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Regina M. Lambert

Abby R. Rubenfeld

DEVIANT TO DIGNIFIED: FROM *CAMPBELL V. SUNDQUIST* TO *TANCO V. HASLAM* – THE PROGRESSION OF LGBT RIGHTS & MARITAL EQUALITY IN TENNESSEE

REGINA M. LAMBERT*
&
ABBY R. RUBENFELD**

"History says, Don't hope
On this side of the grave,
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up
And hope and history rhyme."
Seamus Heaney, The Cure at Troy

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* Regina Lambert was co-counsel in *Tanco v. Haslam*, the Tennessee marriage equality case that went to the United States Supreme Court as a companion case with *Obergefell v. Hodges*. She graduated *summa cum laude* from the University of Tennessee College of Law in 2001 and was inducted into the Order of the Coif. While in law school, Ms. Lambert served as the Editor-in-Chief of the *Tennessee Law Review*. Ms. Lambert has taught at the University of Tennessee College of Law as an adjunct law professor since 2010. Ms. Lambert would like to thank her co-counsel in the *Tanco* case for their dedication, friendship, and memories to last a lifetime. Ms. Lambert dedicates this article to her father, John Paul Lambert.

** Abby Rubenfeld is a solo practitioner in Nashville, Tennessee and was co-counsel in *Tanco v. Haslam*, the Tennessee marriage equality case that went to the United States Supreme Court as a companion case with *Obergefell v. Hodges*. She was formerly the first legal director Lambda Legal Defense and Education Fund, serving there from 1983 through 1988. She served for years on the boards of directors of the Human Rights Campaign and of the National Gay and Lesbian Task Force, as well as of the ACLU of Tennessee. She successfully challenged the constitutionality of the Tennessee sodomy statute in 1996, and has litigated LGBT test case litigation all over the country. She lives in Nashville, Tennessee, and is a huge Lady Vols and Titans fan.

INTRODUCTION

On June 26, 2015, the United States Supreme Court, in *Obergefell v. Hodges*,[1] held 5-4 that the right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2] In this landmark victory for civil rights, the Supreme Court struck down state laws prohibiting same-sex marriage by holding that the fundamental right to marry includes same-sex couples wishing to enter into the institution of marriage.[3]

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1. 135 S. Ct. 2584 (2015).
2. *Id.* at 2604.
3. *Id.* at 2604-05 ("These considerations lead to the conclusion that the right to

The Court's milestone ruling advanced the liberty and equality of lesbians and gay men[4]—who were once considered deviant,[5] mentally disordered,[6] and whose sexual behavior was criminalized in several states into the twenty-first century.[7]

This article addresses the perceptual transformation of the gay individual from a "deviant" societal view to one of "dignity" as acknowledged by the United States Supreme Court.[8] Specifically, it reviews the implementation of Tennessee's first sodomy law in the early 1800s, enforcement over the following one hundred plus years, Tennessee citizens' changing moral view of gay people, the reversal of Tennessee's sodomy law, and ultimately the Supreme Court ruling mandating marriage equality in *Obergefell v. Hodges/Tanco v. Haslam*.[9]

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marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.").

4. *See infra* Section X.D.

5. In *Bowers v. Hardwick*, the U.S. Supreme Court commented:

> During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.' 4 W. Blackstone Commentaries *215.

Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

6. "For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973." *Obergefell*, 135 S. Ct. at 2596 (citing *Position Statement on Homosexuality and Civil Rights*, *in* 131 AM. J. PSYCHIATRY 497 (1974)).

7. "[U]ntil 1961, all 50 States outlawed sodomy." *Bowers*, 478 U.S. at 193.

8. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2599 (stating that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices"); United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (stating that "[b]y [New York's] recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages," the state "enhanced the recognition, dignity, and protection of the class").

9. 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584 (2015).

While keeping a main focus on the progression of Tennessee law, this article will follow Supreme Court litigation from *Bowers v. Hardwick* through *Obergefell* as a background and national overview to contrast the advancement of gay rights nationally. Finally, this article will address the immediate impact of national marriage equality on Tennessee and future issues likely to arise post-*Tanco*.

I. TENNESSEE SODOMY LAW – A BRIEF HISTORY/NATIONAL BACKGROUND[10]

Tennessee enacted its first sodomy law in 1829 when it adopted a new criminal code.[11] The so-called "crimes against nature" statute criminalized sodomy and provided for imprisonment of "not less than five nor more than fifteen years."[12] The first reported Tennessee sodomy case, in 1955, addressed how broad or narrow the statute should be interpreted.[13] In the following years, sodomy cases addressed similar issues, including whether victim statements and/or testimony were admissible as evidence at trial;[14] whether the statute required an actual, verses an attempted, assault;[15] whether corroborating evidence was required under the statute;[16] and whether a victim qualified as an accomplice.[17]

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10. For an extensive account of Tennessee's sodomy law history, see George Painter, *The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States*, GAY & LESBIAN ARCHIVES OF THE PAC. NW. (GLAPN), http://www.glapn.org/sodomylaws/sensibilities/introduction.htm (last modified Feb. 2, 2005).

11. *See id.* (citing Act of Dec. 9, 1829, ch. 23, 1829 Tenn. Pub. Acts 27). The law stated, "Whoever shall commit either of the infamous crimes against nature called sodomy or buggery shall undergo confinement in said Jail and Penitentiary house for a period of not less than five nor more than fifteen years." *Id.*

12. *See* Painter, *supra* note 10 (citing 1829 Tenn. Pub. Acts at 29-30, § 17 and detailing later legislative changes).

13. Fisher v. State, 277 S.W.2d 340, 341 (Tenn. 1955) (rejecting a narrow reading of the sodomy statute).

14. *See* Johnson v. State, 296 S.W.2d 832, 832 (Tenn. 1956) (holding that statements made by a child victim to his father were "admissible when made within a reasonable time thereafter").

15. *See* Valley v. State, 309 S.W.2d 374, 375 (Tenn. 1957) (addressing whether the evidence was sufficient for a conviction under the statute).

16. *See* Sherrill v. State, 321 S.W.2d 811, 816 (Tenn. 1959) (holding that "the testimony of a child as an accomplice should be corroborated"). *See also* Boulton v. State, 377 S.W.2d 936, 940 (Tenn. 1964) (holding that sufficient corroboration was necessary for a conviction when the victim was an accomplice in the crime). The Tennessee law was revised in 1963 to limit the need for corroborating evidence to cases involving alleged conduct with a minor. Act of Mar. 25, 1963, ch. 315, 1963 Tenn. Pub. Acts 1133. *See also* Painter, *supra* note 10 (providing a detailed analysis

Tennessee's sodomy statute was constitutionally challenged in the 1970 case, *Polk v. Ellington*.[18] In *Polk*, the plaintiff sought an injunction against criminal prosecution under the sodomy statute and a declaration that the statute was "unconstitutionally overbroad and vague" in federal court.[19] The United States District Court abstained from addressing the constitutionality of the statute.[20] Because the court found that there was no substantial federal constitutional question, the court held that the plaintiff was not entitled to injunctive or declaratory relief in a federal court.[21] While the *Polk* court invoked the doctrine of abstention, it did state in a footnote and supplemental order that the issue of "whether the involved criminal statute is so vague as to be unconstitutional on its face under the due process clause of the Fourteenth Amendment"[22] was possible and that the statute "may be unconstitutionally overbroad" because it could apply to private opposite-sex marital relations.[23]

Further Tennessee state sodomy cases continued to focus primarily on corroborating evidence and accomplice testimony.[24] In the 1971 case, *Scola v. State*,[25] the court confirmed that corroborating testimony is necessary for a conviction under the sodomy statute when the sole witness is an accomplice/voluntary participant in the crime.[26] The following year, Tennessee state courts first addressed the constitutionality of the sodomy statute in

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of Tennessee sodomy cases).

17. Davis v. State, 442 S.W.2d 283, 285 (Tenn. Crim. App. 1969) (holding that the determination of whether or not a victim qualifies as accomplice is a jury question).

18. 309 F. Supp. 1349 (W.D. Tenn. 1970).

19. *Id.* at 1351.

20. *Id.* at 1353 (Supplemental Order). "In the instant case it does not appear that the constitutional questions raised in the complaint have ever been presented to the Tennessee State courts and thus it is possible that the State courts will be able to interpret the statute in question in such a way as to avoid the constitutional issues." *Id.* at 1352.

21. *Id.* at 1353 (Supplemental Order).

22. *Id.* at 1352 n.4.

23. *Id.* at 1353 (Supplemental Order). "For completeness, we should also say that, since the statute is arguably applicable to certain kinds of sexual activity between married persons carried on in the privacy of the home, it may be unconstitutionally overbroad." *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

24. *See* Painter, *supra* note 10 (providing a detailed analysis of Tennessee sodomy cases).

25. 474 S.W.2d 144 (Tenn. Crim. App. 1971).

26. *Id.* at 145.

Stephens v. State.[27] In *Stephens*, the incarcerated victim was assaulted and sodomized by jailed inmates against his will.[28] The defendant, who was charged and convicted of violating the sodomy statute, argued that corroborating testimony was necessary and that the statute was unconstitutionally vague.[29] The appellate court upheld the conviction, finding that corroboration was not necessary in *Stephens* because the victim was not an accomplice to the crime.[30] Additionally, the court held that the statute was not unconstitutionally vague because the "crime [was] well defined and described at common law" and not at risk of misinterpretation.[31]

In 1973, the Tennessee Court of Criminal Appeals again addressed whether the sodomy statute was unconstitutionally vague in *Locke v. State*.[32] Holding the statute constitutional and applying it broadly, the court expressed "no opinion as to the constitutionality of the application of [the] statute to the private acts of married couples" as that was "a question inapplicable to the facts of this case."[33] In the 1975 case, *Young v. State*, the court addressed the constitutionality of the sodomy statute.[34] After a thorough examination of Tennessee sodomy law, the court affirmed the defendant's conviction, approved a broad application of the sodomy statute, declared that the statute was not impermissibly vague, and encouraged the legislature to review the statute.[35] Additionally, the Tennessee Supreme Court, like the Tennessee Court of Criminal Appeals in *Locke v. State*,[36] clarified that it made "no judgment with respect to the constitutionality of the application of this statute to private consensual acts engaged in by adults, nor such practices pursued in private and within the framework of the marital relationship."[37]

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27. 489 S.W.2d 542 (Tenn. Crim. App. 1972).
28. *Id.* at 543.
29. *Id.*
30. *Id.* at 543-44.
31. *Id.* at 543.
32. 501 S.W.2d 826 (Tenn. Crim. App. 1973).
33. *Id.* at 828.
34. 531 S.W.2d 560 (Tenn. 1975).
35. *Id.* at 563 (encouraging the legislature to "take a new and fresh look at Tennessee's 150-year old 'crime against nature' statute . . . in the light of modern mores and morality" noting it would be "in the public interest and would be of substantial assistance in the administration of criminal justice").
36. *See supra* notes 32-33.
37. *Young*, 531 S.W.2d at 563.

Tennessee amended its sexual assault statute in 1977[38] and again in 1979[39] following confusion regarding whether the 1977 revision repealed the "crime against nature" law.[40] In the period of time from the enactment of Tennessee's sodomy law in 1829 until the mid-1980s, the majority of the reported sodomy cases involved either relations with a person under the age of majority or a nonconsensual act.[41] Beginning in the early- to mid-1970s, and contemporaneous with the development of the constitutional right to privacy,[42] Tennessee courts began to address, in *dicta*, whether the prohibited acts in the sodomy statute would be applicable to consensual adults and within the marital relationship.[43]

Although the Tennessee legislature made revisions to the sodomy statute in 1977 and 1979, it did not reexamine the sodomy statute, even at the suggestion of the Tennessee Supreme Court.[44] It was not until 1989 that the Tennessee legislature revised the Tennessee criminal code.[45] Although common-law crimes were abrogated, the legislature did not repeal the state sodomy law.[46] The "Homosexual Acts" statute replaced common-law sodomy; it reduced the offense from a felony to a minor misdemeanor and greatly reduced the potential penalties, but it limited its scope to same

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38. Act of May 26, 1977, ch. 449, 1977 Tenn. Pub. Acts 1184 (limiting sex crimes to "incest, a crime against nature, assault with intent to commit rape or rape"); *see* Painter, *supra* note 10 (discussing legislative amendments and revisions).

39. Act of May 23, 1979, ch. 415, 1979 Tenn. Pub. Acts 1065 (affirming that the legislative intent of the 1977 Act was not to repeal the sodomy statute); *see* Painter, *supra* note 10 (discussing legislative amendments and revisions).

40. *See* Painter, *supra* note 10 (discussing legislative amendments and revisions).

41. *See* Painter, *supra* note 10 (presenting a thorough history of Tennessee sodomy law cases).

42. *See infra* Section IV.A.

43. *See, e.g.*, Locke v. State, 501 S.W.2d 826, 828 (Tenn. Crim. App. 1973) (expressing "no opinion as to the constitutionality of the application of [the] statute to the private acts of married couples" and also acknowledging that the case did not involve "consenting adults"); *see also*, Young v. State, 531 S.W.2d 560, 563 (Tenn. 1975) (clarifying that the Tennessee Supreme Court made "no judgment with respect to the constitutionality of the application of [the] statute to private consensual acts engaged in by adults, nor such practices pursued in private and within the framework of the marital relationship").

44. *See supra* note 35 and accompanying text.

45. 1989 Tenn. Pub. Acts 1169. Although common-law crimes were abrogated, the legislature did not repeal the "crime against nature" law. *See also* Painter, *supra* note 10 (discussing legislative revisions).

46. *Id.* § 1 (specifically, TENN. CODE ANN. § 39-11-102). *See also* Painter, *supra* note 10 (discussing legislative revisions).

gender sexual acts.[47] In effect, this resolved the prior issue regarding consensual and marital relations between members of the opposite sex.

The Tennessee legislature could also have felt confident that the 1989 changes were constitutional at the time they were made as the United States Supreme Court had heard its first consensual sodomy case four years earlier and upheld Georgia's criminal statute in *Bowers v. Hardwick*.[48] In *Bowers*, the respondent, a Georgia resident, was charged with violating Georgia's statute, which criminalized sodomy, by engaging in consensual, non-commercial sexual relations with a same-sex adult partner in the bedroom of his home.[49] After a preliminary hearing, the state District Attorney decided not to proceed unless there were further developments.[50] The respondent then filed suit in federal court alleging that the Georgia statute was unconstitutional "insofar as it criminalized consensual sodomy."[51] However, the federal district court granted the State of Georgia's motion to dismiss for failure to state a claim.[52]

The respondent appealed, and a divided panel of the Eleventh Circuit Court of Appeals reversed,[53] relying on Supreme Court jurisprudence in *Griswold v. Connecticut*,[54] *Eisenstadt v. Baird*,[55] *Stanley v. Georgia*,[56] and *Roe v. Wade*.[57] The Eleventh Circuit held that the Georgia statute was an unconstitutional violation of the respondent's fundamental rights because "his homosexual activity is a private and intimate association that is beyond the reach of state regulation."[58] Finding violations of both the Ninth Amendment and the Fourteenth Amendment's Due Process Clause, the appellate

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47. *See* Painter, *supra* note 10.

