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# From Zero to Fifty in Eleven Years: The Supreme Court Declares the Right of Same-Sex Couples to Marry in *Obergefell v. Hodges*

Joanna L. Grossman

*Maurice A. Deane School of Law at Hofstra University*

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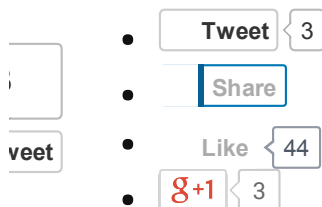
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# Verdict

JUNE 26, 2015

JOANNA L. GROSSMAN

## From Zero to Fifty in Eleven Years: The Supreme Court Declares the Right of Same-Sex Couples to Marry in *Obergefell v. Hodges*



The first marriages by same-sex couples were celebrated in the United States in May 2004, as a result of the Massachusetts Supreme Judicial Court's ruling in ***Goodridge v. Department of Public Health***



(<http://law.justia.com/cases/massachusetts/supreme-court/volumes/440/440mass309.html>), which held that withholding marriage licenses from those couples ran afoul of the state constitution.

Just eleven years later, the U.S. Supreme Court has ruled in ***Obergefell v. Hodges*** (<https://supreme.justia.com/cases/federal/us/576/14-556/>) that the federal Constitution does not allow any state to prohibit the celebration or recognition of marriages by same-sex couples. In the words of Justice Kennedy, writing for a 5-4 majority and as the author of the third in a trilogy of gay rights cases:

The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex. . . .

[T]he Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

In those two simple sentences, the Supreme Court put an end to a controversy that has captivated the public and all branches of government at all levels for more than two decades (and at least piqued the interest of some for two decades before that). All laws prohibiting the issuance of marriage licenses to same-sex couples or recognition of their validly celebrated marriages are now a dead letter. But the simplicity of the holdings—and even the categorical simplicity of their consequences—bely the complexity of the law’s development on this issue and the absolute enormity of the social change that led to such a rapid and complete turnabout.

Where are we now and how did we get there?

### ***Obergefell v. Hodges*: A Small Case with Big Implications**

James Obergefell and John Arthur, a gay couple who had been together for over two decades, made only a modest request of their home state of Ohio. They wanted their marriage to be acknowledged on Arthur’s death certificate. Arthur was suffering with end-stage ALS (Lou Gehrig’s disease), a progressive and fatal disease, but the couple wanted to marry before he died. They flew from Ohio, which did not allow same-sex couples to marry, to Maryland, which did, on a medical transport plane. Because it was too difficult to move Arthur given his debilitating illness, the marriage was solemnized in a ceremony on the plane as it sat on the tarmac.

Arthur died, as expected, just three months later. Ohio law did not permit recognition of a marriage by a same-sex couple for any reason, including for vital statistics records. Obergefell sued, arguing that Ohio’s refusal to give effect to a validly celebrated marriage from Maryland violated his equal protection and due process rights under the federal Constitution. A federal district court sided with Obergefell, ordering Ohio to record Arthur’s status at death as “married.” But the U.S. Court of Appeals for the Sixth Circuit reversed, reasoning that the decision whether to allow or disallow marriages by same-sex couples was reserved to the states.

The appellate court reversed all trial court rulings in cases from other states within its jurisdiction. It found no constitutional problem with a Michigan law that prevented a lesbian couple from jointly adopting a special needs child because their out-of-state marriage could not be recognized there. Nor any with Tennessee’s refusal to recognize the valid New York marriage of an Army reservist who settled there with his husband after a year’s deployment to Afghanistan. The cases involved 16 couples (two with only a

surviving partner) who had been denied either the right to marry in a state within the Sixth Circuit, or the right to have an out-of-state marriage recognized, or both. It was these cases that the Supreme Court agreed last December to hear—and in which it just ruled that all relevant laws are unconstitutional. Before examining that opinion, however, we should consider the key steps leading to this moment.

