both a biological relationship between the citizen and the child and an opportunity to develop a meaningful parent-child relationship. The Court stressed the government's critically important "interest in ensuring some opportunity for a tie between citizen father and foreign born child" as a proxy for the opportunity for connection childbirth affords the mother. *Nguyen* suggests that when it comes to procreation, gender can be

considered and that biological relationships are significant interests.

Nor is the State precluded from considering procreation in regulating marriage. Merely because the Court has discussed marriage as a fundamental right apart from procreation or other rights including contraception, child rearing, and education does not suggest that the link between marriage and procreation may not be considered when the State regulates marriage. The Court's listing of various rights from time to time is intended to be illustrative of cases upholding a right of privacy, ensuring that certain personal decisions might be made "without unjustified government interference." Indeed, it is difficult to separate marriage from procreation considering the State's interest in regulating both. Even in *Turner*, where the Court discussed marriage as a fundamental right for inmates based upon other advantages of marriage, the Court explained that "most inmate marriages are formed in the expectation that they will ultimately be fully consummated" and mentioned the advantage of "legitimation of children born out of wedlock." It goes without saying that there are procreative and personal dimensions of marriage, but a state may place greater emphasis on one or the other as it regulates marriage without violating the Fourteenth Amendment.

It is also undeniable that the State has an important interest in ensuring the well-being of resulting offspring, be they planned or unplanned. To that end, the State can offer marriage and its benefits to encourage unmarried parents to marry and married parents to remain so. Thus, the State could seek to limit the marriage benefit to opposite-gender couples completely apart from history and tradition. Far more opposite-gender couples will produce and care for children than same-gender couples and perpetuation of the species depends upon procreation. Consistent with the greatest good for the greatest number, the State could rationally and sincerely believe that children are best raised by two parents of opposite gender (including their biological parents) and that the present arrangement provides the best incentive for that outcome. Accordingly, the State could seek to preserve the clarity of what marriage represents and not extend it.

Of course, other states may disagree. And it is always possible to argue that there are exceptions. But on this issue we should defer. To be sure, the constant refrain in these cases has been that the States' justifications are not advanced by excluding same-gender couples from marriage. But that is a matter of opinion; any "improvement" on the classification should be left to the state political process.

At the very least, same-gender marriage is a new social phenomenon with unknown outcomes and the State could choose to exercise caution. Utah's justifications for not extending marriage to include same-gender couples are not irrefutable. But they don't need to be; they need only be based upon "any reasonably conceivable state of facts." In conducting this analysis, we must defer to the predictive judgments of the electorate and the legislature and those judgments need

not be based upon complete, empirical evidence.

No matter how many times we are reminded that (1) procreative ability and effective parenting are not prerequisites to opposite-gender marriage (exclusion of same-gender couples is under-inclusive), (2) it is doubtful that the behavior of opposite-gender couples is affected by same-gender marriage (lack of evidence), (3) the evidence is equivocal concerning the effects of gender diversity on parenting (lack of evidence) and (4) the present scheme disadvantages the children of same-gender couples (exclusion is over-inclusive), the State's classification does not need to be perfect. It can be under-inclusive and over-inclusive and need only arguably serve the justifications urged by the State. It arguably does.

That the Constitution does not compel the State to recognize same-gender marriages within its own borders demonstrates a fortiori that it need not recognize those solemnized without. Unlike the federal government in *Windsor*, a state has the "historic and essential authority to define the marital relation" as applied to its residents and citizens. To that end, Utah has the authority to decline to recognize valid marriages from other states that are inconsistent with its public policy choices. To conclude otherwise would nationalize the regulation of marriage, thereby forcing each state "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Such a result runs in direct contravention of the law of comity between states and its uncontroversial corollary that marriage laws necessarily vary from state to state.

The State has satisfied its burden on rational basis review. One only need consider the reams of sociological evidence urged by the parties and the scores of amicus briefs on either side to know that the State's position is (at the very least) arguable. It most certainly is not arbitrary, irrational, or based upon legislative facts that no electorate or legislature could conceivably believe. Though the Plaintiffs would weigh the interests of the State differently and discount the procreation, child-rearing, and caution rationales, that prerogative belongs to the electorate and their representatives.

We should resist the temptation to become philosopher-kings, imposing our views under the guise of constitutional interpretation of the Fourteenth Amendment.

"The Marriage Ruling 'Streak' and What It Means, Made Simple"

SCOTUSblog
Lyle Denniston
August 12, 2014

In sports, a "streak" can say a lot about talent, endurance — and plain luck. Cal Ripken, Jr., of the Baltimore Orioles set a major league baseball record by playing in 2,632 consecutive games. The University of Connecticut's women's basketball team owns the longest string of victories in the college basketball ranks — ninety games in a row.

In law, attorney Thurgood Marshall had a string of victories (sometimes interrupted by defeats) in his campaign to achieve racial desegregation in public education, and attorney Ruth Bader Ginsburg did much the same in advancing the women's rights revolution. But perhaps nothing in constitutional history matches the swiftly developing "streak" of court rulings in favor of same-sex marriage. Still, the actual meaning of that "streak" is open to debate — even about whether it *is* a streak. Let's try to sort it out, simply.

First, what are we talking about here? Courts have been issuing decisions about the government's power to ban same-sex marriage since 1993, in a Hawaii case, but that didn't actually work out to permit such marriages. In fact, that ruling, favorable to the idea, produced just the opposite: a swift and long-running backlash, a wave of federal and state laws and state constitutional amendments reinforcing long-standing opposition to gays and lesbians seeking to wed.

If one starts with a ruling by the highest state court in Massachusetts in 2003, a decision that did actually open marriage to same-sex couples (the first such ruling with a definite effect), there has been a steady trend strongly in that direction, but it has not been continuous.

What most people have been talking about lately has been a line of court decisions that have come down over the past thirteen-plus months. The starting point in that cycle was the Supreme Court's decision in *United States v. Windsor,* in late June of last year.

In that ruling, the Court struck down a key part of a 1996 federal law, the Defense of Marriage Act — one of the laws that had been prompted by the Hawaii court decision three years before. The Court nullified a provision in the law that allowed federal marital benefits to go only to opposite-sex couples. Those benefits, the Court majority said, must be available to same-sex couples who were legally married under their own state laws — for example, in Massachusetts, or other states that had since chosen to allow such unions.

The *Windsor* decision, however, actually decided nothing about whether states could do what the federal law had done — that is, limit marriage to opposite-sex couples. Even so, the opinion did say many favorable things about the need to show respect for the families of same-sex married couples.

In the wake of that decision, a "streak" supposedly has developed, with court after court, at federal and state levels, declaring that the *Windsor* decision undermined state bans on same-sex marriage and striking those bans down.

In most public discussion, it has been said — on this blog, too — that there had been an unbroken string of court victories for same-sex marriage. But this week, a state judge in Tennessee appeared to have broken that string by upholding his state's ban in a same-sex couple's divorce case.