48. 478 U.S. 186 (1986). Although the United States Supreme Court granted certiorari in *Rose v. Locke*, 423 U.S. 48 (1975), in 1973 and determined at that time that Tennessee's sodomy statute was not unconstitutionally vague, *Locke* involved a nonconsensual act. *See supra* notes 32-33.

49. *Bowers*, 478 U.S. at 187-88.

50. *Id.* at 188.

51. *Id.*

52. *Id.*

53. *Id.* at 189.

54. 381 U.S. 479 (1965).

55. 405 U.S. 438 (1972).

56. 394 U.S. 557 (1969). *Stanley v. Georgia* was a 1969 Supreme Court case addressing possession of obscene materials inside of a person's home. *Id.* at 558. The unanimous decision helped to establish an implied right to privacy under the Fourteenth Amendment and invalidated all state laws that banned private possession of obscene materials. *Id.* at 568.

57. 410 U.S. 113 (1973).

58. *Bowers*, 478 U.S. at 189.

court remanded the case and required the state to overcome a strict scrutiny analysis in order to prevail.[59] The Supreme Court granted certiorari.[60]

Reversing the judgment of the Eleventh Circuit without regard for the issues presented by the parties, the Supreme Court held 5-4 that the United States Constitution's Fourteenth Amendment Due Process Clause did not confer any fundamental right for gay individuals to engage in consensual adult sexual relations—even if the conduct took place in the privacy of their own homes.[61] Noting that "[p]roscriptions against [sodomy] ha[d] ancient roots" and that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights," the Supreme Court held that the Georgia sodomy law was constitutional[62] and that there was no "fundamental right to engage in homosexual sodomy."[63] Comparing adult consensual sodomy to "adultery, incest, and other sexual crimes," the Court found the Georgia criminal law withstood constitutional muster—even if the acts were consensual and took place in the privacy of one's home.[64]

In his dissenting opinion, Justice Blackmun stated that the "case [was] no more about 'a fundamental right to engage in homosexual sodomy,'" as the majority interpreted, but rather about "'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[65] Noting that "[o]nly the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of the human personality,'"[66] Justice Blackmun concluded that the majority had actually "refused to recognize . . . the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[67] Criticizing the State of Georgia's defense that the proscribed activity interfered with the state's right to "maintain a decent society,"[68] Blackmun denounced the majority and

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59. *Id.*

60. *Id.*

61. *Id.* at 194-95.

62. *Id.* at 192.

63. *Id.* at 191.

64. *Id.* at 195-96.

65. *Id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

66. *Id.* at 205 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

67. *Id.* at 206 (Blackmun, J., dissenting).

68. *Id.* at 210 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I, 413

declared that "[a] State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."[69] Blackmun concluded his dissent with the hope that "the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in [the] Nation's history than tolerance of nonconformity could ever do."[70] However, it would take almost two decades for the United States Supreme Court to revisit the issue. Tennessee would address and resolve its state sodomy law debate seven years before the Supreme Court resolved the issue nationally.[71]

Six years after *Bowers*, in 1992, the Tennessee Supreme Court addressed an issue that initially appeared unrelated to the new Homosexual Acts law. In *Davis v. Davis*,[72] the defendant's ex-wife appealed a decision of the Tennessee Court of Appeals that reversed a trial court decision awarding her "custody" of frozen embryos following her divorce.[73] The appellate court held that the ex-husband had a "constitutionally protected right not to beget a child where no pregnancy ha[d] taken place" and held there was "no compelling state interest to justify [ ] ordering implantation against the will of either party."[74] The intermediate court also held that "the parties share[d] an interest in the . . . fertilized ova" and remanded, ordering the trial court to enter an order giving each party "joint control" and "equal voice" over the disposition of the embryos.[75]

The Tennessee Supreme Court granted review to address this case of first impression and provide guidance to lower courts in this developing area of law in the event the parties could not agree on the disposition.[76] Finding that "the answer to [the] dilemma turn[ed] on

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U.S. at 59-60).

69. *Id.* at 211-12 (Blackmun, J., dissenting) ("No matter how uncomfortable a certain group may make the majority of this Court, we have held that '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'" (quoting O'Connor v. Donaldson, 422 U.S. 563, 575 (1975))).

70. *Id.* at 214 (Blackmun, J., dissenting).

71. *See* Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

72. 842 S.W.2d 588 (Tenn. 1992).

73. *Id.* at 589-90.

74. *Id.* at 589.

75. *Id.*

76. *Id.* at 590 ("We granted review, not because we disagree with the basic legal analysis utilized by the intermediate court, but because of the obvious importance of the case in terms of the development of law regarding the new reproductive technologies, and because the decision of the Court of Appeals does not give adequate guidance to the trial court in the event the parties cannot agree.").

the parties' exercise of their constitutional right to privacy,"[77] the court stated:

> The right to privacy is not specifically mentioned in either the federal or the Tennessee state constitution, and yet there can be little doubt about its grounding in the concept of liberty reflected in those two documents. In particular, the Fourteenth Amendment to the United States Constitution provides that '[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.'[78]

While the court did not attempt to define the limits of this liberty interest, it identified, "without [d]oubt" certain freedoms including:

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[79]

The *Davis* court identified a privacy right under the Tennessee Constitution, even absent actual privacy language, that provided constitutional protections to be free from state interference in decisions regarding procreation, among other protections.[80] The Tennessee Supreme Court noted:

> Obviously, the drafters of the Tennessee Constitution of 1796 could not have anticipated the need to construe the liberty clauses of that document in terms of the choices flowing from *in vitro* fertilization procedures. But there can be little doubt that they foresaw the need to protect individuals from unwarranted governmental intrusion into matters such as the one now before us, involving intimate questions of personal and family concern. Based on both the language and the development of our state constitution, we have no hesitation in drawing the conclusion that there is a right of

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77. *Id.* at 598.

78. *Id.* 598-99 (quoting U.S. CONST. amend. XIV).

79. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

80. *Id.* at 599-601. "In terms of the Tennessee state constitution, we hold that the right of procreation is a vital part of an individual's right to privacy." *Id.* at 600.

> individual privacy guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights.[81]

This newly recognized state constitutional right to privacy led directly to the demise of Tennessee's sodomy laws four years later.

II. TENNESSEE SODOMY LAW OVERTURNED—*CAMPBELL V. SUNDQUIST*

In 1996, the Tennessee Court of Appeals upheld a trial court decision that the state's sodomy statute was unconstitutional in *Campbell v. Sundquist*—a state court declaratory judgment case that was brought to challenge the validity of the new law.[82] As a result of the *Davis* right of privacy decision, *Campbell* was filed, challenging Tennessee's Homosexual Practices Act.[83] The court determined that the state could not prohibit sexual activity it deemed to be "immoral" and struck down the "homosexual conduct" law as a violation of the right to privacy under the state constitution.[84] The Tennessee Court of Appeals unanimously affirmed the trial court as to the unconstitutional nature of the law,

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81. *Id.*

82. 926 S.W.2d 250 (Tenn. Ct. App. 1996). The original defendant named in the complaint was Ned R. McWherter, who was the Governor of the State of Tennessee at the time of the original filing. *Id.* at 253 n.2. In January 1995, Governor Don Sundquist was substituted as the defendant pursuant to rule 19(c) of the Tennessee Rules of Appellate Procedure and rule 24.04 of the Tennessee Rules of Civil Procedure. *Id.*

83. TENN. CODE ANN. § 39-13-510 (1991) (repealed 1996); Davis v. State, 442 S.W.2d 283, 253 (Tenn. Crim. App. 1969). The Homosexual Practices Act statute stated, "Homosexual acts. – It is a Class C misdemeanor for any person to engage in consensual sexual penetration, as defined in § 39-13-501(7), with a person of the same gender." Section 39-13-501(7) of the Tennessee Code provided, "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." TENN. CODE ANN. § 39-13-501(7) (1991).

84. *Campbell*, 926 S.W.2d at 254. ("In its order the trial court found that private sexual activity between consenting adults of the same sex is protected by the state constitutional right to privacy, that the State had failed to show a compelling state interest sufficient to prohibit private sexual activity between consenting adults of the same sex, and that the HPA is overbroad in that it prohibits behavior which is constitutionally protected.").

but it split 3-2 on the issue of standing.[85] Addressing the parameters of Tennessee's right to privacy, the court noted:

> We think it is consistent with this State's Constitution and constitutional jurisprudence to hold that an adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of Tennessee's protection of the right to privacy, and that this right should not be diminished or afforded less constitutional protection when the adults engaging in that private activity are of the same gender.[86]

Having determined "that the Homosexual Practices Act constitutes a governmental intrusion into the plaintiffs' right to privacy," which is a fundamental right under the Tennessee Constitution, the court subjected the law to a strict scrutiny analysis.[87] The court addressed the five "compelling" justifications offered by the State of Tennessee in support of the law:

> First, the Act discourages activities which cannot lead to procreation. Second, the Act discourages citizens from choosing a lifestyle which is socially stigmatized and leads to higher rates of suicide, depression, and drug and alcohol abuse. Third, the Act discourages homosexual relationships which are "short lived," shallow, and initiated for the purpose of sexual gratification. Fourth, the Act prevents the spread of infectious disease, and fifth, the Act promotes the moral values of Tennesseans.[88]

Each state justification was individually addressed by the court to determine whether any one was sufficient to satisfy a strict scrutiny analysis,[89] noting that to do so, "the legislation must be justified by a 'compelling state interest' and must be narrowly drawn to advance that interest."[90]

Ultimately, not one justification asserted by the state was found compelling by the court.[91] Therefore, the appellate court held that the Homosexual Practices Act was an unconstitutional violation of

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85. *Id.* at 266 (Cantrell, J., partially dissenting as to standing).
86. *Id.* at 262.
87. *Id.* (citing Hawk v. Hawk, 855 S.W.2d 573, 579 nn.8, 9 (Tenn. 1993)).
88. *Id.* at 262.
89. *Id.* at 262-66.
90. *Id.* at 262.
91. *Id.* at 262-63.

the fundamental right of privacy.[92] The court found that the constitutional right to privacy encompasses Tennesseans', including gay Tennesseans', rights to engage in non-commercial, consensual, private sexual conduct because such conduct involves intimate questions of personal and family concern.[93]

Although the three judges unanimously agreed that the statute was a violation of broad constitutional privacy rights, one judge dissented on the technical standing issue because the law had not been enforced against the parties to the lawsuit.[94] Years after unsuccessfully requesting that the legislature revisit and update the sodomy statute, the Tennessee Supreme Court refused to review *Campbell*. The Tennessee Supreme Court requested that the intermediate court publish its opinion, and *Campbell* became precedent. Ultimately, Tennessee abolished its sodomy statute seven years before the United States Supreme Court overruled *Bowers* in *Lawrence v. Texas*.[95]

III. TENNESSEE'S CONSTITUTIONAL & STATUTORY DOMA

In 1996, the same year as the same-sex only sodomy law was held unconstitutional under the Tennessee constitution, the Tennessee legislature enacted a measure that categorically denied recognition to an entire class of marriages—all same-sex couples—including those with valid out-of-state marriages performed in a state that recognized such marriages (called "equality states" for purposes of this article).[96] Referred to as Tennessee's Defense of

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92. *Id.* at 266.

93. *Id.*

94. *Id.* (Cantrell, J., partially dissenting) (noting that the plaintiffs had not been prosecuted or threatened with prosecution under Tenn. Code Ann. § 39-13-510).

95. 539 U.S. 558 (2003).

96. TENN. CODE ANN. § 36-3-113 (1996), *invalidated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Titled "Marriage between one man and one woman only legally recognized marital contract," the statute stated:

> (a) Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.
>
> (b) The legal union in matrimony of only one (1) man and one (1) woman

Marriage Act, or mini-DOMA,[97] the statute explicitly limited the "legal union in matrimony" to "one (1) man and one (1) woman."[98] The statute stated that the public policy of Tennessee was to "reinforce, carry forward, and make explicit the long-standing public policy . . . to recognize the family as essential to social and economic order" as well as a "fundamental building block of our society."[99] Further invoking marriage as a "historical institution," the statute declared the "one (1) man and one (1) woman" union as "the only legally recognized marital contract in [the] state."[100] Not only did Tennessee's mini-DOMA deny the issuance of a marriage license to same-sex couples, it also denied recognition of marriages from any "state or foreign jurisdiction" that issued a license prohibited in Tennessee, declaring such marriages "void and unenforceable in [the] state." [101]

A decade later, in 2006, the voters of Tennessee went even further by amending the state constitution to also declare that, as a matter of constitutional law, all legal marriages performed or recognized in the state must be only between one man and one woman.[102] Specifically, the constitutional amendment stated:

> The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the

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> shall be the only recognized marriage in this state.
>
> (c) Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee.
>
> (d) If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state.

Id.

97. Tennessee's state DOMA is referred to as "mini-DOMA" as compared to the federal Defense of Marriage Act or "DOMA." *See infra* Section V.

98. *Id.* § 36-3-113(b).

99. *Id.* § 36-3-113(a).

100. *Id.*

101. *Id.* § 36-3-113(d).

102. TENN. CONST. art. XI, § 18. The Tennessee constitutional marriage amendment initiative passed with over 80% of the popular vote. *See* TENN. SECRETARY OF ST., NOVEMBER 7, 2006 GENERAL ELECTION CONSTITUTIONAL AMENDMENT QUESTIONS (2006), http://share.tn.gov/sos/election/results/2006-11/RptCtyCon1andCon2.pdf.

> only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.[103]

By expressly limiting recognition to opposite-sex couples, Tennessee's statutory and constitutional bans (collectively the "Anti-Recognition Laws") denied same-sex couples—regardless of whether they were validly married in an equality state—the rights, protections, benefits, obligations, and security otherwise available to all other married couples.[104]

The primary impetus to Tennessee's Anti-Recognition Laws was the progression of marriage equality rights taking place in states across the nation. *Baehr v. Miike* was filed in 1991, challenging Hawaii's prohibition on same-sex marriage as violating the state constitution.[105] In 1993, the Hawaii Supreme Court held that the state prohibition on same-sex marriage implicated Hawaii's equal protection clause as prohibiting sex discrimination.[106] In 1997, the court held that the Department of Health was enjoined from denying marriage applications to same-sex couples.[107] In response, the Hawaii state legislature amended the state constitution in 1997, and it was ratified by the electorate in late 1998.[108] The Hawaii Supreme Court held that the passage of the constitutional marriage amendment took the statute out of the ambit of Hawaii's constitutional equal protection clause and rendered the situation moot.[109] The case attracted national attention.[110]

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103. TENN. CONST. art. XI, § 18.

104. *Id.*

105. Baehr v. Lewin, 852 P.2d 44, 48-49 (Haw. 1993).

106. *Id.* at 74, *aff'd on other grounds sub nom.* Baehr v. Miike, 910 P.2d 112 (Haw. 1996), *argued*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd* 950 P.2d 1234 (Haw. 1997), *rev'd* No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999).

107. *Miike*, 950 P.2d 1234 (Haw. 1997), *aff'g* 1996 WL 694235, at *22.

108. *Miike*, 1999 Haw. LEXIS 391, at *5.

109. *Id.* at *6-*8.