### **From *Baker* to *Baehr***

*Obergefell* is actually not the Supreme Court's first ruling on the validity of a state ban on same-sex marriage. In the first wave of cases seeking a right of same-sex couples to marry, in the early 1970s, two men in Minnesota sued after being denied a marriage license. They were turned away by lower federal courts that consulted dictionaries to see whether two men could marry (the marriage law in Minnesota at the time was silent on gender). And the dictionary says? Marriage is a union between a man and a woman. Although the Supreme Court agreed initially to hear their case, it then dismissed certiorari "for want of a substantial federal question." In other words, there was no plausible constitutional argument that might work in the couple's favor and thus no federal jurisdiction. *Baker v. Nelson* (1971) has lurked over cases in the last several years, as federal courts have tried to navigate around a one-sentence ruling issued without the benefit of briefing, oral argument, or a ruling on the merits, but which was nonetheless entitled to precedential value.

The first wave of this movement subsided without success and, ultimately, morphed into a push for protection on the local level. A 1984 ordinance in Berkeley creating a domestic partnership registry was the first sign that a narrower effort might meet with more success. But, by the 1990s, the gay rights movement geared up again to seek marriage equality. The general strategy was to file challenges in a variety of states simultaneously, but seeking relief only under the respective state constitution. This would, advocates thought, maximize the changes for a favorable ruling—and, importantly, keep any victories out of the hand of the conservative-leaning U.S. Supreme Court.

A 1993 ruling from the Hawaii Supreme Court in *Baehr v. Lewin*, which held that the ban on same-sex marriage was a form of sex discrimination meriting strict scrutiny, seemed hopeful to advocates and threatening to opponents. Both assumed that the State, on remand, would fail to produce justifications sufficient to meet the high standard called for by such scrutiny.

### **From *Baehr* to *Goodridge***

Congress was among the first to react to *Baehr*, with its adoption of the Defense of Marriage Act in 1996 (DOMA), which provided in part that marriages by same-sex

couples would not be recognized for federal law purposes. Within less than a decade, more than two-thirds of the states had passed statutes or constitutional amendments (or both) banning the celebration or recognition of marriages by same-sex couples. (At the high watermark, forty-four states would have such laws on the books.) Meanwhile, Hawaii did not legalize same-sex marriage after all, as a voter referendum gave its legislature the constitutional authority to prohibit it, and the legislature enacted a prohibition immediately.

In the first several years after *Baehr*, the marriage equality movement had no successes and took a number of serious hits—certainly the erection of a widespread infrastructure to prevent both legislative and judicial endorsements of marriages by same-sex couples was a big one. The first tangible victory for the movement came in 1999, when Vermont’s highest court ruled, in ***Baker v. State*** (<http://law.justia.com/cases/vermont/supreme-court/1999/98-032op.html>), that the state could not withhold the benefits of marriage from same-sex couples without violating a provision of the Vermont constitution that requires that all citizens have equal access to “common benefits.” In response, the state legislature invented the civil union as a marriage alternative—same benefits, different name. (Vermont later moved to full marriage equality in 2009.)

Vermont remained the only state with formal recognition for same-sex couples until 2004, when the first marriage licenses were issued in Massachusetts after the ruling in ***Goodridge v. Department of Public Health*** (<http://law.justia.com/cases/massachusetts/supreme-court/volumes/440/440mass309.html>). In that ruling and a follow-up ruling, the Massachusetts Supreme Judicial Court held that same-sex couples had to be permitted to marry on exactly the same terms as different-sex couples—name included. Denial of the right to marry, the court explained, “works a deep and scarring hardship on a very real segment of the community for no rational reason.” Gay couples would be denied not only the benefits of marriage, which had troubled the Vermont court, but would also be relegated to second-class citizenship in the process. While this is a familiar concept now—Justice Ginsburg spoke famously in a 2013 oral argument of the problem of “skim-milk marriage”—at the time, it was all new. As was the court’s conclusion that the prohibition violated both the equal protection and due process clauses of the Massachusetts constitution.

### **From *Goodridge* to *Windsor* to *Obergefell***

Until 2008, Massachusetts remained the only state to allow same-sex couples to marry.