The reality, which also has just become clear, is that the "streak" never really got started as a string of winning decisions for same-sex marriage. It is a fact that the first court ruling to apply the *Windsor* decision came in a New Jersey trial court in September 2013, nullifying a state ban, but that was mainly an expansion of an earlier, pre-*Windsor* ruling by the state's Supreme Court. The first court ruling to start from scratch on the issue went the other way; a state judge in Mississippi — in a same-sex divorce case — on December 6 dismissed a constitutional challenge to that state's ban. It was only a two-page order, so no one can be sure what reasons the judge had.

The string of victories that would in fact come after the *Windsor* decision started on December 19, with a ruling by the New Mexico Supreme Court, although that decision relied on the New Mexico constitution to nullify that state's ban.

Then, one by one, federal and state courts began applying the *Windsor* decision directly to strike down state bans under the federal Constitution. (Even that string was interrupted in May, when a state judge in Tampa dismissed a same-sex marriage divorce case, seeking to challenge that state's ban. Later, four state judges in other courts in Florida would rule in favor of same-sex marriage.)

But, even if the "streak" has not been an unbroken one, the pace and frequency of the decisions that did go against the state bans is, surely, unprecedented. Although groups that have been closely monitoring the string of rulings do disagree on the actual number of victories for same-sex marriage, it is somewhere around thirty, or more.

What the occasional breaks in the "streak" illustrate, though, is that the outcome is not necessarily predictable as other courts take on the question, and an ultimate Supreme Court decision in favor of same-sex marriage is hardly inevitable.

But then does the "streak," such as it is, have any real meaning? It certainly does. As the number of rulings won by same-sex couples has risen, judges later joining in the trend have relied upon the strength of that trend. Each judge is obliged to decide the issue individually, but most of them recognize a consensus when they see one as vivid as this one has been.

Moreover, the strength of the trend has also led attorney generals in several states to decide that a defense of their state's ban is no longer a promising strategy, and they have given up that defense. Others in favor of the bans have tried to step up to make a defense, but that has had its limits.

The "streak" also has created a lower-court record that, even if it does not produce the same result each time, will surely impress the Supreme Court when it finally allows itself to be drawn into the fray. Some historians have said that they know of no instance when the Court has bucked a trend such as this one has become.

But the very nature of that trend can also be an argument against the Supreme Court choosing to get involved itself. If the only breaks in the "streak" have been a handful of rulings by divorce-court judges, none of whom so far has gone deeply into the issue before ruling, the Court could conclude that the issue is working itself out sufficiently in lower courts.

The Court is often led to take on a controversy if the lower courts have split — at least when such splits are vivid and meaningful. The supporters of bans on same-sex marriage have been arguing that there is already a split of that significance on this issue, despite the "streak." They are relying on the fact that the U.S. Court of Appeals for the Eighth Circuit in 2006 explicitly upheld Nebraska's ban on such marriages, and they also cite a string of state supreme court decisions against same-sex marriage pleas.

Every one of those decisions, though, came out before the Supreme Court decision in the *Windsor* case. If that ruling changed the constitutional landscape, as so many judges have since concluded, the Supreme Court could conclude that a current split would provide a more compelling reason to take on the question.

A number of observers who listened to hearings held last week in the U.S. Court of Appeals for the Sixth Circuit came away with a clear impression that a majority of that three-judge panel might well uphold one or more of the state bans in effect in the four states involved in that hearing.

That kind of a break in the current "streak" would certainly demonstrate that there is a real division of opinion on the question, one that it would take a Supreme Court decision to resolve.

Of course, the existence of a genuine split on a major constitutional question such as this one does not necessarily dictate that the Court will be drawn in. The Justices do not agree to settle every lower-court conflict, by any means. They have almost complete discretion in what to put on their docket for decision.

One thing about the "streak" does appear to be quite clear at the moment. Its pace has been such that the Supreme Court is likely to act on one or more cases soon after it returns to Washington in September, ending its summer recess. Any grant of review early in the Term would almost certainly mean a final decision by next summer.

It that were to happen, it would be a remarkable historic journey: from *Windsor* to a definitive ruling on same-sex marriage in just two years' time.

"Comparing Two Federal Appellate Court Decisions on Same-Sex Marriage"

Verdict
David S. Kemp
July 30, 2014

On Monday, a panel of the U.S. Court of Appeals for the Fourth Circuit ruled that Virginia's ban on same-sex marriages in that state violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution. This decision follows closely on the heels of a decision by a panel of the U.S. Court of Appeals for the Tenth Circuit, which came to the same conclusion just over a month ago with respect to Utah's same-sex marriage ban.

In this column, I examine the Fourth Circuit panel majority's reasoning striking down Virginia's ban and compare that with the reasoning employed by the Tenth Circuit panel that struck Utah's similar law last month. I note that the majority opinions from both courts closely track one another, both in precedents cited and in reasoning. I also discuss the similarities and differences between the dissenting opinions and argue that these dissenting opinions likely indicate the focal points of these cases if and when they reach the U.S. Supreme Court.

***Bostic v. Schaefer*: The Fourth Circuit Strikes Down Virginia's Same-Sex Marriage Ban**

A panel of the U.S. Court of Appeals for the Fourth Circuit held Monday that Virginia's constitutional and statutory bans on same-sex marriage are unconstitutional. In a 2-1 decision, the panel quickly disposed of the arguments put forth by the proponents of the law, making it the second federal appeals court this summer to rule against a state's same-sex marriage ban.

The panel first considered the threshold question whether the plaintiffs had judicial standing to bring their claims in federal court at all. Finding that they had, the court turned to a second preliminary question: whether the U.S. Supreme Court's summary dismissal of a case in 1972 "for want of a substantial federal question" precluded the instant case. That prior case, *Baker v. Nelson*, involved an appeal from the Minnesota Supreme Court upholding a ban on same-sex marriage. Summary dismissals are considered to be rulings on the merits, but they do not carry the same precedential value as an opinion after briefing and oral arguments. They do, however, prevent lower courts from "coming to opposite conclusions on the precise issues presented and necessarily decided by those actions" except "when doctrinal developments indicate otherwise." The majority found that the Supreme Court's decisions in *Lawrence v. Texas*, in 2003, and *United States v. Windsor*, a decade later, constituted such doctrinal developments. Thus, it concluded, *Baker* was no longer binding.

The panel then turned to the opponents' Fourteenth Amendment arguments. First, it considered the appropriate level of constitutional scrutiny: rational basis review or some form of heightened scrutiny. The

laws' opponents argued that the ban infringes on their right to marriage, which the Supreme Court has recognized as a fundamental right subject to strict scrutiny. The proponents agreed that marriage is a fundamental right, but argued that the fundamental right to marriage does not encompass a right to same-sex marriage and thus that the law triggers only rational basis review. The panel found that the Supreme Court's precedents on the fundamental right to marriage do not define the rights in question as "the right to interracial marriage," "the right of people owing child support to marry," and "the right of prison inmates to marry"; rather these seminal cases speak of "a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." Thus, the panel held, the right to marriage encompasses the right to marry the person of one's choosing and therefore includes the right to same-sex marriage. Finding that the law implicated the fundamental right of marriage, the panel applied strict scrutiny. Under this level of review, the government must show that the laws in question are narrowly tailored and necessary to further compelling state interests.