110. *See, e.g.*, David W. Dunlap, *Some States Trying to Stop Gay Marriages Before They Start*, N.Y. TIMES, Mar. 15, 1995, at A18 (observing that "[a] battle over the very definition of marriage, which began two years ago in Hawaii, is spreading

Congressional Republicans used the possibility that the courts might invalidate Hawaii's marriage eligibility requirements, as appeared possible following the Hawaii Supreme Court's 1993 decision, as a rationale for the enactment of the federal DOMA in 1996.[111] In the "Background and Need for Legislation" Section of DOMA House Report 104-664, the reason behind the bill (H.R. 3396) was in "response to a very particular development in the State of Hawaii."[112] Noting that "the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples," the report articulated the likely issues involving the Full Faith and Credit Clause of the United States Constitution among many other governmental concerns.[113] Asserted governmental interests advanced by the bill include "defending and nurturing the institution of traditional, heterosexual marriage" and "defending traditional notions of morality."[114]

Dozens of statutes and constitutional amendments at the state level, including in Tennessee as discussed above, also followed *Baehr* in an effort to avoid any effects same-sex marriages could have on state laws. Along with the federal Defense of Marriage Act, which permitted states to avoid the Full Faith and Credit Clause of the Constitution by disregarding valid out-of-state marriages, several states responded to *Baehr* through statutory or constitutional

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through Western states as lawmakers hasten to foreclose any possible legalization of homosexual matrimony"); Susan Essoyan, *Hawaiian Wedding Bells Ring Alarm Bells, Marriage: As Court Looks at Same-Sex Unions, Debate Crosses the Ocean*, L.A. TIMES (Sept. 8, 1996), http://articles.latimes.com/1996-09-08/news/mn-41831_1_alarm-bells (addressing a Hawaii gay couple's attempt to obtain a marriage license, the author noted that "their move has set off alarm bells across the country, triggered a rancorous national debate and even become a football in the presidential campaign").

111. *See, e.g.*, H.R. REP. NO. 104-664 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905 (Section III: Interstate Implications of *Baehr v. Lewin*: The Full Faith and Credit Clause; Section IV: Implications of *Baehr v. Lewin* on Federal Law); *see also* Richard Socarides, *Why Bill Clinton Signed the Defense of Marriage Act*, NEW YORKER (Mar. 8, 2013), http://www.newyorker.com/news/news/news-desk/why-bill-clinton-signed-the-defense-of-marriage-act ("As Republicans prepared for the 1996 Presidential election, they came up with what they thought was an extremely clever strategy. A gay-rights lawsuit in Hawaii was gaining press coverage as an initial series of preliminary court rulings suggested that gay marriage might be legally conceivable there. Clinton was on the record opposing marriage equality. But Republicans in Congress believed that he would still veto legislation banning federal recognition of otherwise valid same-sex marriages, giving them the campaign issue: the defense of marriage.").

112. H.R. REP. NO. 104-664, at 2.

113. *Id.*

114. *Id.* at 12, 15.

protections, or both. Such constitutional and statutory measures were designed to prevent the issuance of marriage licenses and also prevent the recognition of marriages performed in an equality state. Tennessee was one of those states "protected" by its own state DOMA and constitutional amendment.

IV. THE NATIONAL LANDSCAPE PRE-*WINDSOR*

A. Sodomy & the Right to Privacy

Like Tennessee, prior to 1962, every other state in the union criminalized sodomy,[115] which included a variety of proscribed sexual acts.[116] In 1962, the American Law Institute ("ALI") developed the Model Penal Code ("MPC") to encourage uniformity among states' criminal statutes.[117] At that time, the ALI removed private, adult, consensual sodomy from the MPC, although soliciting sodomy remained.[118] That same year, Illinois was the first state to adopt the ALI's recommendation to remove consensual sodomy from

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115. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 106 (2000) (noting that "[a]lthough all fifty states and the District of Columbia had sodomy laws on their books in the mid-twentieth century, since then over half of the states have discarded their sodomy laws").

116. *Id.* at 106 n.7 ("Although various states define sodomy differently, in general sodomy laws proscribe both oral and anal sex.").

117. *See, e.g.*, Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 467 (1961) ("Having assumed the discipline of drafting, we are not without ambition that our models will seem worthy of adoption or at least of adaptation. The work consists, however, not alone of the suggested statutory text but also of extensive comments canvassing existing law and practice, formulating legislative issues, and analyzing possible solutions. Hence, even if our drafting or our view of proper legislative policy should be rejected on a given point, the work may still be useful in informing legislative choice. That is, in any case, the faith that animates the undertaking."); *see also* Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 VIRTUAL MENTOR 916, 917 (2014) ("This persecution of private sexual acts between consenting adults generated criticism from highly influential legal authorities such as the American Law Institute—an organization comprising legal scholars, practitioners, and judges responsible for drafting the Model Penal Code (MPC), which state legislatures often adopted in part or in its entirety in developing their criminal laws—and several state commissions that argued for the decriminalization of private sodomy between consenting adults.").

118. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME SEX MARRIAGE 10 (2013) ("In the 1960s, civil libertarians began to change their views on homosexuality. In 1962, the prestigious American Law Institute approved its Model Penal Code, which rejected criminal punishment for private sex between consenting adult homosexuals.").

its criminal code.[119] It was years before any other state followed suit. The Supreme Court's 1986 *Bowers* opinion did nothing to encourage states that had not already repealed their sodomy laws or had them overturned by the state courts.[120] By the beginning of the twenty-first century, a majority of states no longer had sodomy laws, and those that did no longer or rarely enforced those laws.[121] It is significant that Tennessee's sodomy law was overturned in 1996 based on the Tennessee state constitution,[122] seven years before the United States Supreme Court overruled *Bowers* and nationally decriminalized private, consensual, adult sexual activity.[123]

In 2003, the United States Supreme Court granted certiorari in *Lawrence v. Texas*.[124] In *Lawrence*, the petitioners were arrested, charged, and convicted of "deviate sexual intercourse" for engaging in a sexual act with a same-sex consenting adult.[125] At trial, petitioners alleged that the statute violated their rights under both the Texas Constitution[126] and the Equal Protection and Due Process

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119. Act of July 28, 1961, 1961 Ill. Laws 1983.

120. Bowers v. Hardwick, 478 U.S. 186 (1986).

121. *See* Painter, *supra* note 10 ("Most reports before and after *Lawrence* was decided list 13 remaining states with sodomy laws, whereas the correct number was 14 (plus Puerto Rico and the U.S. military for 16 in the nation). The discrepancy is caused by the erroneous omission of Michigan, based on a 1990 trial court decision striking down the operative state laws. That decision had precedent only in a single county, was not appealed, and was undermined by later decisions by the Michigan Court of Appeals (which has statewide jurisdiction) and the Michigan Supreme Court. Consequently, Michigan had a viable sodomy law until the day *Lawrence* was decided."); *see also* Jennifer Naeger, *And Then There Were None: The Repeal of Sodomy Laws After* Lawrence v. Texas *and Its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 ST. JOHN'S L. REV. 397, 397 n.3 ("Many states have admitted to never prosecuting consenting adults for sodomy engaged in privately." (citing Gryczan v. State, 942 P.2d 112, 118 (Mont. 1997), State v. Morales, 869 S.W.2d 941, 943 (Tex. 1994), and Campbell v. Sundquist, 926 S.W.2d 250, 255 (Tenn. Ct. App. 1996))).

122. *Campbell*, 926 S.W.2d at 255.

123. *Bowers*, 478 U.S. at 186, *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

124. 539 U.S. 558 (2003).

125. *Id.* at 562-63. The petitioner was charged with section 21.06(a) of the Texas Penal Code, which provided: "A person commits an offense if he engaged in deviate sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (1973) (amended 1993). The statute defines "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE ANN. § 21.01(1) (1973) (amended 2001).

126. TEX. CONST. art 1, § 3a.

Clauses of the Fourteenth Amendment.[127] The trial court held that the Texas sodomy law that criminalized two consenting same-sex individuals for engaging in intimate sexual conduct was not unconstitutional, and the petitioners appealed.[128] The Texas Court of Appeals heard the case *en banc* and, in a divided opinion, affirmed the convictions and rejected petitioners' arguments, holding that *Bowers v. Hardwick*[129] was controlling precedent on the due process argument.[130] The Supreme Court granted certiorari.[131]

1. The Substantive Reach of Due Process – From *Griswold* to *Casey*

In order to address the issues presented and determine whether *Bowers* should be overturned, the *Lawrence* Court reviewed its prior jurisprudence related to liberty and privacy beginning with *Griswold v. Connecticut*.[132] In *Griswold*, the appellants were charged with violating a statute that prevented the distribution of advice to married couples related to the prevention of conception.[133] Appellants claimed that the statute violated their Fourteenth Amendment constitutional rights.[134] Focusing on the marital relationship and the protected space of the marital bedroom, the Court agreed, invalidating the state law and holding that the protected interest was a "fundamental and basic" right to privacy.[135]

Following *Griswold*, the Court held that the right to make decisions regarding sexual conduct was not limited to the marital relationship. In *Eisenstadt v. Baird*,[136] the Court again addressed contraception, although this case focused on whether the state of Massachusetts had a rational basis for treating married and

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127. *Lawrence*, 539 U.S. at 563 (citing U.S. CONST. amend. XIV, § 1).

128. *Id.*

129. Bowers v. Hardwick, 478 U.S. 186 (1986).

130. *Lawrence*, 539 U.S. at 563.

131. *Id.* at 564.

132. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

133. *Griswold*, 381 U.S. at 480. The Connecticut statutes involved, §§ 53-32 and 54-196, stated: Section 53-32: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.* (citing CONN. GEN. STAT. § 53-32 (1958)). Section 54-196: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.* (citing CONN. GEN. STAT. § 54-196 (1958)).

134. *Griswold*, 381 U.S. at 480.

135. *Id.* at 499.

136. 405 U.S. 438 (1972).

unmarried persons differently.[137] The Court stated that the right to privacy was an individual right and held, under the Equal Protection Act, that a law prohibiting unmarried persons from obtaining contraceptives was an unconstitutional limit on the exercise of their personal rights.[138] The Court noted:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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.[139]

Both contraception cases, *Griswold* and *Eisenstadt*, were referenced in *Roe v. Wade*,[140] which presented a constitutional challenge to a Texas abortion prohibition.[141] In *Roe*, the Court found that a woman had the right to certain fundamental decisions affecting her life and confirmed that the Fourteenth Amendment's

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137. *Id.* at 447.

138. *Id.* at 453-55. Justice Brennan wrote in the majority opinion:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. at 454 (quoting Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

139. *Id.* at 453 (citing Stanley v. Georgia, 394 U.S. 557 (1969), Skinner v. Oklahoma, 316 U.S. 535 (1942), and Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

140. 410 U.S. 113, 129 (1973).

141. *Id.* at 116. The Court noted that the Texas statute at issue "[made] it a crime to 'procure an abortion' . . . or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.'" *Id.* at 117-18 (quoting TEX. PENAL CODE §§ 1191, 1196 (1961)). The Court further noted that "[s]imilar statutes are in existence in a majority of the States." *Id.* at 118.

Due Process Clause liberty protection has a substantive dimension of primary significance in defining the rights of the person.[142] Although it acknowledged that "the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman,"[143] the Court found that a right to privacy under the Due Process Clause extended to a woman's decision to have an abortion.[144] Therefore, the Court held 7-2 that state laws that criminalize all abortions except life-saving procedures on the mother's behalf, and that do not take into consideration other interests, are unconstitutional under the Fourteenth Amendment's Due Process Clause.[145] The Court made clear that the Due Process Clause protects the right to privacy, which includes protection from state action criminalizing a woman's right to terminate her pregnancy.[146]

Following *Roe*, the Court addressed, among other issues, a law prohibiting the sale or distribution of nonprescription contraceptives to minors in *Carey v. Population Services International*.[147] In *Carey*, the Supreme Court held that the law at issue was a violation of the Due Process Clause of the Fourteenth Amendment.[148] Specifically, the Court held that minors were entitled to the same constitutional protections as adults, although it acknowledged that states do have broader authority to regulate minors' activities.[149] In a 7-2 decision, the Court held that the protection of the right of privacy under the Due Process Clause included the right of the individual, whether single or married, "to beget or bear a child," and that a state cannot intrude on an individual's decisions on matters of procreation.[150] The Court's holding in *Carey*, along with its reasoning and holding in *Eisenstadt* and *Roe*, confirmed that the *Griswold* right to a privacy-protected interest was not confined to married adults. Following *Carey*, the Court addressed same-sex consensual adult sodomy in *Bowers v. Hardwick*.[151]

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142. *Id.* at 152.

143. *Id.* at 162.

144. *Id.* at 154 (further noting that this right must be balanced against the state's two legitimate interests in regulating abortions: protecting women's health and protecting the potentiality of human life).

145. *Id.* at 164-66.

146. *Id.*

147. 431 U.S. 678 (1977).

148. *Id.* at 681-82.

149. *Id.* at 692.

150. *Id.* at 684-85.

151. 478 U.S. 186 (1986). *See supra* notes 48-70 and accompanying text.

In *Bowers*, the Court determined that the issue presented was whether the Constitution conferred a fundamental right to gay persons to engage in same-sex consensual adult sodomy, without regard to the significant right to privacy issues in fact presented by the litigants.[152] The Eleventh Circuit had held that the Georgia statute was an unconstitutional violation of the defendant's fundamental rights under the Ninth Amendment and Due Process Clause of the Fourteenth Amendment because his sexual activity, consensual same-sex adult sodomy, was a private and intimate association beyond the reach of the state.[153]

Reversing the Court of Appeals, the Supreme Court found that:

> [the] case d[id] not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. . . . The issue presented is 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.[154]

Disagreeing with the Eleventh Circuit that "the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy,"[155] the Court found it "evident that none of the rights announced in those cases [bore] any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy" because there was "[n]o connection between family, marriage, or procreation" and same-sex adult consensual activity.[156] The Court further noted that "any claim that [the privacy] cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[157]

Holding that a state's rational basis for the law may be the "belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable,"[158] the Court noted that "law . . . is constantly based on notions of morality, and if all laws representing

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152. *Bowers*, 478 U.S. at 189-90.
153. *Id.* at 189.
154. *Id.* at 190.
155. *Id.*
156. *Id.* at 190-91.
157. *Id.* at 191.
158. *Id.* at 196.

essentially moral choices [were] to be invalidated under the Due Process Clause, the courts [would] be very busy indeed."[159] In his concurrence, Chief Justice Burger quoted Blackstone, referring to same-sex consensual adult sodomy as "'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"[160]

The four dissenting Justices, foreshadowing *Lawrence* almost two decades later, wrote that "[the] case [was] no more about 'a fundamental right to engage in homosexual sodomy,' but about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[161] In a strongly worded dissent, Justice Blackmun wrote, "No matter how uncomfortable a certain group may make the majority of this Court, we have held that '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[162] It would take over seventeen years for the Supreme Court to fully recognize the points articulated in Justice Blackmun's dissent.[163]

In 1992, the Supreme Court addressed Pennsylvania's Abortion Control Act of 1982 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[164] In *Casey*, petitioners, abortion clinics and physicians, filed suit challenging the constitutionality of a Pennsylvania statute that required, among other things, notification to the husband and various other stringent requirements prior to permitting an abortion.[165] Noting that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code,"[166] the *Casey* Court reaffirmed the substantial force of the liberty protected by the Due Process Clause related to "marriage, procreation, contraception, family relationships, child rearing and education."[167]

Addressing constitutional protections for the autonomy of the person, the *Casey* Court stated, "At the heart of liberty is the right to

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159. *Id.*

160. *Id.* at 197 (Burger, C.J., concurring) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 214-15 (N.Y., Harper & Bros. Publishers 1858)).