But beginning then—and continuing until now—states began to join Massachusetts. Four states adopted marriage equality in 2008, including the first out of the northeastern United States, Iowa. But even as additional states began to allow same-sex marriage, other states joined the opponents' movement, erecting obstacles to voter, legislative, and judicial influences that would allow marriage equality. During this period of ebb and flow, it seemed likely that marriage equality rights would remain piecemeal and scattered until younger generations, who support it much more strongly, took power. But at some unidentifiable point, the winds changed. While marriage-equality opponents once won at every ballot box, often with surprisingly strong majorities even in Democratic-leaning states, they began to lose. States that had staked out firm positions in opposition to marriage equality reversed themselves. The states that prohibited marriage equality still greatly outnumbered the states that embraced it, but the change seemed to be moving only in one direction—in favor of marriage equality.

The landscape changed dramatically, however, in 2013, with the Supreme Court's ruling in *United States v. Windsor* (<http://supreme.justia.com/cases/federal/us/570/12-307/>). As explained in more detail [here](http://verdict.justia.com/2013/06/26/doma-is-dead) (<http://verdict.justia.com/2013/06/26/doma-is-dead>), the Court held that the federal-law provision of DOMA violated the federal constitutional guarantees of due process and equal protection. Given the federal government's usual practice of deferring to state determinations of marital status when administering federal laws and programs, its sudden refusal to give effect to one class of marriage for every purpose was a discrimination of an "unusual character" that raised an inference of animus and violated the constitution. Justice Kennedy's opinion read much like his opinion in *Lawrence v. Texas* (<http://supreme.justia.com/cases/federal/us/539/558/case.html>) (2003), in which the Court ruled 6-3 that state criminal bans on same-sex sexual behavior violate the right to privacy protected in the Due Process Clause of the Fourteenth Amendment. The majority opinions in each case were sensitive to the developing social norms about gay rights and relationships and nuanced in their analysis of relevant constitutional principles. And, together, they presaged Justice Kennedy's opinion in *Obergefell*, in which he took those principles to their logical extension.

At the time the Court ruled in *Windsor*, it could also have ruled on the issue of marriage equality directly. A companion case, *Hollingsworth v. Perry*, involved a federal constitutional challenge to California's voter-passed ban on marriages by same-sex couples. But the challenge was dismissed on standing grounds, and the Court never reached the merits.

*Windsor*, as it turns out, was a game changer. In fewer than two years, federal courts in dozens of states applied *Windsor*'s reasoning to invalidate state bans on celebration and

recognition of marriages by same-sex couples. Those rulings were upheld by the vast majority of federal appellate courts—with the Sixth and Eighth Circuits as the only exceptions. The reasoning varied by case, but, by and large, those cases represented a large-scale rejection of the most common reasons proffered to justify bans on same-sex marriage. Reasons that might have seemed persuasive to courts a decade or two earlier now struck them as implausible, even laughable. That turnabout can only be explained by the massive change in public attitudes and opinions on this issue. Opposition to gay rights went from a traditional position to a bigoted one. And marriage equality went from being a fringe aspiration to the conventional wisdom. States refusing to ride the tide were looking more and more like those that clung to their anti-miscegenation laws until 1967, when the Supreme Court invalidated them in *Loving v. Virginia* (<https://supreme.justia.com/cases/federal/us/388/1/>).

### ***Obergefell v. Hodges*: The Final Word**

The ruling in *Obergefell* is thus the end of a long story rather than the beginning of one. So how did it end?

The opinion begins broadly and poetically—or better reserved, as Justice Scalia suggests in a biting dissent, for a fortune cookie. “The Constitution,” the opinion opens, “promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons within a lawful realm, to define and express their identity.” This sentence leaves no mystery as to the outcome of the case and stakes out the tone and substance of the opinion that follows.

Justice Kennedy starts with a broad but concise history of marriage—hitting high points from Confucius—“marriage lies at the foundation of government”—to Cicero—the “first bond of society is marriage.” For Justice Kennedy, marriage is central “to the human condition”; “sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm”; and a “dynamic [that] allows two people to find a life that could not be found alone.” Marriage “responds to the universal fear that a lonely person might call out only to find no one there.” (Though, I must suggest that marriage is no guarantee that the response to such a call might not be just a loud snore.) It is therefore unsurprising, Kennedy writes, that marriage “has existed for millennia and across civilizations.”