The law's proponents put forth five interests that they argued justified the laws: "(1) Virginia's federalism-based interest in maintaining control over the definition of marriage within its borders, (2) the history and tradition of opposite-sex marriage, (3) protecting the institution of marriage, (4) encouraging responsible procreation, and (5) promoting the optimal childrearing environment." Even assuming that each of these reasons was indeed compelling, the panel still found that the laws prohibiting same-sex marriage were not sufficiently narrowly tailored to further any of these interests.

In reaching its conclusion that Virginia's ban on same-sex marriage violates the Constitution, the panel notably placed great weight on the Supreme Court's language in *Lawrence* and *Windsor* recognizing the equal legitimacy of gay couples' intimate relationships.

Comparison to the Tenth Circuit's Decision in *Kitchen v. Herbert*

At the end of June, a panel of the U.S. Court of Appeals for the Tenth Circuit issued a similar ruling striking down Utah's same-sex marriage ban. In that case, the majority also found that the plaintiffs had standing to challenge the state law and that *Baker v. Nelson* was no longer binding authority.

The law's proponents provided four allegedly compelling state interests: "(1) fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children; (2) children being raised by their biological mothers and fathers—or at least by a married mother and father—in a stable home; (3) ensuring adequate reproduction; and (4) accommodating religious freedom and reducing the potential for civic strife."

The Tenth Circuit panel's reasoning was very similar to that of the Fourth Circuit panel, albeit more directly critical of the law. The panel questioned the state's purported interests, stating that "each of the appellants' justifications rests fundamentally

on a sleight of hand in which same-sex marriage is used as a proxy for a different characteristic shared by both same-sex and some opposite-sex couples." However, even assuming the interests are compelling, the panel found the argument "that procreative couples must be channeled into committed relationships in order to promote the State's interests in childbearing and optimal childrearing . . . fails because the prohibition on same-sex marriage has an insufficient causal connection to the State's articulated goals."

I found the Fourth Circuit's reasoning somewhat more thoroughly explained and supported as to the question whether same-sex marriage is encompassed in the fundamental right to marriage, particularly in that it more directly relied on *Loving v. Virginia* to reach its conclusion.

The Dissenting Opinions

Judge Paul Kelly concurred in part and dissented in part with the Tenth Circuit panel majority. He concurred only with respect to the issue of standing and dissented with respect to the treatment of *Baker v. Nelson* as no longer binding, the conclusion that same-sex marriage is encompassed within the fundamental right to marry (and therefore he concluded that under the rational basis test, the law should be upheld).

Judge Paul Niemeyer dissented from the Fourth Circuit panel's majority opinion and argued that the fundamental right to marry does not include a right to marry someone of the same sex.

While *Baker v. Nelson* is certainly important and a determination of its applicability may ultimately affect the outcome of the issue if it reaches the U.S. Supreme Court, the scope of the fundamental right to marry is at the crux of both cases, as the two dissents illustrate.

It seems to me disingenuous to deny the strong parallels between these cases and *Loving*. The dissents both contend that the fundamental right to marry is distinguishable from a right to marry someone of the same sex, and that the latter is a "new" right that departs from history and tradition. Yet at the same time, they deny that *Loving* involved a similar departure, even though marriage had historically been denied to interracial couples.

To attempt to characterize same-sex marriage as a category separate and apart from marriage as an institution is to ignore exactly what it is that gay couples seek—recognition of their relationships as equal to those of straight couples. As Justice Kennedy wrote in *Lawrence*, and as quoted by the Tenth Circuit majority, the drafters of the Fifth and Fourteenth Amendments "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

"Virginia Wants Gay Marriage Ban Review by Supreme Court"

Bloomberg
Andrew Harris
August 8, 2014

Virginia Attorney General Mark Herring, a first-term Democrat and supporter of marriage equality, said he asked the U.S. Supreme Court to review a ruling that struck down a gay marriage ban in his state in order to get a quick final word on the issue.

Herring's request, announced in a statement today, would be the third such bid lodged with the high court this week, following requests by lawyers defending similar measures in Utah and Oklahoma. Herring's petition wasn't immediately available at the court.

Laws barring gay couples from marrying in the three states were struck down by federal judges, in rulings that were upheld by appeals courts. The Supreme Court has discretion to accept cases for review. Other challenges involving gay marriage bans are before U.S. appeals courts in Cincinnati, Chicago and San Francisco.

Several Supreme Court justices have expressed reluctance to tackle the issue, with Anthony Kennedy and Sonia Sotomayor suggesting in a separate gay-rights case last year that it'd be too soon for a high court ruling. Likening the Virginia ban to its one-time prohibition of interracial marriage, Herring said, "Virginia got that case wrong. Now we have a chance to get it right."

Almost There

"Many brave men and women have fought for years for the constitutional guarantee of marriage equality, and now, we are almost there," Herring said.

Same-sex marriage is legal in 19 states and the District of Columbia. Decisions striking down bans in nine states are on hold pending the outcome of appeals.

Each side in the Virginia case has asked the U.S. appeals court in Richmond to delay its decision pending a resolution by the Supreme Court, a spokesman for Herring, Michael Kelly, said today.

Less than a month into his term, Herring announced his office would reverse the position of his Republican predecessor, Kenneth Cucinnelli. The new attorney general argued for his state's law to be declared unconstitutional and then for the ruling to be upheld on appeal.

Law Defender

Defending the law was Norfolk County court clerk George E. Schaefer and Prince William County court clerk Michele McQuigg.

Nick Bouknight, a spokesman for the Scottsdale, Arizona-based Alliance Defending Freedom, whose lawyers represented McQuigg, declined to comment on whether the group would ask the Supreme Court to review the Virginia case. Jeffrey Brooke, an attorney for Schaefer, didn't immediately return a call seeking comment.

The cases are *Bostic v. Schaefer*, 14-1167, *Bostic v. Rainey*, 14-1169 and *Bostic v. McQuigg*, 14-1173, U.S. Court of Appeals, Fourth Circuit (Richmond).

"Supreme Court Blocks Virginia Same-Sex Marriages"

Washington Blade
Chris Johnson
August 20, 2014

The U.S. Supreme Court agreed to a stay Wednesday on a federal appeals court's ruling against Virginia's ban on same-sex marriage, blocking same-sex marriages from taking place this week in the Old Dominion.

Without explanation, the court announced in a single-page order it has stayed the ruling by the U.S. Fourth Circuit of Appeals in *Schaefer v. Bostic*, which affirmed Virginia's prohibition on same-sex marriage is unconstitutional.

Although Chief Justice John Roberts is responsible for stay requests in the Fourth Circuit, the order indicates he referred the matter to the entire court. The vote by the Supreme Court on the decision isn't included in the order.