161. *Id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

162. *Id.* at 212 (Blackmun, J., dissenting) (quoting O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)).

163. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

164. 505 U.S. 833 (1992).

165. *Id.* at 844-45.

166. *Id.* at 850.

167. *Id.* at 851 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)).

define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[168] The Court found that the statute placed substantial obstacles in the path of a woman seeking an abortion before viability and was therefore invalid.[169] Finding that a requirement for spousal notification prior to an abortion was unduly burdensome and unconstitutional, the Court rejected the common law view of the married couple as one.[170] The *Casey* Court also held that requiring parental notification in the case of minors is constitutional so long as there is a medical emergency exception or a judicial bypass procedure.[171] The Court noted that state regulation of abortion has a far greater impact on the mother's liberty than the father's.[172] Although the husband has a substantial interest in the unborn fetus, when balancing between the mother and father's interest, the balance weighs in the mother's favor.[173] Further, spousal notification would essentially enable a husband to have a veto power over his wife's decision.[174] The dissent, however, argued that the spousal notification statute required notification, not consent, and found that the statute furthered legitimate state interests, such as promoting the integrity of the marital relationship.[175]

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168. *Id.*

169. *Id.* at 901 (stating "Subsection (12) of the reporting provision requires the reporting of, among other things, a married woman's 'reason for failure to provide notice' to her husband. This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal. Like the spousal notice requirement itself, this provision places an undue burden on a woman's choice, and must be invalidated for that reason." (citation omitted)).

170. *Id.* at 896 ("The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.").

171. *Id.* at 899 ("Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent," although absent such consent "a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent" or that the abortion "would be in her best interests.").

172. *Id.* at 896.

173. *Id.*

174. *Id.* at 898 ("A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.").

175. *Id.* at 975 ("In our view, the spousal notice requirement is a rational

In 1995, the Court addressed a challenge to a voter-approved amendment to Colorado's constitution in *Romer v. Evans*.[176] The *Romer* amendment prohibited all legislative, executive, or judicial actions at the state or local level designed to protect gay persons.[177] Gay persons and municipalities whose ordinances were invalidated sued to declare the amendment invalid and enjoined its enforcement.[178] The state supreme court enjoined the enforcement, and state officials appealed to the Supreme Court.[179] Affirming the court below, the Supreme Court—in an opinion authored by Justice Kennedy—held that the amendment violated the Equal Protection Clause of the Fourteenth Amendment because it was class-based legislation that withdrew legal protections from injuries caused by discrimination only as to gay people and forbade restatement of protective laws and policies.[180] Holding that the classification was unconstitutional because it caused gay people to be treated unequal to heterosexuals, the Court struck down the provision, concluding that it was "born of animosity toward the class of persons affected" and had no legitimate governmental purpose.[181] For the first time in history, the United States Supreme Court found a constitutional right to equality for gay people under the Constitution and addressed the "animosity" behind discriminatory laws directed toward them. During this time in the late twentieth century, societal views toward the gay individual began to transform as well.

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attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity." (Rehnquist, C.J., dissenting)).

176. 517 U.S. 620 (1996).

177. *Id.* at 623-24. The amendment stated,

> "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy, whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."

Id. at 624.

178. *Id.* at 625.

179. *Id.* at 625-26.

180. *Id.* at 635-36.

181. *Id.* at 634-36. "A State cannot so deem a class of persons a stranger to its laws." *Id.* at 635.

2. The Gay Individual as a Human Being Emerges— *Lawrence v. Texas*

In 2002, six years after the *Romer*[182] decision and sixteen years after the Supreme Court's holding in *Bowers*,[183] which declared there was no "fundamental right to homosexual[] . . . sodomy" and in which the majority compared consensual same-sex intimate relations to "adultery, incest, and other sexual crimes,"[184] the Court granted certiorari in *Lawrence v. Texas*.[185] The challenged Texas statute criminalized same-sex consensual intimate sexual relations, referred to in the statute as "deviate sexual intercourse."[186] The lower courts held that the statute was not a violation under the U.S. Constitution based on the Court's holding in *Bowers v. Hardwick*.[187] The *Lawrence* Court granted certiorari to consider three issues:

> 1. Whether petitioners' criminal convictions under the Texas 'Homosexual Conduct' law – which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples – violate the Fourteenth Amendment guarantee of equal protection of the laws.
> 2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
> 3. Whether *Bowers v. Hardwick* should be overruled?[188]

At its core, the issue presented was, like that in *Bowers* before it, whether the petitioners had a right as consenting adults to engage in private sexual conduct in the exercise of their liberty under the Fourteenth Amendment's Due Process Clause.[189] Writing for a 5-4 majority in an opinion again authored by Justice Kennedy,

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182. 517 U.S. 620 (1996).

183. Bowers v. Hardwick, 478 U.S. 186 (1986).

184. *Id.* at 192, 196.

185. 539 U.S. 558 (2003), *cert. granted*, 537 U.S. 1044 (2002).

186. *Id.* at 563 (quoting TEX. PENAL CODE ANN. § 21.06(a) (1973) (amended 1993)). The law at issue, section 21.06(a) of the Texas Penal Code, provided, "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." *Id.* The statute defined "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person, or (B) the penetration of the genitals or the anus of another person with an object." *Id.*

187. *Id.* (citing *Bowers*, 478 U.S. 186).

188. *Id.* at 564 (citations omitted).

189. *Id.* at 564.

the Court relied on due process to strike down the Texas law that restricted same-sex couples' associational freedom to make personal choices regarding sexual intimacy.[190] By holding that "the substantive guarantee of liberty" could not be infringed for individuals who chose to be intimate with same-sex partners, the Court affirmed that the due process guarantee protects a gay individual's fundamental rights on an equal basis with a heterosexual individual.[191]

Justice Kennedy's introduction in the *Lawrence* opinion stated:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[192]

After a thorough review of its jurisprudence beginning with *Griswold*[193] and ending with *Carey*,[194] the Court re-evaluated the *Bowers* decision—concluding that it had been wrongly decided.[195]

The *Lawrence* majority's analysis of *Bowers* began with an acknowledgement that the *Bowers* Court misstated the issue before it because it "fail[ed] to appreciate the extent of the liberty at stake."[196] Acknowledging that the *Bowers* Court "was making the . . . point that for centuries there have been powerful voices to condemn homosexual conduct as immoral," the *Lawrence* Court stated:

> The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as

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190. *Id.* at 578.

191. *Id.* at 575. "Persons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do" for "the most intimate and personal choices a person may make in a lifetime." *Id.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

192. *Lawrence*, 539 U.S. at 562.

193. Griswold v. Connecticut, 381 U.S. 479 (1965).

194. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

195. *Lawrence*, 539 U.S. at 564-78.

196. *Id.* at 567.

> ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'[197]

Addressing the *Bowers* Court's analysis of the history of sodomy and whether "[p]roscriptions against that conduct have ancient roots," the *Lawrence* Court noted that "American laws targeting same-sex couples did not develop until the last third of the 20th century"[198] and that "[i]t was not until the 1970s that any State singled out same-sex relations for criminal prosecution."[199] The Court observed that the majority of recorded sodomy prosecutions and convictions were related to "predatory acts against those who could not or did not consent," such as incest, rape, and bestiality, as opposed to consensual private acts between adults. "The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual nature."[200]

Finding that the issue in *Bowers*[201] was wrongfully characterized as to whether there was a constitutional right to homosexual sodomy as opposed to the correct analysis of "whether the majority may use the power of the State to enforce [its] views on the whole society through operation of the criminal law,"[202] the Court criticized the *Bowers* decision. Observing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," the *Lawrence* majority noted that such awareness "should have been apparent" at the time *Bowers* was decided.[203] Identifying the "autonomy of the person" addressed in *Casey*,[204] the Court found that the *Bowers* decision denied gay individuals that right to autonomy.[205] Focusing on the substantive due process liberty

197. *Id.* at 571 (quoting *Casey*, 505 U.S. at 850).
198. *Id.* at 567, 570.
199. *Id.*
200. *Id.* at 570.
201. Bowers v. Hardwick, 478 U.S. 186 (1986).
202. *Lawrence*, 539 U.S. at 571.
203. *Id.* at 572.
204. Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).
205. *Lawrence*, 539 U.S. at 574.

interest, the Court stated that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[206]

The Court addressed the important link between "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty,"[207] stating:

> If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* . . . should be addressed. Its continuance as precedent demeans the lives of homosexual persons.[208]

The Court noted that the "stigma" imposed by the statute "is not trivial,"[209] and that the criminal nature of the offense impacts "the dignity of the persons charged."[210]

Addressing a dignitary right and the right to liberty under the Due Process Clause, the majority stated:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[211]

Because the Texas sodomy statute furthered no legitimate state interest to "justify its intrusion into the personal and private life of the individual,"[212] the law was in violation of the United States Constitution.[213] Finding that the "foundations of *Bowers* have

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206. *Id.* at 567.
207. *Id.* at 575.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 578.
212. *Id.*
213. *Id.* at 578-79. Justice O'Connor's concurring decision in *Lawrence*, which is

sustained serious erosion" from recent decisions and that the rationale could not "withstand careful analysis,"[214] the *Lawrence* Court overruled the case, writing, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. [It] should be and now is overruled."[215]

In the majority's penultimate paragraph, the Court addressed the drafters of the Constitution and praised their foresight, acknowledging a fundamental truth about human nature:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew that 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.[216]

In *Lawrence*, the gay individual emerges as a *citizen*—a *person*, a *human being*—entitled to dignitary and constitutional rights. The language utilized by the Supreme Court majority acknowledged for the first time the value and importance of the individual lives affected by the sodomy laws—the humanness of the gay individual. Examples include the Court's recognition of the "dignity of the person[];"[217] the "stigma" that a criminal statute attaches that can "demean[] the lives of homosexual persons;"[218] and that "[t]he petitioners are entitled to respect for their private lives."[219] In *Lawrence*, the Court at last comprehended and identified the gay

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based on the Equal Protection Clause rather than the Due Process Clause of the United States Constitution, notes that "[t]he statute at issue here makes sodomy a crime only if a person 'engages in deviate sexual intercourse with another individual of the same sex.'" *Id.* at 581 (O'Connor, J., concurring) (citing TEX. PENAL CODE ANN. § 21.06(a) (1973) (amended 1993)). Justice O'Connor further noted that "[m]oral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 582.

214. *Id.* at 576 (noting the impact of recent decisions in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) and Romer v. Evans, 517 U.S. 620 (1996)).

215. *Id.* at 578 (noting that Justice Stevens' analysis in his dissenting opinion in *Bowers* should have been controlling when that case was decided).

216. *Id.* at 578-79.

217. *Id.* at 575.

218. *Id.*

219. *Id.* at 578.

individual as one deserving of dignity, value, and basic Constitutional rights and freedoms.[220]

In contrast, Justice Scalia's dissent compared the "immoral and unacceptable"[221] sodomy act criminalized by the Texas statute with "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity"[222] and wrote that the majority "opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[223] Further reflecting and identifying the many and varied challenges and prejudices gay individuals had to overcome in the ongoing battle to obtain the dignity and respect referenced by the *Lawrence* majority, Scalia declared:

> Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.[224]

To his credit, Justice Scalia does make a prophetic observation in his *Lawrence* dissent. Specifically, he wrote that the majority's decision:

> dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "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;" what justification could there possibly be for

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220. *Id.* at 578-79.

221. *Id.* at 599 (Scalia, J., dissenting) (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).

222. *Id.* (Scalia, J., dissenting).

223. *Id.* at 602 (Scalia, J., dissenting).

224. *Id.* (Scalia, J., dissenting).

> denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution?"[225]

It would be a little over a decade before Justice Scalia's observation proved true.[226]

*B. Key Pre-*Windsor *Supreme Court Marriage Cases*

Contemporaneous with the development of the constitutional right to privacy, the Court also further developed and expanded upon the fundamental right to marry. Prior to *Loving v. Virginia*,[227] the United States Supreme Court had held in four cases that marriage was a fundamental right of the individual.[228] In those cases, the Court affirmed that the right to marry was one of the liberties protected by the Due Process Clause and "one of the basic civil rights of man." In *Loving* and the nine other cases reaffirming marriage as a fundamental right before the *United States v. Windsor* decision, the Court held that the Fourteenth Amendment "sheltered" citizens against the State's "unwarranted usurpation, disregard, or disrespect."[229]

In *Loving*, the Court addressed the constitutionality of Virginia's statutes preventing and criminalizing interracial marriages.[230] Appellants, a husband and wife who were indicted and convicted for violating the Virginia anti-miscegenation statute, filed a lawsuit to challenge its constitutionality.[231] Rejecting the state's assertion that

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225. *Id.* at 604-05 (Scalia, J., dissenting) (citations omitted) (quoting the majority opinion).

226. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

227. 388 U.S. 1 (1967).

228. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (Marriage is "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (The right "to marry, establish a home and bring up children" is a central part of liberty protected by the Due Process Clause.); Maynard v. Hill, 125 U.S. 190, 205, 211 (1888) (Marriage is "the most important relation in life" and the "foundation of the family and society, without which there would be neither civilization nor progress.").

229. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (citing Turner v. Safley, 482 U.S. 78 (1987), Zablocki v. Redhail, 434 U.S. 374 (1978), and *Loving*, 388 U.S. 1 (regarding marriage); *Skinner*, 316 U.S. 535 (regarding procreation); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), and *Meyer*, 262 U.S. 390 (regarding raising children)).

230. *Loving*, 388 U.S. at 2.

231. *Id.* at 3.

racial discrimination was absent, since the law applied equally to blacks and whites and since both races were prohibited from marrying a person of a different race, the Court held that there was no legitimate overriding purpose to justify the classification.[232]

Clarifying that "the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination," the Court stated that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[233] Therefore, the Court invalidated the racial bans, holding that restrictions on the freedom to marry, based solely on racial classifications, violated the central meaning of the Equal Protection Clause and deprived citizens of liberty without due process in violation of the Due Process Clause of the Fourteenth Amendment.[234] The *Loving* Court held, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[235]

The importance of marriage as a fundamental right was further developed in the 1978 case, *Zablocki v. Redhail*.[236] In *Zablocki*, the Court addressed a challenge to a state law that prevented Wisconsin residents from marrying if they were behind on child support obligations or if the child they were responsible for was likely to become a "public charge."[237] Because the statute significantly

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232. *Id.* at 8, 11. The Supreme Court of Appeals of Virginia upheld the constitutionality of the miscegenation provision, quoting its prior decision in *Naim v. Naim*. *Id.* at 7 (citing Naim v. Naim, 87 S.E.2d 749 (Va. 1955)). The Court's opinion dismissed this reliance, stating that "[i]n *Naim*, the state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy." *Id.* (quoting *Naim*, 87 S.E.2d at 756).

233. *Id.* at 10.

234. *Id.* at 11-12.