The essence of the opinion, however, begins at the end of this history—both literally in the organization of the opinion and more abstractly in the question before the Court. Do same-sex couples have the right to participate in this timeless institution, which has always been understood to involve the union between a man and a woman? Despite respondents’ arguments to the contrary, history does not answer the question. If the



petitioners, such as James Obergefell, sought to “demean the revered idea and reality of marriage,” its venerable history might stop them in their tracks. But, what the petitioners want, is to participate in the institution “because of their respect—and need—for its privileges and responsibilities.” And because of their “immutable nature,” petitioners’ desire for marriage can only be satisfied by marriage to a person of the same sex.

The key to Kennedy’s analysis is that the fundamental right to marry is broad enough to encompass the right of same-sex couples to marry. How can these couples have a fundamental right to marry if they have never been permitted to marry in the past? As he did in *Lawrence*, Justice Kennedy cabined the inquiry into tradition, observing that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.” Moreover, the history of marriage reveals it is an institution affected both by continuity and change. While it has withstood the test of time and culture, it has also morphed into something earlier societies might not recognize—from family arrangement to a voluntary contract between adults; from an institution revolving around a gender hierarchy to one premised, at least theoretically on an equal partnership; from a lifelong, but largely economic relationship to a potentially shorter, but more deeply affective one. Surely the demise of coverture, in which married women cease to have any legal identity, changed the face of marriage more than opening it up to some gay and lesbian couples. The “deep transformations” in the structure of marriage, Kennedy writes, “have strengthened, not weakened, the institution of marriage.”

In the crux of the opinion, Justice Kennedy identifies four principles regarding the right to marry that make clear it is broad enough to include same-sex couples. First, prior precedents on the right to marry make clear that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” Marriage and liberty are inextricably intertwined. The personal choice to marry—like the personal choice to engage in consensual sexual activity, to use contraception, or to terminate a pregnancy—belongs to us all.

Second, “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.” The importance of this union has been recognized even when procreation is not possible—for example, in a [case \(https://supreme.justia.com/cases/federal/us/482/78/\)](https://supreme.justia.com/cases/federal/us/482/78/) involving marriage by prisoners. Marriage allows people to define their relationships by commitment.

Third, marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” Rather than ceding to the arguments that same-sex marriage might hurt children, Justice Kennedy cites children’s needs and rights in favor of marriage equality. The denial of marriage to the many same-sex couples who are raising children causes instability, unpredictability, harm, and humiliation. And



for same-sex couples who choose not to procreate, they are no different from the many heterosexual couples who make the same choice.

Fourth, because marriage “is a keystone of our social order,” marriage is supported not only by a couple’s vows, but by society’s “pledge to support the couple, “offering symbolic recognition and material benefits to protect and nourish the union.” Marriage has always been a status privileged by federal and state governments, making marriage even more important—and its deprivation more harmful. In addition to the loss of material benefits, “[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”

The latter portion of Kennedy’s opinion draws out in more detail the project he began in *Lawrence*—noting the relationship between constitutional claims rooted in liberty and those in equality. In the marriage context, that link has been clear. In *Loving v. Virginia*, the Court invalidated Virginia’s ban on interracial marriages under both the Due Process and Equal Protection Clauses, even though either would have been sufficient to end the case. And in later marriage cases, it relied on the fundamental rights branch of equal protection to invalidate marriage regulations, again blurring the lines between the two types of claims. And many of the early equal protection cases on gender involved challenges to the traditional model of marriage. In the gay rights context, the connection is obvious. *Lawrence* drew on both liberty and equality principles to invalidate Texas’s ban on same-sex sodomy. And, according to Justice Kennedy, the same dynamic applies in the same-sex marriage context. “It is now clear,” he writes, “that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right.” The majority thus invalidated same-sex marriage prohibitions on both due process and equal protection grounds.

## Conclusion

A final piece of the *Obergefell* opinion is to expressly overrule *Baker*. Thus we have traveled from a world in which a claim for marriage equality does not even merit discussion to one in which it is now the law of the land.

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*Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of **Inside the Castle: Law and the Family in 20th Century America** (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of **Gender Equality: Dimensions of Women's Equal Citizenship** (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.*

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