The court adds that if the court ends up declining a writ of certiorari to hear the case, the stay will terminate automatically. But if the court decides to hear the case, the stay will continue until judgment is issued.

Had the court declined to issue a stay, clerks' offices in Virginia could have started distributing marriage licenses to same-sex couples at 8 am on Thursday. That's when the Fourth Circuit was set to issue the mandate on its decision.

Evan Wolfson, president of Freedom to Marry, said the stay decision from the Supreme Court "underscores of the urgency" of a national resolution in favor of marriage equality.

"Americans across the country are being deprived of the freedom to marry and respect for their lawful marriages, as well as the tangible protections and precious dignity and happiness that marriage brings," Wolfson said. "It is time for the Supreme Court to affirm what more than thirty courts have held in the past year: marriage discrimination violates the Constitution, harms families, and is unworthy of America."

The Supreme Court halted same-sex marriages in Virginia after Prince William County Circuit Court Clerk Michèle McQuigg, who's defending the state's ban on same-sex marriage in court, requested the stay from justices. Attorneys representing same-sex couples in the lawsuit — both the Bostic and the Harris plaintiffs — had asked the court to decline the stay, but the Commonwealth of Virginia on behalf of Virginia Registrar of Deeds Janet Rainey filed a brief agreeing that a stay should be put in place.

Prior to the announcement from the Supreme Court, the anti-gay legal firm Alliance Defending Freedom, which is defending Virginia's marriage ban on behalf of McQuigg, followed up with a response insisting that a stay on the Fourth Circuit decision is necessary to prevent harm to the state.

"The balance of the harms thus reduces to this: the *Bostic* and *Harris* Respondents

have identified potential harms (e.g., a delay in obtaining state recognition of their relationships) that will result only if they ultimately prevail in this case, whereas Clerk McQuigg and Registrar Rainey have identified certain harms (e.g., enjoining a duly enacted state constitutional provision) that will result as soon as the Fourth Circuit issues its mandate," writes senior counsel Byron Babione. "That balance tips sharply in favor of staying the Fourth Circuit's mandate."

The litigation seeking same-sex marriage in Virginia itself has already been appealed to the Supreme Court. Earlier this month, Virginia Attorney General Mark Herring, who has refused to defend Virginia's marriage law in court, filed an appeal on behalf of the state. Alliance Defending Freedom has already pledged to file a similar appeal seeking to uphold the ban.

Following the decision from the Supreme Court, Herring said in a conference call with reporters he wants an expedited resolution to the case, which is why he already petitioned the Supreme Court to review the Fourth Circuit's decision against the marriage law.

"It's still difficult to expect Virginian folk to wait to exercise what I believe is a fundamental right, especially when we are so close to our goal, and that is why I've been pushing to expedite and get a ruling from the Supreme Court that will definitively answer the constitutional questions about marriage equality and permanently protect the families of Virginia's same-sex couples," Herring said.

Asked by the *Washington Blade* to respond to critics who would say it's disingenuous to call Virginia's ban on same-sex marriage unconstitutional on one hand, but support a stay on a ruling against it on the other, Herring emphasized he's pushing for a speedy resolution to the case in favor of same-sex couples.

"I support and will continue to fight for equal treatment under the law, and I'm going to continue to do that," Herring said. "But at the same, I recognize that until the Supreme Court makes its decision that outcome is not certain. So, to those who are tired of their state not treating them fairly and equally, I am working as hard as I can to fight for equality. I worked for it in the district court, I fought for it in the Fourth Circuit and I'll fight for it in the Supreme Court."

The American Foundation for Equal Rights announced after the stay decision was announced that it'll file a brief in support of the petition already filed by Virginia Attorney General Mark Herring calling on the Supreme Court to take up the case.

"The federal court system agrees, the majority of Americans agree, and the President of the United States agrees that it is time this country treats its same-sex couples and their children just the same as all other loving families," said plaintiffs' lead co-counsel David Boies of Boies, Schiller & Flexner, LLP. "We are confident that when the Supreme Court reviews the *Bostic* case, it too will agree and end the flagrant injustice of segregating Americans based on sexual orientation."

The decision to block the same-sex marriages from occurring overturns a decision from the Fourth Circuit, which refused to grant a stay on its decision striking down Virginia's marriage ban.

But the high court's decision to stay same-sex marriages in Virginia is consistent with other stay decisions it has issued in other states following rulings in favor of marriage equality.

In January, the court issued a stay on same-sex marriages taking place in Utah as a result of a district court ruling in the case of *Kitchen v. Herbert* striking down the state's ban on gay nuptials. Additionally, the court halted state recognition of these 1,300 marriages in *Evans v. Utah* after the U.S. Tenth Circuit Court of Appeals deemed the state for the time being should consider them valid.

Chris Gasek, senior fellow at the anti-gay Family Research Council, claimed the Supreme Court's decision to stay same-sex marriages in Virginia as a victory for opponents of marriage equality.

"Today, the Supreme Court put a hold on the Fourth Circuit ruling, allowing Virginia's law to continue to be enforced while the Fourth Circuit's opinion is appealed," Gasek said. "We are glad that the Court saw the wisdom of slowing down the judicial process in this instance so that marriages will not be entered into that would later have to be nullified. Such irresponsible mayhem has been witnessed in Utah, and it resulted in legal chaos for state residents and state officials."

"Fourth Circuit Calls Virginia's Gay Marriage Ban "Segregation," Strikes it Down"

Slate
Mark Joseph Stern
July 28, 2014

On Monday, the 4th Circuit Court of Appeals ruled that Virginia's gay marriage ban is unconstitutional, the latest victory for marriage equality in a unbroken string of triumphs since the Supreme Court overturned DOMA in 2013. The opinion included no stay; until the Supreme Court steps in, then, gay couples in Virginia may get married starting now.

The judges of the 2–1 majority labeled the state's ban "segregation" and held that, because it targeted a disfavored minority and implicated a fundamental right, it should be subject to strict scrutiny. It's clear that, to the majority, laws like Virginia's represent little more than bald bigotry:

> [I]nertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws. Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.

Although the court struck down only Virginia's marriage ban, the 4th Circuit also has jurisdiction over Maryland, West Virginia, South Carolina, and North Carolina. The latter three states still ban gay marriage—but today's ruling throws those laws in serious jeopardy.

The majority opinion, written by Judge Henry Franklin Floyd and joined by Judge Roger Gregory, is most notable for its systematic dismantling of Virginia's painfully prejudiced, laughably lousy arguments against gay marriage. The state centered its arguments around the idea that because gay couples cannot have biological children together, they simply don't deserve to get married. When asked why infertile straight couples can still marry, the state responded that these couples set a "positive example for couples who can have unintended children, encouraging them to marry." Here's Floyd on this puzzling theory:

> We see no reason why committed same-sex couples cannot serve as similar role models. … Allowing infertile opposite-sex couples to marry does nothing to further the government's goal of channeling procreative conduct into marriage. Thus, excluding same-sex couples

> from marriage due to their inability to have unintended children makes little sense.