235. *Id.* at 12.

236. 434 U.S. 374 (1978).

237. *Id.* at 375. The Wisconsin statute stated in part:

> (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made.

Id. at 375 n.1 (quoting WIS. STAT. § 245.10 (1973)).

interfered with the exercise of a fundamental constitutional right to marry, the Court subjected it to strict scrutiny.[238] The Court held that the Wisconsin statute was in violation of constitutional equal protection because it significantly interfered with the fundamental right to marry and also because it was not closely tailored to effectuate the state's interests.[239] The Court's opinion invoked language from *Loving, Skinner, Griswold,* and *Carey* that addressed the fundamental right to marry and affirmed that "the right to marry is a part of the fundamental 'right to privacy' implicit in the Fourteenth Amendment's Due Process Clause."[240] Therefore, the Court found the statute unconstitutional.[241]

The Court went further with the fundamental right analysis in the 1987 *Turner v. Safley*[242] case when the Supreme Court held that prisoners had a constitutional right to marry under *Zablocki*.[243] In *Turner*, prison inmates filed a class action for injunctive relief challenging prison regulations, including a prohibition that prevented inmates from marrying absent permission from the prison superintendent, which was only allowed for a compelling reason.[244] The Court struck down the marriage regulation as facially invalid because there was no reasonable relationship between the rule and the goals of the penal system.[245] Thus, the Court held that the prohibition was a violation of the prisoner's constitutional right to marry and that marriage remained a fundamental right for individuals, including prison inmates who may never have the opportunity to consummate a marriage or have children.[246] In *Turner*, the Court recognized numerous other "important attributes of marriage," including "expressions of emotional support and public commitment . . . [as] an important and significant aspect of the marital relationship," along with "spiritual significance," "receipt of

238. *Id.* at 388.

239. *Id.* at 388-91.

240. *Id.* at 383-85.

241. *Id.* at 391.

242. 482 U.S. 78 (1987).

243. *Id.* at 95-99. Along with a prisoner's right to marry, the Court also addressed regulations enforced by the Missouri Department of Corrections (DOC) related to inmate-to-inmate correspondence. Finding that DOC rules and regulations are subject to a lesser standard of scrutiny than the strict scrutiny required when addressing the fundamental right to marry, the Court upheld the validity of the correspondence regulations. *Id.* at 91-93.

244. *Id.* at 82. Testimony at trial showed that "generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason." *Id.*

245. *Id.* at 99.

246. *Id.*

government benefits," "property rights," and "other, less tangible benefits."[247]

V. THE FEDERAL DEFENSE OF MARRIAGE ACT

In 1993, after the Hawaii Supreme Court held in *Baehr v. Lewis*[248] that the state must show a compelling interest in prohibiting same-sex marriage because it constitutes sex discrimination, a violation of the due process and equal protection terms of the state constitution,[249] the fallout was swift and prompted same-sex marriage opponents to action on both the state and federal level.[250] Their primary concern was that if marriage became legal in Hawaii or any other state in the Union, other states would be compelled to recognize that marriage under the Full Faith and Credit Clause of the United States Constitution.[251] There was also a federal pushback based on similar concerns as well as issues preventing federal recognition and availability of federal rights and benefits.[252] In 1996, the House Judiciary Committee's Report called for a federal response to *Baehr*, warning that "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits."[253] The House Judiciary Committee plainly stated that the Act was intended by Congress to "reflect and honor a collective moral judgment" and to express "moral disapproval of homosexuality."[254]

The Defense of Marriage Act ("DOMA"),[255] introduced on May 7, 1996, easily passed both houses of Congress and was signed into law on September 21, 1996, by President Bill Clinton.[256] The main provisions of DOMA stated:

> SECTION 1. SHORT TITLE.
>
> This Act may be cited as the "Defense of Marriage Act".

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247. *Id.* at 95-96.

248. 852 P.2d 44 (Haw. 1993).

249. *Id.* at 65-68.

250. *See supra* Section III.

251. *See supra* Section III.

252. H.R. REP. NO. 104-664 (1996).

253. *Id.* at 10.

254. *Id.* at 15-16.

255. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) [hereinafter DOMA] (codified at 1 U.S.C. § 7 (2011) and 28 U.S.C. § 1738C (2011)).

256. *See infra* notes 267-68 and accompanying text.

SEC. 2. POWERS RESERVED TO THE STATES.

. . . .

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

. . . .

SEC. 3. DEFINITION OF MARRIAGE.

. . . .

> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."[257]

DOMA defined marriage for federal purposes as the union of one man and one woman.[258] The long title was "An Act to define and

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257. DOMA, *supra* note 255, at §§ 1-3.

258. *Id.* § 3. The pertinent text states:

> SEC. 3. DEFINITION OF MARRIAGE.
>
> (a) IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:
>
> "§ 7. Definition of 'marriage' and 'spouse'
>
> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.".

protect the institution of marriage."[259] Section 2 of DOMA allowed states to refuse to recognize same-sex marriages granted under the laws of other states.[260] While DOMA did not prevent states from recognizing same-sex marriages, it did prevent same-sex married couples from being recognized as "spouses" for all federal law purposes, effectively barring them from all federal marriage benefits.[261] Section 3 of DOMA essentially codified non-recognition of same-sex married couples from all federal benefits, including social security survivors' benefits, immigration, bankruptcy, insurance benefits for government employees, and filing married joint tax returns.[262] DOMA also excluded same-sex spouses from protections afforded to families of federal officers,[263] federal ethics laws, and laws evaluating financial aid eligibility.[264] In 2004, the General Accounting Office issued a report finding that there were 1,138 "federal statutory provisions classified to the United States Code in which benefits, rights, and privileges are contingent on marital status or in which marital status is a factor."[265]

Although President Clinton's official political position at that time was against same-sex marriage, he criticized DOMA.[266]

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259. DOMA, Pub. L. No. 104-199, 110 Stat. 2419.

260. *Id.* § 2.

261. *Id.* §§ 2-3.

262. *See infra* note 266 and accompanying text.

263. 18 U.S.C. § 115 (2012).

264. *See infra* note 266 and accompanying text.

265. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), http://www.gao.gov/new.items/d04353r.pdf. "[A]s of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges." *Id.*

266. On Friday, September 20, 1996, prior to signing DOMA, President Clinton released the following statement:

> Throughout my life I have strenuously opposed discrimination of any kind, including discrimination against gay and lesbian Americans. I am signing into law H.R. 3396, a bill relating to same-gender marriage, but it is important to note what this legislation does and does not do.
>
> I have long opposed governmental recognition of same-gender marriages, and this legislation is consistent with that position. The act confirms the right of each State to determine its own policy with respect to same-gender marriage and clarifies for purposes of Federal law the operative meaning of the terms "marriage" and "spouse."
>
> This legislation does not reach beyond those two provisions. It has no effect on any current Federal, State, or local antidiscrimination law and does not

Nonetheless, after Congress passed the bill with enough votes to override a presidential veto, Clinton reluctantly signed DOMA, refusing a signing ceremony or photographs during the signing.[267] It was not until 2013, shortly before the United States Supreme Court heard oral arguments in *United States v. Windsor*,[268] that President Clinton publicly urged the Court to overturn DOMA.[269]

When then-Senator Barack Obama ran for President in 2008, the Democratic platform on which he ran included pushing for the repeal

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> constrain the right of Congress or any State or locality to enact antidiscrimination laws. I therefore would take this opportunity to urge Congress to pass the Employment Non-Discrimination Act, an act which would extend employment discrimination protections to gays and lesbians in the workplace. This year the Senate considered this legislation contemporaneously with the act I sign today and failed to pass it by a single vote. I hope that in its next session Congress will pass it expeditiously.
> I also want to make clear to all that the enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination, violence, or intimidation against any person on the basis of sexual orientation. Discrimination, violence, and intimidation for that reason, as well as others, violate the principle of equal protection under the law and have no place in American society.

William J. Clinton, Statement on Same-Gender Marriage, *in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 1635 (1996).

267. Richard Socarides, who served as White House Special Assistant and Senior Adviser during the Clinton Administration, wrote:

> During the campaign season, Clinton would sometimes complain publicly about how the Republicans were using the marriage issue against him. He said, derisively, that it was "hardly a problem that is sweeping the country" and his press secretary called it "gay baiting, pure and simple." And that September, when the Defense of Marriage Act was passed, President Clinton signed it.
> There are no pictures of this occasion—no pens that were saved. My advice to the people who arranged for these things was to get it done and out of the way as quickly as possible; he signed it late at night one evening after returning from a day-long campaign trip.

Socarides, *supra* note 111.

268. 133 S. Ct. 2675 (2013).

269. Bill Clinton, *It's Time to Overturn DOMA*, WASH. POST, Mar. 8, 2013, at A17 ("I join with the Obama administration, the petitioner Edith Windsor and the many other dedicated men and women who have engaged in this struggle for decades in urging the Supreme Court to overturn the Defense of Marriage Act.").

of DOMA.[270] In 2011, as promised, the Obama administration, through a statement by Attorney General Holder, announced that Section 3 was unconstitutional and, although the administration would continue to enforce DOMA, it would no longer defend it:

> After careful consideration, . . . the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases.[271]

The Attorney General clarified that, although the administration would no longer defend DOMA, "Section 3 of DOMA will continue to remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down."[272] Following this announcement, Attorney General Holder wrote to the Speaker of the House, John Boehner, and noted that Congress could participate in the lawsuits that the administration would no longer be defending.[273] On March 4, 2011, Boehner announced that the Bipartisan Legal Advisory Group ("BLAG") would convene to determine whether or not it would

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270. An October 28, 2011, Reuters article noted:

> * REPEAL DON'T ASK, DON'T TELL - Last December, Obama signed legislation repealing a military policy that banned gays from openly serving in the armed forces. The policy known as "Don't Ask, Don't Tell" had been signed into law in 1993 under President Bill Clinton.
> Obama has since hailed the repeal, which went into effect in September, and urged Congress to repeal the Defense of Marriage Act, a 1996 law that defines marriage as between a man and a woman.

Malathi Nayak, *Factbox: Has Obama Delivered on His 2008 Campaign Promises?*, REUTERS (Oct. 28, 2011, 11:08 AM), http://www.reuters.com/article/us-usa-campaign-obama-promises-idUSTRE79R3M920111028.

271. PRESS RELEASE, DEP'T OF JUSTICE, STATEMENT OF THE ATTORNEY GENERAL ON LITIGATION INVOLVING THE DEFENSE OF MARRIAGE ACT (Feb. 23, 2011), http://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act.

272. *Id.*

273. Letter from Eric Holder, Attorney General, to John A. Boehner, Speaker, U.S. House of Representatives, (Feb. 23, 2011), https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act.

defend Section 3 DOMA lawsuits in place of the administration.[274] On March 9, 2011, the committee voted 3-2 to defend any lawsuits filed against the federal government that challenged Section 3 of DOMA.[275]

VI. *UNITED STATES V. WINDSOR*

The *United States v. Windsor*[276] case made it to the Supreme Court to challenge the constitutionality of Section 3 of DOMA,[277] which defined marriage as solely between opposite-sex couples for purposes of federal law.[278] In *Windsor*, the plaintiff filed a lawsuit against the federal government after being denied a refund of federal estate taxes paid by the estate of her deceased same-sex legal spouse.[279] The plaintiff, a New York resident, was validly married in

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274. Press Release, House of Representatives, Statement by House Speaker John Boehner (R-OH) Regarding the Defense of Marriage Act (Mar. 4, 2011), http://www.speaker.gov/press-release/statement-house-speaker-john-boehner-r-oh-regarding-defense-marriage-act.

275. *See* Igor Volsky, *Boehner Will Defend Constitutionality of DOMA*, THINKPROGRESS (Mar. 9, 2011, 8:00 PM), http://thinkprogress.org/lgbt/2011/03/09/177294/doma-boehner-2/ ("'Today, after consultation with the Bipartisan Leadership Advisory Group, the House General Counsel has been directed to initiate a legal defense of this law,'" Boehner said in the statement. 'This action by the House will ensure that this law's constitutionality is decided by the courts, rather than by the President unilaterally.'").

276. 133 S. Ct. 2675 (2013).

277. *See supra* Section V.

278. *Windsor*, 133 S. Ct. at 2683.

279. *Id.* The Court stated the facts resulting in the *Windsor* litigation as follows:

> Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deem[ed] their Ontario marriage to be a valid one.
>
> Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denie[d] federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced [a] refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violate[d] the guarantee of equal protection, as applied to the Federal Government

Canada in 2007, and her same-sex marriage was recognized under New York law.[280] In 2009, her spouse died and left her entire estate to the plaintiff, who sought to claim the federal estate tax exemption for surviving spouses.[281] However, because DOMA did not recognize marriages between same-sex couples, the plaintiff was denied marital estate tax exemptions usually available for opposite-sex married couples.[282] The Internal Revenue Service ("IRS") found that the exemption did not apply and denied the plaintiff's claim; the plaintiff paid the $363,000 in estate taxes and requested a refund, which the IRS denied.[283]

In a lawsuit filed on November 9, 2010, the plaintiff alleged that DOMA violated the equal protection guarantee under the United States Constitution because it singled out legally married same-sex couples for differential treatment.[284] Because the executive branch announced that it had determined Section 3 to be unconstitutional and that the Department of Justice would no longer defend the law, BLAG intervened to defend DOMA.[285] Finding that Section 3 could not pass even a deferential rational basis review, the District Court for the Southern District of New York found it violated the plaintiff's rights under the equal protection guarantees of the Fifth Amendment and ordered a refund of the taxes paid, with interest.[286]

The Second Circuit Court of Appeals affirmed this result in a 2-1 decision after applying heightened scrutiny based on sexual orientation.[287] Finding DOMA unconstitutional under the equal protection guarantees of the Fifth Amendment, the Second Circuit observed:

> Our straightforward legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition. But law (federal *or* state) is not concerned with holy matrimony. Government deals with marriage as a civil

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through the Fifth Amendment.

Id. (citations omitted).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. Windsor v. United States, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

285. *See supra* Section V.

286. *Windsor*, 833 F. Supp. 2d at 406.

287. Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012).

> status–however fundamental–and New York has elected to extend that status to same-sex couples.[288]

All involved parties petitioned the United States Supreme Court to review the decision, and the Court granted certiorari in December 2012.[289]

On June 26, 2013, in a 5-4 decision authored by Justice Kennedy, the Court affirmed the Second Circuit Court of Appeals and held that Section 3 of DOMA was unconstitutional, declaring it a deprivation of the liberty protected by the Due Process Clause of the Fifth Amendment.[290] The majority acknowledged that most Americans may not have even considered the possibility that gay people would ever be able "to affirm their commitment to one another before their children, their family, their friends, and their community" through a federally recognized right to marry: "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[291]

The Court found that same-sex married couples, whom the State of New York desired to protect, were injured by the federal statute and that the federal government's differentiation between same-sex and opposite-sex state-sanctioned married couples "demean[ed] the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify."[292] The *Windsor* Court both recognized and reinforced a greater understanding of same-sex couples and their lives, including the children being raised in their families, noting that "[t]he limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen [over time] as an unjust exclusion."[293]

The *Windsor* majority concluded that Section 3 was unconstitutional as a violation of "basic due process and equal protection principles applicable to the Federal Government."[294] Therefore, the federal government was required to acknowledge

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288. *Id.* at 188.

289. United States v. Windsor, 133 S. Ct. 2675 (2013), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-307).

290. *Windsor*, 133 S. Ct. at 2696.

291. *Id.* at 2689.

292. *Id.* at 2694 (citation omitted). "DOMA seeks to injure the very class New York seeks to protect." *Id.* at 2693.

293. *Id.* at 2689.

294. *Id.* at 2693.

same-sex marriages in those states where they were legal and to provide federal benefits accordingly. Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, stated that "DOMA writes inequality into the entire United States Code,"[295] noting:

> DOMA'S principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities.[296]

Not only did the Court find that the law was motivated by an "improper animus,"[297] but in language that was light years removed from the language of *Bowers* in 1986, Justice Kennedy also noted that DOMA demeaned persons in a lawful same-sex marriage.[298] Specifically referencing DOMA, Justice Kennedy stated that "the principal purpose and the necessary effect of [the] law [was] to demean those persons who are in a lawful same-sex marriage."[299] Addressing the legislative history of DOMA's enactment, the Court stated that "[DOMA's] own text demonstrates 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."[300] As Justice Kennedy clearly recognized, same-sex couples were rightly entitled to the same constitutional protections and dignitary rights as opposite-sex couples.

At the very heart of *Windsor* lies the principle that gay people have dignity and that the United States Constitution mandates that such dignity receive equal respect under the law.[301] The Court's recognition that gay people were constitutionally entitled to "equal dignity" represented a major leap from the deviant criminals referred to in prior case law and what the *Bowers* Court declared to

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295. *Id.* at 2694.

296. *Id.*

297. *Id.* at 2693.

298. *Id.* at 2695.

299. *Id.*

300. *Id.* at 2693.

301. *See, e.g., id.* at 2696 ("[DOMA] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

be unqualified for constitutional protection a mere twenty-seven years prior.[302] It was not the only time the majority acknowledged the "dignity" of same-sex couples in the *Windsor* holding. In the penultimate paragraph of the majority opinion, Kennedy again remarks on the "dignity" and "equality" denied by Section 3:

> The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be *dignified and proper*. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is *less worthy* than the marriage of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and *dignity*. By seeking to displace this protection and treating those persons as living in marriages *less respected than others*, the federal statute is in violation of the Fifth Amendment.[303]

While the *Windsor* decision had no immediate direct effect on Tennessee law, since the state prohibited same-sex marriage and same-sex marriage recognition both statutorily and constitutionally, it did lead to a flurry of litigation challenging state DOMAs

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302. Bowers v. Hardwick, 478 U.S. 186 (1986). In *Bowers*, the Court noted:

> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Id. at 192-94 (footnotes and citations omitted). *See also supra* Sections I, IV.A.

303. *Windsor*, 133 S. Ct. at 2695-96 (emphasis added).

throughout the nation, including Tennessee.[304] Numerous lawsuits were filed challenging the denial of state marriage licenses to same-sex couples and the denial of recognition to same-sex marriages validly performed in other states that did recognize same-sex marriages.[305] At the time the *Windsor* decision was announced, only ten states and the District of Columbia permitted same-sex marriage.[306] That number was about to increase dramatically in a very short time.

Chief Justice Roberts and Justices Scalia and Alito authored separate dissenting opinions.[307] In Justice Scalia's dissent, joined in full by Justice Thomas and in part by Chief Justice Roberts, Scalia foresaw the challenges to come.[308] Although the majority decision stated that it was reserving power to the states, Scalia believed the *Windsor* majority made it inevitable that federal courts would overturn state same-sex marriage bans.[309] In his dissent, he wrote:

> As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe. By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition.[310]

Scalia went so far as to write the script, and his prediction materialized much more quickly than most expected.[311]

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304. *See, e.g.*, Tanco v. Haslam, 7 F. Supp. 759 (M.D. Tenn. 2014) (challenging the constitutionality of Tennessee's Anti-Recognition Laws); *see generally,* David Harper & Randy Krehbiel, *Oklahoma Gay Marriage Ban Ruled Unconstitutional: Federal Judge Tosses Out State's Same-Sex Ban*, (Jan. 15, 2014, 12:00 AM) http://www.tulsaworld.com/news/government/oklahoma-gay-marriage-ban-ruled-unconstitutional/article_f6765186-6534-52ec-aed0-492461868ce0.html ("There has been a flurry of activity in nation's courts regarding same-sex marriage since June when the U.S. Supreme Court ruled in the United States v. Windsor case that the federal Defense of Marriage Act's section defining marriage as being between one man and one woman was unconstitutional.").

305. *See supra* Section III.

306. *See* Press Release, Human Rights Campaign, One Year Later, Historic Supreme Court Marriage Rulings Still Center Stage (June 24, 2014), http://www.hrc.org/press/one-year-later-historic-supreme-court-marriage-rulings-still-center-stage.

307. *Windsor*, 133 S. Ct. at 2681.

308. *See generally id.* at 2697-2711 (Scalia, J., dissenting).

309. *Id.* at 2710 (Scalia, J., dissenting).

310. *Id.*

311. *Id.* at 2709-10 (Scalia, J., dissenting). To illustrate his point, Justice Scalia specifically wrote:

VII. THE NATIONAL LANDSCAPE POST-*WINDSOR*

In the wake of the *Windsor* decision, the Obama administration began to extend federal rights, privileges, and benefits to same-sex couples, applying a "state of celebration" rule to most federal benefits as opposed to a "state of residency" rule.[312] The "state of celebration" rule allowed federal recognition to same-sex married couples, regardless of whether the state they resided in recognized their marriage, so long as they were validly married in a state that did.[313] Thus, as a result of *Windsor*, married same-sex couples. regardless of domicile, were eligible for federal tax benefits, military benefits, federal employment benefits for United States government employees, immigration benefits, and Family Medical Leave, among others.[314]

In the year following the *Windsor* decision, "eleven cases from ten states [were] pending before five federal appeals courts, after lower courts issued rulings on the constitutionality of marriage bans."[315] In each case, plaintiffs filed lawsuits challenging

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> Consider how easy (inevitable) it is to make the following substitutions in a passage from today's opinion:
>
> ~~DOMA's~~ *This state law's* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships* and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities.

Id. (Scalia, J., dissenting) (alterations in original) (internal citations omitted).

312. *See, e.g.*, Joseph S. Adams et al., *Treasury Department & IRS Issue Defense of Marriage Act (DOMA) Guidance – Adopt a "State of Celebration" Approach*, NAT'L LAW REVIEW (Aug. 30, 2013), http://www.natlawreview.com/article/treasury-department-irs-issue-defense-marriage-act-doma-guidance-adopt-state-celebra (discussing extension of federal tax exemptions for same-sex married couples); *see also*, Shaun Terrill, *A State of Celebration – Treasury and IRS Issue Ruling Implementing Effect of* Windsor *decision*, BLOOMBERG BNA (Aug. 29, 2013), http://www.bna.com/state-celebration-treasury-b17179876615/ (discussing extension of federal tax exemptions for same-sex married couples).

313. *See, e.g.*, Terrill, *supra* note 312.

314. *See supra* note 265 and accompanying text.

315. *See, e.g.*, Press Release, Human Rights Campaign, *supra* note 306 ("These lower court rulings came from judges who were appointed by both Democrat and Republican presidents. The Sixth Circuit [held] the distinction of being the only

discriminatory marriage laws, including Tennessee in October 2013, only four months after *Windsor* was decided. Utah was the first state domino to fall when a federal district court struck down the state ban as unconstitutional in December 2013.[316] The first federal appellate court to weigh in on the issue was the Tenth Circuit Court of Appeals, hearing state appeals from Utah[317] and Oklahoma.[318] Almost a year to the day after *Windsor*, on June 25, 2014, the Tenth Circuit, voting 2-1, affirmed the Utah district court's holding, striking down the state ban as unconstitutional.[319] Shortly thereafter, on July 18, 2014, the Tenth Circuit issued a ruling affirming the Oklahoma district court's finding that Oklahoma's state ban was unconstitutional.[320] Those rulings affected all states in the Tenth Circuit's jurisdiction: Utah, Oklahoma, Colorado, Wyoming, and Kansas, but the circuit stayed the decisions pending appeal to the United States Supreme Court.[321]

In *Bostic v. Rainey*, decided February 13, 2014, a Virginia federal district court ordered the state to both recognize valid out-of-state marriages and issue marriage licenses to same-sex couples.[322] That ruling was stayed pending appeal to the Fourth Circuit Court of Appeals.[323] On July 28, 2014, the Fourth Circuit became the second federal appellate court to uphold the unconstitutionality of a state

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federal appeals court to date that will consider marriage cases from all states within its jurisdiction. Three cases out of Utah, Oklahoma and Virginia have already been argued before federal appeals courts. Two states – Oregon and Pennsylvania – declined to appeal federal court rulings that struck down their marriage bans as unconstitutional. In total, 30 states either have marriage equality or have seen state marriage bans struck down as unconstitutional in court.").

316. Kitchen v. Herbert, 961 F. Supp. 1181 (D. Utah 2013).

317. Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014) (No. 14-124) ("[S]urely 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.").

318. Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014) (No. 14-136) ("State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry.").

319. *Kitchen*, 755 F.3d at 1199.

320. *Bishop*, 760 F.3d at 1096.

321. *See Kitchen*, 755 F.3d at 1230; *Bishop*, 760 F.3d at 1096. On December 19, 2013, the New Mexico Supreme Court, a state in the Tenth Circuit, held that its state constitution required that the right to marry within the state include same-sex couples. *See* Griego v. Oliver, 316 P.3d 865 (N.M. 2013).

322. 970 F. Supp. 2d 456, 484 (E.D. Va. 2014). This case was later renamed to *Bostic v. Schaefer*.

323. *Id.* at 484.

same-sex marriage ban in a 2-1 decision.[324] The other states under the Fourth Circuit's jurisdiction include Maryland, West Virginia, North Carolina, and South Carolina.[325] However, Maryland was not affected because it had enacted same-sex marriage by legislative act, confirmed by voter referendum in 2012.[326] The Fourth Circuit's decision was also stayed pending a certiorari petition to the Supreme Court.[327]

On September 4, 2014, a three-judge panel of the Seventh Circuit Court of Appeals was the first federal appellate panel to unanimously uphold the district court rulings striking down the same-sex marriage bans a mere nine days after the court heard oral arguments.[328] In *Baskin v. Bogan*, Judge Posner invoked the Supreme Court's *Windsor* decision and declared, "The denial of these federal benefits to same-sex couples brings to mind . . . *Windsor*, which held unconstitutional the denial of federal marital benefits to same-sex marriages recognized by state law. The Court's criticisms of such denial apply with even greater force to Indiana's law."[329] The Seventh Circuit then issued a stay pending appeal to the Supreme Court.[330]

On September 28, 2014, at the very first conference of the 2014 Term, the United States Supreme Court reviewed certiorari petitions on file from the Tenth, Fourth, and Seventh appellate circuits.[331] On October 6, 2014, in a surprise to legal observers, the

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324. Bostic v. Schaefer, 760 F.3d 352, 376 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014) (No. 14-225) (The fundamental right to marry "is not circumscribed based on the characteristics of the individuals seeking to exercise that right.").

325. The Fourth Circuit "hears appeals from the nine federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina and from federal administrative agencies." *About the Court*, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, http://www.ca4.uscourts.gov/about-the-court (last visited Mar. 21, 2016).

326. *See, e.g.*, Edith Honan, *Maryland, Maine, Washington Approve Gay Marriage*, REUTERS (Nov. 7, 2012, 4:42 PM), http://www.reuters.com/article/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107 ("In Maryland, the measure passed 52 percent to 48 percent.").

327. Order in Pending Case, *Bostic*, 760 F.3d 352 (2014) (No. 14-1167) (issued August 20, 2014).

328. Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014). The Seventh Circuit combined two cases from Indiana and Wisconsin, *Baskin v. Bogan*, 12 F. Supp. 3d 1144 (S.D. Ind. 2014), and *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014).

329. *Baskin*, 766 F.3d at 659 (citation omitted).

330. Order, *Baskin*, 766 F.3d 648 (2014) (No. 14-2386) (issued September 14, 2014).

331. *See, e.g.*, Chris Geidner, *Supreme Court Denies Review of Same-Sex Marriage Cases, Bringing Marriage Equality to Five States*, BUZZFEED NEWS (Oct. 6,

Court rejected those petitions from the three appellate circuits, which represented five states' decisions: Utah, Oklahoma, Virginia, Indiana, and Wisconsin, immediately bringing the number of equality states to twenty-four.[332] However, this action by the Court affected an additional six states in each appellate court's jurisdiction, which virtually overnight caused the number of marriage equality states to increase to thirty.[333] While some states promptly began issuing marriage licenses, others chose to continue fighting.[334] Eventually, however, all states affected by the certiorari denial were ultimately required to issue licenses and recognize the marriages of out-of-state same-sex couples.

On October 7, 2014, one day after the Supreme Court denied certiorari to the Tenth, Fourth, and Seventh circuits, the Ninth Circuit of Appeals ruled in two cases, overturning a Nevada district court decision that held that Nevada's ban on same-sex marriage was constitutional and affirming an Idaho district court decision that held that Idaho's ban was unconstitutional.[335] In another

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2014, 9:51 AM), http://www.buzzfeed.com/chrisgeidner/supreme-court-denies-review-of-same-sex-marriage-cases-bring#.of6y33DEE5.

332. *Id.*

333. *Id.* Geidner's article noted that not only were the five states affected—which brought the total to twenty-four states with marriage equality—but "also makes the appeals court decisions striking down the marriage bans in those states the law of the land in the 4th Circuit, 7th Circuit, and 10th Circuit courts of appeals—a result that makes marriage equality likely to come in short order in all states within those circuits." Noting that the other cases in those circuits would also be affected, the article clarifies that:

> [T]he controlling precedent in those circuits now is that bans on same-sex couples' marriages are unconstitutional. Among the other states in the 4th Circuit without marriage equality currently that would be impacted are North Carolina, South Carolina, and West Virginia. Among the other states in the 10th Circuit without marriage equality currently that would be impacted are Colorado, Kansas, and Wyoming. That, once resolved, would bring the total number of states with marriage equality to 30.

Id.

334. Michael D. Dorf, *Will the Supreme Court's Same-Sex Marriage Ruling Face "Massive Resistance"?*, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA (June 30, 2015), https://verdict.justia.com/2015/06/30/will-the-supreme-courts-same-sex-marriage-ruling-face-massive-resistance. Marina Fang, *Some States Are Still Trying To Resist Gay Marriage*, HUFFPOST POLITICS (June 28, 2015, 8:42 PM), http://www.huffingtonpost.com/2015/06/28/states-gay-marriage_n_7683480.html.