Floyd also had some fun with Virginia's other major argument—the claim that gay marriage somehow increases out-of-wedlock births among *straight* people, a societal ill since children do better with married parents. The idea that gay marriage spurs out-of-wedlock births, the court rightly notes, is pure nonsense, bigoted magical thinking barely concealed as legalistic casuistry. But the second half of the state's formulation is quite true: Children do tend to do better with married parents. Thus, Virginia's marriage ban actually *harms* children, denying them the right to have legally wedded parents.

In his bitter dissent, Judge Paul Niemeyer edges toward what we might call full Scalia, repeatedly demeaning the value of gay people's relationships and families. Gay marriage bans, Niemeyer writes, are necessary to secure "stable family units" and to "giv[e] children an identity." Without gay marriage bans, the "political order resulting from [these] stable family units" will be shattered, and states may be forced to recognize "polygamous or incestuous relationships."

This last quote directly cites Scalia—in dissent. That's what so odd about Niemeyer's decision: As an appellate judge, he's bound by the Supreme Court's precedent. That precedent insists that a gay marriage ban "demeans the [gay] couple, whose moral and sexual choices the Constitution protects," violating "basic due process and equal protection principles." But Niemeyer seems to be living in a world where Scalia's dissents became law and the state retains unfettered power to disparage gay people's lives. Luckily for us, Scalia's dissents were just dissents—as is Niemeyer's opinion. Welcome to the fold, Virginia.

"Reading the Court's Signals on Same-Sex Marriage"

SCOTUSblog
Lyle Denniston
August 22, 2014

Since early this year, the Supreme Court has stepped back into the same-sex marriage controversy five times. While it has done little to explain those actions, it has sent some signals about its thinking. Its most important signals may have been those it appeared to have sent Wednesday, in putting off the issuance of marriage licenses to same-sex couples in Virginia.

Between the nine lines of that order, the Court implied that it will not be rushed into a decision about which, if any, cases it is going to review. And it left no doubt that the Justices themselves, not the lawyers or their clients, are in charge of the timing. The Court, in short, has not yet gotten caught up in the race to settle the basic constitutional issue just as soon as it could possibly do so.

The Court actually has said very little in the nearly fourteen months since its five-to-four decision in *United States v. Windsor* – the ruling that did not deal with state power to ban same-sex marriage but is being widely interpreted by most lower courts as if it had very much to do with that. It has not granted any cases on the validity of a state ban, and it has not even hinted — at least not reliably — at what it might eventually decide on the point.

The Virginia order, granting a county clerk's plea to head off the issuance of marriage licenses to same-sex couples that would have started the next morning, is the only one of the five actions the Justices have taken that will help shape their own eventual role in confronting the basic controversy. All of the other four dealt only with the situations in lower courts.

The Court had been urged, by all sides in the Virginia case, to speed up the process of finding a case for review by turning a simple request for delay into an actual, formal petition — a move that could have cut short several procedural steps, and set up the Virginia case as a prime candidate for review.

The Court silently refused the suggestion, simply delaying things in Virginia until after a county clerk actually files a petition for review, in the usual form and on the usual timetable. That was a clear sign that the Court was doing its best to act as if it were business as usual, even on this hot constitutional controversy.

That development might well have slowed down not only the county clerk's petition, but also the one already filed by state officials in Virginia, which had seemed likely to be in shape procedurally for early consideration for possible review. Knowing that another petition involving the Virginia ban is on the way, the Court may wait for it before acting on the state's separate petition.

Unless the pace steps up significantly on Virginia's part of this controversy, the petition by Virginia officials may lag behind the one filed by Utah — one that seems to be accelerating. The Utah case, in fact, might be ready for the Court to examine as early as next week or the week after — that is, if the Court were in town, and in session, and not on summer recess.

The Court, however, has given no sign that it is going to take any definite action on the new same-sex marriage cases, at least until it returns to town in September from the recess that began at the beginning of July. Yesterday's order, in fact, tended to reinforce that outlook.

But what of the other four orders the Court has issued this year – one in January, one in June, and two in July? Any messages there?

Two of the orders — on January 6 and July 18 — delayed decisions by federal district courts until the Tenth Circuit could consider appeals of those decisions. In those cases, the trial judges struck down Utah's ban on new same-sex marriages and the separate ban on the state's refusal to recognize existing same-sex marriages. Later, the Tenth Circuit affirmed the ruling against the new marriage ban; the other case, on recognition of existing marriages, awaits review in that court.

In both cases, it was the state that asked to delay implementation of the trial judges' rulings. By granting those pleas, the Court implied that it wanted an orderly review process in lower courts, and was sympathetic to the claim of state officials that chaos might ensue if same-sex couples were free to marry when the constitutional controversy remained unsettled. (There have, in fact, been hundreds of same-sex marriages in intervals between lower court rulings, and their validity remains uncertain.)

Although many defenders of state bans have interpreted those two orders as signaling that the Court itself was likely to grant review of the issue later, and, indeed, that there was a good chance that the Court would overturn the lower court decisions and uphold the bans, only the former was probably an intended message. The merits of the decision are just too weighty for the Court to be sending signals on how it would rule when a case became fully developed before it.

But no one knows for sure, because neither of those orders was explained by the Justices, and there were no noted dissents by any of the nine members of the Court.

The other two orders from the Justices came on June 4, dealing with a trial judge's ruling striking down an Oregon ban, and on July 9, involving a trial judge's ruling against a ban in Pennsylvania. In a sense, those didn't really count: in neither was the plea for delay made by state officials; in fact, officials in both Oregon and Pennsylvania had given up defending their states' bans.

In the first of those two cases, a private group that had been denied entry into the case wanted to mount a defense; in the second, a county clerk — who had no real authority over the state's policy on marriage licenses and had been kept out of the case — wanted to put on a defense.

The full Court denied the Oregon plea, thus sending a clear signal that an "outsider" to a test case was not going to be given a chance to stand in for the state to defend a ban. That, in fact, had been the actual decision the Court had issued on the same day that it issued the *Windsor* decision: *Hollingsworth v. Perry*, barring an appeal by the proponents of the California ban, the ballot measure known as "Proposition 8."

That Oregon denial then was cited, by title only, as a precedent by Justice Samuel A. Alito, Jr., when he turned aside the Pennsylvania county clerk's plea. Again, the message was that this clerk, given the actual nature of her duties, was an "outsider."

(By the way, the Court had no problem in the Virginia case with the fact that the request for delay there also came from a county clerk. In Virginia, county clerks are centrally involved in implementing the state's policy on marriage licenses, and they have the authority to be in court on their own. Indeed, the clerk – Michele B. McQuigg of Prince William County — was defending the ban after state officials switched the state's position and gave up the defense that had been pursued by their predecessors in office.)

There is no basis for the theory that, in those two orders, the Court was signaling that it supported a decision by state officials to abandon a defense of a state constitutional provision, or that it was implying that it thought the trial judges were right in nullifying the bans. The only real message was that those who were asking for delay were not legally entitled to ask.