335. Justin Snow, *Federal Appeals Court Finds Idaho, Nevada Same-Sex Marriage Bans Unconstitutional*, METRO WEEKLY (Oct. 7, 2014), http://www.metroweekly.com/2014/federal-appeals-court-finds-idaho-nevada-same-sex-marriage-bans-un

unanimous 3-0 panel opinion authored by Judge Stephen Reinhardt, the Ninth Circuit Court of Appeals found bans on same-sex marriage in Idaho and Nevada to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[336] The Ninth Circuit's decision was stayed and immediately appealed to the Supreme Court.[337] Once the Ninth Circuit stay was resolved, the number of marriage equality states rose to thirty-five, over three times the number of marriage equality states prior to the *Windsor* decision.[338]

Overall, in the sixteen-month period following the *Windsor* decision, the number of states that licensed same-sex marriages and/or recognized valid out-of-state same-sex marriages jumped from ten states, plus the District of Columbia, to thirty-five states and the District of Columbia.[339] All four federal appellate courts that had addressed the constitutionality of the same-sex marriage issue were in agreement that the state bans were unconstitutionally impermissible.[340] With the exception of one federal district court

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constitutional/.

336. Latta v. Otter, 771 F.3d 456 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015) (No. 14-765). *Latta* combined the cases from Idaho and Nevada, *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho 2014), and *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012). *Latta*, 771 F.3d at 457, 464-65. The opinion stated, "To allow same-sex couples to adopt children and then to label their families as second-class because the adoptive parents are of the same sex is cruel as well as unconstitutional." *Id.* at 474.

> Classifying some families, and especially their children, as of lesser value should be repugnant to all those in this nation who profess to believe in "family values." In any event, Idaho and Nevada's asserted preference for opposite-sex parents does not, under heightened scrutiny, come close to justifying unequal treatment on the basis of sexual orientation.

Id.

337. Snow, *supra* note 335.

338. *See id.* ("'Today's decision from the Ninth Circuit brings to 35 the number of freedom to marry states, and 64% of the American people now live in a state where gay people will soon share in the freedom to marry,' Evan Wolfson, founder and president of Freedom to Marry, said in a statement. 'We now have more states that have ended the exclusion of gay couples from marriage than had ended bans on interracial marriage when the Supreme Court brought the country to national resolution in *Loving v. Virginia*. We hope that the other federal appellate courts will move swiftly to end the disparity and unfair denial that too many loving and committed couples in the 15 remaining states endure.'").

339. *See supra* notes 315, 333 and accompanying text.

340. *See, e.g.*, Marriage in the Courts, HUMAN RIGHTS CAMPAIGN, http://americansformarriageequality.org/marriage-in-the-courts (last visited Mar. 21, 2016).

decision,[341] all federal district courts that had considered the issue were also in agreement.[342] Justice Ginsberg noted in an interview at the University of Minnesota College of Law that there was no reason for the Supreme Court to grant certiorari related to the same-sex marriage issue due to the almost unanimous agreement from the lower courts.[343] But she did note that those interested in whether the Supreme Court would take a case should look to the Sixth Circuit.[344]

VIII. *TANCO V. HASLAM*—FROM FILING TO SIXTH CIRCUIT

A. District Court Filing

Less than four months after *Windsor* was decided, a marriage equality suit was filed in Tennessee. On October 21, 2013, *Tanco v. Haslam*[345] was filed in the United States District Court for the Middle District of Tennessee on behalf of four couples who had each moved to Tennessee after legally marrying in their state of residence and who had each asked to have their valid out-of-state marriages recognized by the State of Tennessee.[346]

Three of the four couples had relocated to Tennessee for employment purposes. One couple included an active duty member of the military—a combat veteran from the war in Afghanistan—who was transferred by the military to a base near Memphis, Tennessee.[347] Another couple included one spouse who was

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341. Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014).

342. *See* Justin Snow, *Federal Judge Finds Louisiana Same-Sex Marriage Ban Constitutional*, METRO WEEKLY (Sept. 3, 2014), http://www.metroweekly.com/2014/09/federal-judge-finds-louisiana-same-sex-marriage-ban-constitutional/.

343. *See, e.g.*, Brian Bakst, *Ruth Bader Ginsburg: Watch 6th Circuit for SCOTUS' Next Move on Gay Marriage*, HUFFINGTON POST, (Sept. 16, 2014, 9:14 PM), http://awiderbridge.org/ruth-bader-ginsburg-watch-6th-circuit-for-scotus-next-move-on-gay-marriage/ (on whether Supreme Court would hear marriage equality case).

344. *Id.* Noting that "Ginsburg said cases pending before the circuit covering Kentucky, Michigan, Ohio and Tennessee would probably play a role in the high court's timing. She said 'there will be some urgency' if that appeals court allows same-sex marriage bans to stand." *Id.*

345. *See* Complaint for Declaratory and Injunctive Relief, Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014) (No. 3:13-cv-01159) (filed October 21, 2013).

346. *Tanco*, 7 F. Supp. 3d at 762. The lawsuit was originally filed by four same-sex couples. On March 10, 2014, the parties stipulated to the dismissal of one of the couples (Kellie Miller and Vanessa DeVillez). *Id.* at 762 n.1. The remaining three plaintiff couples were Valeria Tanco and Sophy Jesty, Ijpe DeKoe and Thomas Kostura, and Johno Espejo and Matthew Mansell. *See infra* notes 347-49 and accompanying text.

347. *Tanco*, 7 Supp. 3d at 764-65. Sergeant First Class Ijpe DeKoe and Thomas

transferred to Nashville, Tennessee, by his multi-national law firm employer; his stay-home parent-husband and their two children moved as well.[348] Tanco and Jesty, the third couple, were veterinarians who were offered teaching positions at the University of Tennessee School of Veterinary Medicine; shortly before filing the case, they learned that they were pregnant with their first child.[349]

The Tennessee case was intentionally designed to present a very narrow, limited issue, unlike the other post-*Windsor* cases.[350] The case intentionally provided the Supreme Court with the option of taking the next "baby step" after *Windsor*—requiring states to, like the federal government, recognize same-sex marriages of state residents if the marriage was validly performed in an equality state.[351] Thus, the case was a pure recognition case, and it did not include Tennessee residents who were denied marriage licenses in the state and/or Tennessee residents who went to equality states to legally marry and then returned to their homes in Tennessee. As events quickly developed, however, no baby steps were needed.

In *Tanco*, the plaintiffs challenged the constitutionality of Article XI, section 18 of the Tennessee Constitution[352] and section 36-3-

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Kostura, a graduate student, were residents of Memphis, Tennessee, at the time the *Tanco* lawsuit was filed. *Id.* at 764. They were validly married in the State of New York on August 4, 2011, while Mr. Kostura was still a resident of that State and Sergeant DeKoe was stationed in the State of New Jersey. *Id.* After Sergeant DeKoe returned from a tour of duty in Afghanistan, Sergeant DeKoe was transferred outside of Memphis, Tennessee, where the couple moved together. *Id.* at 764-65.

348. *Id.* at 765. Matthew Mansell and Johno Espejo were residents of Franklin, Tennessee, at the time of the filing of the *Tanco* lawsuit. *Id.* They were validly married in the State of California on August 5, 2008, while residing in California, and subsequently moved to Tennessee when Mr. Mansell's employer transferred his position to Nashville, Tennessee. *Id.* Mr. Mansell and Mr. Espejo are parents to a daughter and a son, who also moved to Franklin, Tennessee, when Mr. Mansell was transferred because of his job. *Id.*

349. *Id.* at 764. Drs. Valeria Tanco and Sophy Jesty are Professors of Veterinary Medicine. *Id.* While residing in the State of New York, they were legally married in that state on September 9, 2011, and subsequently moved to Tennessee to accept offers of employment at the University of Tennessee, where they worked for the duration of the litigation. *Id.* On March 27, 2014, Drs. Tanco and Jesty welcomed a daughter into their family, Emilia Maria Jesty. *See* Biskupic, *infra* note 404, 406.

350. *See Tanco*, 7 Supp. 3d at 763 n.4.

351. *Id.*

352. TENN. CONST. art. XI, § 18.

> The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation,

113[353] of the Tennessee Code Annotated (the "Anti-Recognition Laws") alleging that the constitutional and statutory provisions that prohibited the State of Tennessee from recognizing the marriages of same-sex couples, lawfully entered into in other jurisdictions, violated their rights under the federal constitution.[354] The arguments included that Tennessee's Non-Recognition Laws impermissibly discriminated against the plaintiffs on the basis of sexual orientation, infringing on their federal constitutional rights to due process, equal protection, and interstate travel.[355] Each of the plaintiff couples had validly married in a marriage equality state and subsequently relocated to Tennessee.[356]

The Complaint for Declaratory and Injunctive Relief alleged that the State's refusal to recognize the plaintiffs' valid out-of-state marriages was a departure from Tennessee's long history of recognizing marriages when validly performed in another state, even if that marriage would not have been permitted in Tennessee.[357] The complaint alleged that "[t]he challenged provisions single[d] out the marriages of same-sex couples and exempt[ed] them from Tennessee's long-standing rule that 'a marriage valid where

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> purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

Id.

353. TENN. CODE ANN. § 36-3-113(a) (1996). Tennessee asserts the importance of "the family as essential to social and economic order," but excludes same-sex couples specifically, implying that same-sex families are not capable of functioning as families. *See id.* Tennessee's statute also provided that "[a]ny policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee." *Id.* at § 36-3-113(c). The Tennessee law further suggests that allowing same-sex couples to share in "the unique and exclusive rights and privileges" of marriage would disrupt "the common good." *See id.* at § 36-3-113(a).

354. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 345.

355. *Id.* at 26-36.

356. *Id.* at 2.

357. *Id.* at 8; *see also* Farnham v. Farnham, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (noting Tennessee's long applied rule that "a marriage valid where celebrated is valid everywhere" (quoting Pennegar v. State, 10 S.W. 305, 306 (Tenn. 1889))).

celebrated is valid everywhere.'"[358] The complaint asserted that "Tennessee's categorical refusal to recognize the valid out-of-state marriages of same-sex couples ha[d] no reasonable or rational basis or justification and violate[d] multiple guarantees of the Constitution of the United States."[359] The complaint requested that the district court find the Anti-Recognition Laws unconstitutional and require Tennessee officials to recognize valid out-of-state same-sex marriages in the same manner as valid out-of-state opposite-sex marriages.[360]

Specifically, the complaint addressed the "dignitary harm" that the United States Supreme Court first acknowledged in *United States v. Windsor*, stating:

> Tennessee's refusal to recognize same-sex couples' valid out-of-state marriages divests them of "a dignity and status of immense import" that they previously obtained by marrying. By denying recognition to Plaintiffs' otherwise valid marriages in this manner, Tennessee "instructs all [state] officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." Tennessee's relegation of lawfully married same-sex couples and their children to this inferior status constitutes "a deprivation of the liberty of the person," in violation of the Fourteenth Amendment. Because the Constitution "withdraws from Government the power to degrade or demean in the way this law does," Tennessee's Anti-Recognition Laws are unconstitutional to the extent they deny equal legal recognition to marriages of same-sex couples validly celebrated in other jurisdictions.[361]

Utilizing additional Supreme Court language from *Romer v. Evans*, the complaint also alleged:

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358. Complaint for Declaratory and Injunctive Relief, *supra* note 345, at 1 (citing *Farnham*, 323 S.W.3d at 134 (quoting *Pennegar*, 10 S.W. at 306)). For over a century, Tennessee recognized marriages that were valid where celebrated, even if they were not permitted in Tennessee, including common law marriages, Shelby Cty. v. Williams, 510 S.W.2d 73, 74 (Tenn. 1974), marriages by parties who do not satisfy Tennessee's minimum age requirements, Keith v. Pack, 187 S.W.2d 618, 619 (Tenn. 1945), and marriages based on the doctrine of marriage by estoppel, *Farnham*, 323 S.W.3d at 140.

359. Complaint for Declaratory and Injunctive Relief, *supra* note 345, at 2.

360. *Id.*

361. *Id.* at 3 (citations omitted) (quoting United States v. Windsor, 133 S. Ct. 2675, 2692-96 (2013)).

> Tennessee's refusal to respect Plaintiffs' legal marriages also undermines their financial security and deprives them of important legal rights and protections, as well as mutual responsibilities they wish to assume. Although Plaintiffs legally became family under the laws of other states, Tennessee law refuses to see them as family and instead impermissibly treats Plaintiffs and other married same-sex couples as complete "stranger[s] to [the state's] law."[362]

Further, because the State of Tennessee refused to recognize Plaintiffs' valid out-of-state marriages, the complaint alleged that the Plaintiffs, along with all other same-sex couples who had moved to Tennessee after legally marrying in their prior state of residence, "are denied all protections, benefits, and obligations that Tennessee law affords to all other Tennessee residents who entered into valid marriages outside Tennessee."[363] Examples provided in the complaint included unequal treatment under Tennessee's intestacy laws, wrongful death actions, parentage rights, and statutory protections and presumptions available to opposite-sex married couples.[364]

The plaintiffs asserted that Tennessee Anti-Recognition Laws warranted heightened scrutiny protection under the Fourteenth Amendment because the laws deprived the plaintiffs of "protected liberty and property interests in their extant marital relationships, impermissibly burden[ed] the fundamental right to marry, discriminate[d] based on sex and sexual orientation, and impermissibly burden[ed] the fundamental right to travel between the states by treating same-sex spouses as though they were legal strangers."[365] Finally, the complaint asserted that the state could not pass even a deferential rational basis test as no legitimate government interest was advanced by Tennessee Anti-Recognition Laws.[366] Again, the complaint, invoking *Windsor*, alleged that the only objective served by the laws was to demean and harm same-sex couples and their children.[367]

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362. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 635 (1996)).
363. *Id.* at 3-4.
364. *Id.* at 4.
365. *Id.*
366. *Id.* (citing Stemler v. City of Florence, 126 F.3d 856, 873-74 (6th Cir. 1997)).
367. *Id.*

B. Michigan, Ohio, & Kentucky

The other three states in the Sixth Circuit—Michigan, Ohio, and Kentucky—also had statutes and/or constitutional amendments that limited the definition of civil marriage as a union between one man and one woman.[368] Same-sex plaintiff couples from those states, including two men whose same-sex spouses were deceased, filed suits in their respective federal district court challenging their respective state laws.[369] Their claims, like the claims of the Tennessee plaintiffs, alleged violations of the Fourteenth Amendment by denying plaintiffs the right to marry in their home state and/or to have their marriage recognized by their home state despite having been legally performed in another marriage equality state.[370] Ohio and Kentucky were two of the first to receive opinions from a federal district court. Less than a month after *Windsor*, the District Court for the Southern District of Ohio issued an order restraining the Ohio Registrar from accepting and recording a death certificate absent recognition of the deceased's marital status and the recognition of his same-sex spouse.[371] In Kentucky, the judge

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368. In 1996, the Michigan legislature enacted Mich. Comp. Laws § 551.1, which identified marriage as "inherently a unique relationship between a man and a woman," and amended Mich. Comp. Laws §§ 551.1-551.4 to limit eligibility to marry to "a man and a woman." 1996 Mich. Pub. Acts 334. The State of Ohio had both constitutional and statutory provisions that denied legal recognition within the state to marriages entered into in other jurisdictions between same-sex spouses. OHIO CONST. art. XV, § 11; OHIO REV. CODE ANN. § 3101.01(C) (LexisNexis 2015) (the "marriage bans" or "bans"). *See also* H.B. 272, 2003-2004 Leg., 125 Sess. (Ohio 2004). In 1998, Kentucky's General Assembly enacted a series of statutes explicitly limiting marriage to only opposite-sex couples. Section 402.005 of the Kentucky Revised Statutes defined marriage as an institution existing exclusively between one man and one woman; section 402.020(1)(d) prohibited marriage between members of the same sex; section 402.040(2) declared that marriage between members of the same sex was against Kentucky public policy; and section 402.045 voided same-sex marriages performed in other jurisdictions. KY. REV. STAT. ANN. §§ 402.005, 402.020(1)(d), 402.040(2), 402.045 (LexisNexis 2010).