Through all of this year, from January on, the Court could not help but be aware of what was happening in the lower courts, with a string of decisions nullifying state bans on same-sex marriage. The fact that the Court has been drawn in on five occasions has kept it in the middle of the controversy, even if it has mostly kept its own counsel about what it is thinking.

With a little more than five weeks until the Justices assemble in their first private Conference, in advance of the new Term starting October 6, it is by no means clear that any same-sex marriage case will be ready for the Justices to consider it on September 29. That depends, in part, on whether the Court will have cases before it one at a time, as each is ready, or in a group., when several are ready.

The last scheduled day for distributing a case for consideration by the Justices at the September 29 meeting is September 10 — now, just three weeks away. The pending Utah case has a fair prospect of being ready then, but there is reason to doubt at this point that the pending Oklahoma and Virginia cases will be complete. The lawyers involved have said they were working diligently to push matters along, but the clock is against them for action by the Justices at the outset of the new Term.

There will be plenty of time, though, to get a case before the Court for decision during the new Term. If a case is accepted for review by sometime next January, it is almost

certain to be decided before the end of the Term, late next June.

Is a grant of review a certainty in coming months? There is never a sufficiently strong advance signal to predict that.

“ACLU Opposes Time Extension in Utah’s Same-Sex Recognition Case”

The Salt Lake Tribune
Marissa Lang
August 19, 2014

Four gay and lesbian couples asked a federal appeals court Tuesday to deny Utah extra time to appeal a judge’s order requiring the state to offer spousal benefits to same-sex couples married in Utah.

The longer the appeal is dragged out, the couples’ attorney said, the more harm will be done.

"There are families who face financial, emotional and dignitary harms every single day [Utah] refuses to recognize their marriages," wrote John Mejía, counsel for the American Civil Liberties Union of Utah, which represents the plaintiffs in this case. "These real concrete harms mitigate strongly against any further extensions in this case."

On Monday, the Utah attorney general’s office asked the 10th Circuit Court of Appeals for a one-month extension of the Sept. 22 deadline set by the court for the state’s appeal.

Giving the state until Oct. 22 to appeal the *Evans v. Utah* lawsuit would allow the state to better brief the court, the state argued, given the "factually and legally complex" nature of the case, and the fact that the attorneys involved have a busy workload.

But on Tuesday, the ACLU said that’s not good enough.

"[Utah has] had since January of this year, when this case was filed, to deliberate about the issues presented here and have undoubtedly already done much of the required research and writing needed," Mejía wrote. "It also cannot be said that the defendants could not have foreseen the timing of the present briefing schedule to anticipate a need to shift resources and priorities."

The Evans case is the state’s second legal battle over same-sex marriage to reach the 10th Circuit, which in June upheld U.S. District Court Judge Robert J. Shelby’s historic decision in December on the *Kitchen v. Herbert* lawsuit that toppled Utah’s ban on same-sex marriage, allowing gay and lesbian couples to wed in Utah for a brief period of 17 days.

After the nation’s high court halted all same-sex marriages, giving the state a chance to appeal the ruling, Utah said its laws were returned to their "status quo" and it would be illegal for them to extend marital benefits to same-sex spouses.

But in May, U.S. District Judge Dale A. Kimball ordered Utah to do just that. The judge found that denying these couples spousal benefits was a violation of their Fourteenth Amendment rights to equal protection and due process.

"The State has placed plaintiffs and their families in a state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance,

and many other property and fundamental rights associated with marriage," Kimball wrote in his decision. "These legal uncertainties and lost rights cause harm each day that the marriage is not recognized."

This argument was used again in the motion filed early Tuesday by the ACLU.

A stay put in place by the U.S. Supreme Court blocked all movement toward doling out spousal benefits to married same-sex Utahns after Kimball and the 10th Circuit denied similar requests from the state. That stay will expire once the 10th Circuit has ruled on the lawsuit.

It's this indefinite hold that the ACLU said is hurting Utah families.

"While Plaintiffs' counsel understand the need for professional courtesy in agreeing to extension requests," Mejía wrote, "they are unable to do so when extensions will work tangible harm to their clients."

Utah has contended that allowing same-sex couples to apply for, and receive, marital benefits would render the lawsuit moot and undermine the judicial process to which the state is entitled.

Federal appeals court Judge Paul J. Kelly, who wrote a dissent when his colleagues Judges Carlos F. Lucero and Jerome A. Holmes refused to halt the granting of benefits to same-sex spouses, has asserted that the courts have been "running roughshod over state laws which are currently in force."

"It is disingenuous to contend that the state will suffer no harm if the matter is not stayed," he wrote.

Meanwhile, the state also continues to defend its right to define marriage as a union between one man and one woman by asking the U.S. Supreme Court to take up its *Kitchen v. Herbert* case — its last recourse in Utah's effort to revive its ban on same-sex marriage, Amendment 3, which Utah voters passed in 2004.

Virginia and Oklahoma have filed similar petitions, and more states are expected to file for a hearing before the nation's high court before the year's end.

The U.S. Supreme Court is on break until October. When the justices reconvene they will decide which case — if any — they may take up on the issue of state same-sex marriage legislation.

"Utah Seeks U.S. Supreme Review to Revive Gay-Marriage Ban"

Bloomberg
Joel Rosenblatt
August 6, 2014

Utah asked the U.S. Supreme Court to revive its same-sex marriage ban, becoming the first state to do so since the high court last year struck down a law that barred the federal government from recognizing gay marriage.

Since that pivotal ruling in June 2013, gay-marriage advocates have tallied more than two dozen lower-court victories without a single defeat. Utah's prohibition was the first in that spate of cases to be found unconstitutional by a federal appeals court.

The 5-4 ruling in *U.S. v. Windsor* is the high court's most definitive take on the constitutional rights of gay couples. Striking down a 1996 U.S. law that denied federal benefits to legally married same-sex spouses, the court's majority said the measure created a "second-tier marriage" for gay couples.

While courts have consistently read last year's ruling as undercutting any rationale for state bans, Utah argued the opposite in yesterday's petition for review. The state said the June decision by the U.S. Court of Appeals in Denver that its ban is unconstitutional runs afoul of the conclusion in the *Windsor* case that defining domestic relations belongs with the states.

"There are dozens of cases that raise the question whether the Constitution dictates a single marriage definition," according to Utah's filing. "If Utah prevails here, the court will have necessarily concluded that Utah is 'competent' to define marriage" and the resolution of the case "can mark the end of marriage litigation in all respects."

Same-sex marriage is now allowed in 19 states and the District of Columbia.

Marriage Licenses

Utah's voter-approved ban was first struck down by a Salt Lake City federal judge on Dec. 20. More than 1,000 couples received marriage licenses from Dec. 23 to Jan. 6.

After the Supreme Court put the ruling on hold to allow for an appeal, Utah refused to grant marital benefits to those couples, sparking even more litigation.

In yesterday's petition, Utah cited previous Supreme Court rulings that support states' rights to define marriage. While defending its ban in lower courts the state emphasized that voters backed the 2004 law by an almost 2-1 margin.

The state argued that its case is the "ideal vehicle" to resolve the question of whether such bans are legal because Utah's governor, attorney general and a majority of its legislators are united in defending the law. State officials in Oklahoma and Virginia didn't defend their bans that were found unconstitutional by federal appeals panels last month.

"My responsibility is to defend the state constitution and its amendments as Utah

citizens have enacted them," Utah Attorney General Sean Reyes, a Republican, said in an e-mailed statement.

'Majorities Overstep'

Shannon Minter, a lawyer who represents a gay couple in the Utah case, responded to the states' rights argument by arguing that "courts have to step in and act as a check when majorities overstep and take rights away from vulnerable minorities."

"One of the most important roles that the courts play in our democracy is enforcing individual liberties, and the important principle of equal protection of the laws," Minter said yesterday an interview.

Utah's request for the Supreme Court to weigh in comes at a time when public support for gay marriage is growing, reaching a new high of 55 percent in a Gallup poll conducted May 8-11. The nationwide poll, which had a margin of error of 4 percentage points, showed 42 percent opposed.

Virginia Attorney General Mark Herring said in a statement yesterday he will petition the Supreme Court Aug. 8 to review his state's ban. Herring, a Democrat who took office in January refused to defend the ban before it was struck down by trial and appeals court judges, said he wants the final resolution from the high court as soon as possible.

'Final Word'

"I believe the district and appeals courts ruled correctly in striking down Virginia's discriminatory marriage ban, but it has long been clear that the Supreme Court will likely have the final word," he said.

The Supreme Court could decide at its September conference to accept or reject either of the petitions from Utah and Virginia. Its next nine-month term starts in October.

Despite all the momentum in lower courts to legalize gay marriage, several high court justices from the *Windsor* majority have signaled they aren't especially eager to up the issue right away.

Justices Anthony Kennedy and Sonia Sotomayor suggested during arguments last year in a separate gay-rights case from California that it was too soon for a Supreme Court ruling on gay marriage. Ruth Bader Ginsburg has hinted she has a similar view, saying the court moved too quickly in 1973 when it legalized abortion nationwide.

The Utah appeals court case is *Kitchen v. Herbert*. The Virginia case is *Bostic v. Schaefer*.

"10th Circuit Upholds Same-Sex Marriage"

The Salt Lake Tribune
Jessica Miller, Kristen Stewart, & Pamela Manson
June 25, 2014

A federal appeals court on Wednesday ruled that states outlawing same-sex marriage are in violation of the U.S. Constitution.

By upholding a Utah judge's decision, a three-member panel of the 10th Circuit Court of Appeals in Denver became the first appeals court in the nation to rule on the issue, setting a historic precedent that voter-approved bans on same-sex marriage violate the Fourteenth Amendment rights of same-sex couples to equal protection and due process.

But the court immediately stayed the implementation of its decision, pending an anticipated appeal to the U.S. Supreme Court.

Utah attorney general's office said Wednesday it will initiate that appeal.

Meanwhile, the state could ask the 10th Circuit Court to re-hear the matter before the full court.

University of Utah law professor Clifford Rosky called Wednesday's ruling, "the most important victory of the entire gay rights movement."

It is the first time a federal appeals court has recognized that same-sex couples have the same fundamental right to marry as all Americans, said Rosky, chairman of Equality Utah's board of directors.

"Very few courts have embraced the fundamental rights argument and this court seems to have completely embraced it and applied 'strict scrutiny,' the highest standard recognized under constitutional law," Rosky said.

If the state asks the 10th Circuit Court to re-hear the matter before the full court of 12 judges, Rosky said he doubts they will get a different result, and the request may not even be granted.

The court's two-to-one ruling affirms U.S. District Judge Robert Shelby's December decision, which struck down Utah's ban on same-sex marriage and prompted more than a 1,000 same-sex couples to marry during a 17-day window before the U.S. Supreme Court issued a stay, halting all such weddings.

Wednesday's decision "certainly lends legal clarity at this stage," said Salt Lake County District Attorney Sim Gill.

But it remains unclear what practical effect it will have, if any, Gill said.

The state of Utah now has 90 days to ask the high court to weigh in, Gill said. The only way that counties would be free to immediately start issuing marriage licenses to same-sex couples would be if the state chooses not to petition the high court, he said.

"The ball really goes back to the state of Utah," Gill said.

The Utah attorney general's office released this statement Wednesday: "Although the Court's 2-1 split decision does not favor the State, we are pleased that the ruling has been issued and takes us one step closer to reaching certainty and finality for all Utahns on such an important issue with a decision from the highest court.

"For that to happen, the Utah Attorney General's Office intends to file a Petition for Writ of Certiorari to the United States Supreme Court. The Tenth Circuit Court's issuance of a stay will avoid further uncertainty until the case is finally resolved. Whether the Utah Attorney General's Office seeks en banc [full court] review of the Tenth Circuit's ruling has yet to be determined."

Despite the continuing uncertainty, attorney Peggy Tomsic, who represented the three same-sex couples who are plaintiffs in the *Kitchen v. Herbert* lawsuit that is the subject of Wednesday's decision, called the ruling "an absolute victory for fairness and equality" for the people of Utah and other states in the 10th Circuit.

Plaintiff's Moudi Sbeity and Derek Kitchen, had posted this Facebook comment: "Today is a great day for all that came before us, for all in the current trenches fighting for equality, and for all who are affected.

"The 10th Circuit upheld Judge Shelby's ruling, affirming that the right to marry and love is a right guaranteed to all Americans," the couple said. "Thank you all for the outpouring of love and support, and especially a huge thank you to our team and co-plaintiffs. Love on, Utah!"

Many conservatives in Utah were disheartened by the ruling, but they have not given up in their fight to keep marriage between a man and a woman.

Gov. Gary Herbert issued a statement saying he was "disappointed."

"I believe states have the right to determine their laws regarding marriage. I am grateful the Court issued a stay to allow time to analyze the decision and our options. But as I have always said, all Utahns deserve clarity and finality regarding same-sex marriage and that will only come from the Supreme Court."

Sen. Orrin Hatch made headlines recently by saying in May that it was almost a certainty that gay marriage will become legal. That said, he still expressed disappointment at the 10th Circuit's actions.

"Although I am not surprised by today's decision, I disagree with the court's reasoning and hope the Supreme Court ultimately adheres to the original understanding of the Constitution and allow each state to define marriage for itself," he said.

Rep. Rob Bishop, R-Utah, said, "Utahns have made clear their wishes on this subject and their wishes should not be superseded by a judge. Additionally, protecting the 1st Amendment and religious institutions' rights and ability to uphold and act in accordance with their beliefs and principles must be a priority."

The Sutherland Institute, a conservative think tank, promised to help gather a legal team to defend the state's gay marriage ban.

"Any appeal at the U.S. Supreme Court is the main event and may decide the future of marriage for decades," according to a statement from Sutherland. "Defenders of marriage must be prepared. It's disappointing to have a few federal judges decide that they can unilaterally override the decision of Utah voters to preserve marriage as society's way of preserving children's opportunity to be reared by a mother and father."

The ruling affects all states in the 10th Circuit Court of Appeals: Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

The court's majority opinion focused on the 14th Amendment, which gives equal protection to American citizens. The court said its reading of the Constitution shows that the legal rights of married couples has nothing to do with the gender of those in the union.

"We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union," the appellate court said.

"Courts do not sit in judgment of the hearts and minds of citizens."

The majority judges attacked the state's arguments, which centered largely around how same-sex marriage affects child-rearing and religious freedom.

The judges wrote that the state's arguments rested on a link between marriage and procreation — an argument that they said failed because opposite-sex couples who do not or cannot procreate are still allowed to marry.

"Utah citizens may choose a spouse of the opposite sex regardless of the pairing's procreative capacity," the opinion reads. "The elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah, apparently without breaking the 'conceptual link between marriage and procreation.'"

The judges pointed out that the only reference to reproduction in Utah's marriage law is a provision that allows first cousins to marry if they are over 65 years old or are over 55 and cannot reproduce.

The judges also emphasized that religious leaders are still free to practice their sacraments and traditions as they see fit, and are not required to allow same-sex marriage in their churches.

"We continue to recognize the right of the various religions to define marriage according to their moral, historical and ethical precepts," the opinion reads. "Our opinion does not intrude into that domain or the exercise of religious principles in this arena. The right of an officiant to perform or decline to perform a religious ceremony in unaffected by today's ruling."

Also Wednesday, a federal judge in Indianapolis struck down Indiana's ban on same-sex marriage Wednesday, according to

the Associated Press. The ruling took effect immediately, allowing same-sex couples to marry.

The 10th Circuit Court on Wednesday split along that same lines that were formed during oral arguments in April, with pointed questions asked by the three judges — Paul J. Kelly Jr., Carlos F. Lucero and Jerome A. Holmes — about marriage studies, jurisdiction and standard of scrutiny.

At that time, Kelly — who was the dissenting judge in Wednesday's opinion — had asked the plaintiffs' attorney hard questions about state authority.

Kelly on Wednesday disagreed that the Fourteenth Amendment requires Utah to extend marriage to same-sex couple or recognize those marriages from other states.

He noted that the U.S. Supreme Court has recognized a fundamental right to marriage but said every decision vindicating that right has involved two opposite-gender people.

"Indeed, the Court has been less than solicitous of plural marriages or polygamy," Kelly wrote. "If the States are the laboratories of democracy, requiring every state to recognize same-gender unions — contrary to the views of its electorate and representatives — [it] turns the notion of a limited national government on its head."

Marriage does not exist in a vacuum and states have the right to regulate it, the judge said. He said Utah should prevail because the state has shown a rational basis for its decision — responsible procreation, effective parenting and the desire to proceed cautiously with a new social phenomenon.

"Utah's justifications for not extending marriage to include same-gender couples are not irrefutable. But they don't need to be; they need only be based upon 'any reasonably conceivable state of facts,' " Kelly wrote.

He also wrote, "We should resist the temptation to become philosopher-kings, imposing our views under the guise of constitutional interpretation of the Fourteenth Amendment."

During the April arguments in Denver, Tomsic had asked the judges to ensure marriage equality for all, while the state's lead attorney, Gene C. Schaerr, asked them to preserve marriage rights only for opposite-sex couples.

The state argued at that hearing that children benefit from being parented by a mother and a father, not two mothers or two fathers.

But Tomsic also argued that the case is about family. She said couples want to provide for and protect each other legally, and children are demeaned and humiliated when their parents are unable to marry and provide them with the benefits and protections associated with the civil institution.

Rosky called Wednesday's ruling "a bipartisan decision," noting that Kelly was nominated to the bench by former President George H.W. Bush, Lucero was nominated in by former President Bill Clinton and Holmes was nominated by former President George W. Bush.

Utah legislator Jim Dabakis, who is openly gay and was married during the brief time in

December when same-sex marriage in Utah was legal, said of the ruling: "I am joyous, as I know hundreds of thousands of LGBT folks and their families are, all across the great state of Utah. This is a pro-family decision and it fits squarely with true Utah family values — love, kindness and a fair playing field for all. It's wonderful to see Utah, once again lead the country in gay rights."

Salt Lake City Mayor Ralph Becker said, "This is a great day for the laws of the United States, but it still has a long way to go," noting that the 10th Circuit expects the Supreme Court to have the final say.

The mayor, who helped marry gay couples in the hours after Judge Shelby's ruling last December, noted that Utah's key role in a legal process that may affect the entire nation.

The state "is playing a leading role in one of the major issues in our day for social justice" Becker said. "For me, it is exciting."

Evan Wolfson, president of Freedom to Marry, released a statement saying that ruling "has brought us one giant step closer to the day when all Americans will have the freedom to marry. This first federal appellate ruling affirms what more than 20 other courts all across the country have found: There is no good reason to perpetuate unfair marriage discrimination any longer. America is ready for the freedom to marry, and it is time for the Supreme Court to bring our country to national resolution and it should do so now."

The Church of Jesus Christ of Latter-day Saints released a statement saying: "The Church has been consistent in its support of marriage between a man and a woman and teaches that all people should be treated with respect. In anticipation that the case will be brought before the U.S. Supreme Court, it is our hope that the nation's highest court will uphold traditional marriage."

Meanwhile, a group called Mormons for Equality said many LDS Church members around the country were "celebrating today's ruling as a positive step toward protecting more families and children in our society.

"We appreciate in particular that the judges clearly addressed the distinction between the civil and religious marriage, and affirmed that 'religious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit.'

"This ruling confirms that civil marriage equality is not a question about religious beliefs or practices, but rather of what public policies will treat all members of our society fairly and protect the diverse families which exist in our communities."

John Mejia, legal director of the American Civil Liberties Union of Utah, said in a news release, "This is a proud day for everybody in the state of Utah, and everybody across the country, who supports marriage equality."

The ACLU had submitted a "friend of the court" brief in support of the plaintiffs in the *Kitchen v. Herbert* lawsuit. The ACLU also has filed a lawsuit in Utah federal court seeking recognition of the marriages of same-sex couples who were wed during the 17-day period when they were legal.

The Democratic candidate for Utah attorney general, Charles Stormont, said that as attorney general, he would immediately drop the appeal to the U.S. Supreme Court, because it is "an enormous waste of money and we should be fighting to protect people's rights, not to take them away. The state has no business dictating how people build their families, and the State should never tell children or their parents that they are second class citizens."

Regarding the decision in Indiana, Rea Carey, Executive Director of the National Gay and Lesbian Task Force, said, "We are delighted that same-sex couples in the Hoosier State will now have the option of marriage. Marriage equality has clearly reached a critical mass and we can look forward to all Americans having the freedom to marry."