369. *See* Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (filed in Kentucky); DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (filed in Michigan); Obergefell v. Kasich, 2013 U.S. Dist. LEXIS 102077 (S.D. Ohio, July 22, 2013) (filed in Ohio).

370. *Bourke*, 996 F. Supp. 2d at 547; *DeBoer*, 973 F. Supp. 2d at 759; *Obergefell*, 2013 U.S. Dist. LEXIS 102077, at *7.

371. *Obergefell*, 2013 U.S. Dist. LEXIS 106226 (S.D. Ohio July 22, 2013). In granting and issuing the restraining order, the court noted that it found "that Plaintiffs have established by clear and convincing evidence their entitlement to injunctive relief." The court also ordered that "a temporary restraining order shall

ordered recognition of valid out-of-state marriages in *Bourke v. Beshear*.[372] Those rulings were stayed pending appeal to the Sixth Circuit. Ultimately, each district court case in the Sixth Circuit ruled in favor of the same-sex plaintiffs.

The State of Michigan had both statutory and constitutional bans in place, restricting the licensing and recognition of marriage to opposite-sex couples.[373] On January 23, 2012, a lesbian couple filed *DeBoer v. Snyder* in federal district court, challenging the state's ban on adoption by same-sex couples seeking to jointly adopt their children.[374] In August 2012, United States District Court Judge Friedman suggested that the lawsuit should be amended to challenge the state's ban on same-sex marriages, the underlying issue.[375] On March 7, 2013, Judge Friedman announced that he would delay the case pending the outcome of two same-sex marriage cases before the U.S. Supreme Court,[376] *United States v. Windsor*[377] and *Hollingsworth v. Perry*.[378] Following the Supreme Court's June 26, 2013, *Windsor* decision, Judge Friedman held a trial from February 25 to March 7, 2014, and on March 21, 2014, he ruled for the plaintiffs.[379] Judge Friedman's decision held that Michigan's denial of rights to same-sex couples was unconstitutional, and he did not stay the decision.[380] Michigan Attorney General

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issue by separate order, directing, *inter alia*, that the local Ohio Registrar of death certificates is hereby **ORDERED** not to accept for recording a death certificate for John Arthur which does not record his status as 'married' and/or does not record James Obergefell as Mr. Arthur's 'surviving spouse' at the time of Mr. Arthur's death, which is imminent." *Obergefell*, 2013 U.S. Dist. LEXIS 102077, at *21.

372. *Bourke*, 996 F. Supp. 2d. at 544 ("[T]he Court concludes that Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review. Accordingly, Kentucky's statutes and constitutional amendment that mandate this denial are unconstitutional.").

373. Michigan banned recognition of same-sex unions in any form since a 2004 popular vote that was added as an amendment to the state constitution. MICH. CONST. art. I, § 25. The Michigan Marriage Amendment states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." *Id.*

374. *DeBoer*, 973 F. Supp. 2d at 759-60.

375. *Id.* at 760.

376. *Id.*

377. 133 S. Ct. 2675 (2013).

378. 133 S. Ct. 2652 (2013).

379. *DeBoer*, 973 F. Supp. 2d at 775.

380. *Id.* In the holding, Judge Bernard A. Friedman noted,

Schuette immediately filed for an emergency motion requesting a stay.[381] In the interim, more than 300 same-sex couples married in Michigan before the Sixth Circuit Court of Appeals stayed enforcement of the district court decision the next day.[382]

In Ohio, two separate lawsuits were filed challenging Ohio's denial of marriage rights to same-sex couples.[383] The plaintiffs in those lawsuits requested that the State of Ohio recognize marriages from other jurisdictions for the purpose of recording a spouse on a death certificate and for recording parents' names on birth certificates.[384] United States District Court Judge Timothy Black held that Ohio was constitutionally required to recognize same-sex

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> In attempting to define this case as a challenge to "the will of the people," state defendants lost sight of what this case is truly about: people. No court record of this proceeding could ever fully convey the personal sacrifice of these two plaintiffs who seek to ensure that the state may no longer impair the rights of their children and the thousands of others now being raised by same-sex couples. It is the Court's fervent hope that these children will grow up "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Today's decision is a step in that direction, and affirms the enduring principle that regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail.

Id. (quoting *Windsor*, 133 S. Ct. at 2694).

381. *See* Petition of the State of Michigan Defendants-Appellants for Initial Hearing en Banc, *DeBoer*, 973 F. Supp. 2d 757 (No. 14-1341) (filed April 4, 2014). *DeBoer* was appealed to the U.S. Court of Appeals for the 6th Circuit on March 21, 2014. The next day, after 323 marriage licenses had been issued in four Michigan counties, the appellate court placed a temporary hold on the district court's order allowing same-sex marriage through March 26. *See, e.g.*, Rebecca Cook, *Ruling to Strike Down Michigan Gay Marriage Ban Put on Hold*, REUTERS (Mar. 22, 2014, 8:32 PM), http://www.reuters.com/article/us-usa-gaymarriage-michigan-idUSBREA2K1Y 420140323. After hearing arguments on March 25, an appellate court panel voted 2–1 to approve the state attorney general's motion to extend the stay indefinitely and to expedite the appeal. *See, e.g.*, Sergio Martínez-Beltrán, *Appeals Court Extends Stay in Gay Marriage Ruling Pending an Appeal*, STATE NEWS (Mar. 25, 2014, 6:32 PM), http://statenews.com/article/2014/03/appeals-court-extends-stay-in-gay-marriage-ruling-pending-an-appeal.

382. *See supra* note 381 and accompanying text.

383. Henry v. Himes, 14 F. Supp. 3d 1036 (S.D. Ohio 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013).

384. *Henry*, 14 F. Supp. 3d at 1041-43 (for recognition of both same-sex couples' names as parents on birth certificates); *Obergefell*, 962 F. Supp. 2d at 972 (for recognition of same-sex couples' names as spouse on death certificates).

marriages from other jurisdictions.[385] In his opinion, Judge Black cited the *Windsor* majority opinion and included language from Scalia's dissent, stating, "[T]he question is presented whether a state can do what the federal government cannot–*i.e.*, discriminate against same-sex couples . . . simply because the majority of the voters don't like homosexuality . . . . Under the Constitution of the United States, the answer is no."[386] While Judge Black stayed general enforcement of the ruling, he ordered Ohio to recognize out-of-state same-sex marriages for completing death certificates in all cases and for four birth certificates.[387] Ohio's Attorney General appealed the rulings to the Sixth Circuit which consolidated the two cases and scheduled them for oral argument on August 6, 2014.[388]

In Kentucky, two lawsuits were filed against the State, challenging both the state's ban on issuing marriage licenses to same-sex couples and recognition of valid out-of-state marriages. In one, *Bourke v. Beshear*, a same-sex couple, legally married in Canada, filed suit in the United States District Court for the Western District of Kentucky against the Kentucky Governor and Attorney General on July 26, 2013.[389] The *Bourke* plaintiffs argued that Kentucky violated the United States Constitution by denying recognition to their valid out of state marriages.[390] On February 12, 2014, District Court Judge John Heyburn II found in favor of the plaintiffs and held that Kentucky was in violation of the Constitution's guarantee of equal protection.[391] He temporarily stayed his decision while Kentucky appealed to the Sixth Circuit Court of Appeals.[392]

In the meantime, a second Kentucky lawsuit was filed, *Love v. Beshear*, in which two same-sex couples challenged Kentucky's

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385. *Obergefell*, 962 F. Supp. 2d at 973.

386. *Id.* at 973-74.

387. *Id.* at 997-98.

388. *See* Notice of Appeal, *Obergefell*, 962 F. Supp. 2d 968 (No. 1:13-cv-00501) (filed January 16, 2014); *see also* Public Notice, U.S. Court of Appeals for the Sixth Circuit, Notice to the Public and the Media Concerning Oral Argument in the Same-Sex Marriage Cases to be Heard August 6, 2014 (July 14, 2014), www.ca6.uscourts.gov/internet/documents/Final_NOTICE.pdf.

389. Complaint for Declaratory and Injunctive Relief, Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (No. 3:13-cv-00750) (filed July 25, 2013).

390. *Id.* at 4.

391. *Bourke*, 996 F. Supp. 2d at 544.

392. *Id.* at 558. Stay granted by Love v. Beshear, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014).

marriage licensing law after being denied marriage licenses.[393] On February 14, 2014, the couples requested permission to intervene in the *Bourke* case.[394] Judge Heyburn, in his final *Bourke* order, bifurcated the case and allowed the *Love* plaintiffs to intervene and argue against Kentucky's refusal to issue marriage licenses to same-sex couples.[395] On July 1, 2014, Judge Heyburn found in favor of the intervening *Love* plaintiffs and held that Kentucky's state ban on issuing licenses to same-sex couples was an unconstitutional violation of the Equal Protection Clause.[396] The state appealed, and the Sixth Circuit consolidated the *Love* case with the *Bourke* case and scheduled oral argument for August 6, 2014, along with the other three states in the Sixth Circuit's jurisdiction.[397]

C. Tennessee – the Tanco *Preliminary Injunction*

On November 19, 2013, the Tennessee plaintiffs filed a Motion for a Preliminary Injunction, requesting that the State of Tennessee be required to recognize only the marriages of the three couples pending the outcome of the litigation based on the violation of their fundamental constitutional rights, the irreparable injury each couple was suffering, and the likelihood they would ultimately win on the merits.[398] Choosing to proceed on the basis of a preliminary injunction rather than seeking summary judgment was an intentional strategic decision intended to expedite action in the case and set the case up for an immediate appeal. On March 14, 2014, United States District Judge Aleta Trauger granted the injunction, noting, "At this point, all signs indicate that, in the eyes of the United States Constitution, the plaintiffs' marriages will be placed on an equal footing with those of heterosexual couples and that proscriptions against same-sex marriage will soon become a footnote in the annals of American history."[399] In its order, the District Court noted that several "thorough and well-reasoned cases" had been decided by federal district courts following the Windsor decision and

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393. 989 F. Supp. 2d at 539.

394. Motion to Intervene, *Love*, 989 F. Supp. 2d 536 (No. 3:13-cv-00750) (filed February 14, 2014).

395. *Love*, 989 F. Supp. 2d at 539 n.2.

396. *Id.* at 539.

397. *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014); *see also* Public Notice, *supra* note 388.

398. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction at 4-5, Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014) (No. 3:13-cv-01159) (filed November 19, 2013).

399. *Tanco*, 7 F. Supp. 3d at 772.

each one held that similar state law restrictions on same-sex marriage "violate[d] the Equal Protection Clause and/or the Due Process Clause, even under 'rational basis' review" and concluded that petitioners were likely to succeed on the merits.[400]

Although the State immediately filed a motion to stay the ruling on March 18, 2014,[401] Judge Trauger denied the motion on March 20, 2014, noting the limited application of the injunction to the three plaintiff couples.[402] On March 25, 2014, the Tennessee Attorney General then filed an interlocutory appeal with the Sixth Circuit Court of Appeals, requesting a stay of the injunction.[403] While the interlocutory appeal was pending before the Sixth Circuit, thirteen days after the preliminary injunction was granted, one of the plaintiff couples, Valeria Tanco and Sophy Jesty, welcomed the birth of a baby girl, Emilia Maria Jesty.[404] Because the preliminary injunction was in effect at the time of the birth, Tennessee was required to recognize the couple's valid out-of-state marriage, and both parents benefitted from Tennessee's parental presumption statutes.[405] Both women were recognized as Emilia's legal parents on her original birth certificate—a first in Tennessee history.[406]

The following month, on April 25, 2014, the Sixth Circuit Court of Appeals issued a stay of the *Tanco* preliminary injunction (as it had in the cases from the other Sixth Circuit states), and set the case for expedited consideration on the merits by a Sixth Circuit

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400. *Id.* at 768.

401. Defendants' Motion for Stay Pending Appeal, *Tanco*, 7 F. Supp. 3d 759 (No. 3:13-cv-01159) (filed March 18, 2014).

402. Memorandum & Order, *Tanco*, 7 F. Supp. 3d 759 (No. 3:13-cv-01159) (issued March 20, 2014).

403. Motion of Defendants-Appellants for Stay Pending Appeal [in *Tanco* case], DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (No. 14-5297) (filed March 25, 2014).

404. *See* Joan Biskupic, *Valeria Tanco and Sophy Jesty, Tennessee Lesbian Moms, Become a Legal First for Gay Marriage*, HUFFINGTON POST (Apr. 9, 2014, 7:00 AM), http://www.huffingtonpost.com/2014/04/09/tennessee-lesbian-moms-case_n_5116823.html.

405. *See* TENN. CODE ANN. §§ 68-3-306, 36-2-304 (2014). While those statutes use the word "husband" rather than "spouse" and speak of "men" presumed to be fathers, they were both adopted in 1977, prior to most modern day equal protection jurisprudence and before numerous courts held that bans on allowing same-sex couples to have civil marriages violate the United States Constitution, such that to remain constitutional, the statutes must now be interpreted to be gender neutral and most treat same-sex married couples the same as opposite-sex married couples.

406. *See* Joan Biskupic, *Two Moms, a Baby and a Legal First for U.S. Gay Marriage*, REUTERS (Apr. 9, 2014, 8:54 AM), http://www.reuters.com/article/us-usa-courts-samesexmarriage-idUSBREA380B420140409.

judicial panel.[407] The Sixth Circuit justified the stay based on what was described as the "unsettled" nature of the law, as well as the public interest and the interests of the parties involved.[408]

In the six cases from the four Sixth Circuit states, the plaintiffs had each prevailed at the district court level on arguments involving either the unconstitutional nature of the state's refusal to issue marriage licenses and/or the state's refusal to recognize a valid out-of-state marriage. Each state appealed those decisions. After the Sixth Circuit combined all six cases from the four states in its jurisdiction, the four states prepared briefs and prepared for oral arguments in Cincinnati, Ohio, for August 6, 2014.[409]

IX. THE SIXTH CIRCUIT COURT OF APPEALS—*TANCO* BECOMES *DEBOER V. SNYDER*[410]

In their brief, the Tennessee plaintiffs argued that the collective import of recent decisions from the United States Supreme Court over the prior four decades articulated principles requiring Tennessee to recognize the valid out-of-state marriages of same-sex couples.[411] This argument relied on the fundamental right to marry recognized by the Supreme Court in a line of cases,[412] including *Loving v. Virginia*,[413] *Zablocki v. Redhail*,[414] and *Turner v. Safley*.[415] The plaintiffs further relied on *Lawrence v. Texas*,[416] identifying the constitutional right of consenting same-sex adults to engage in intimate sexual relations, and *United States v. Windsor*,[417] identifying the right of lawfully married same-sex couples to have their state marriages honored and respected by the federal

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407. Order [in *Tanco* case], *DeBoer*, 772 F.3d 388 (No. 14-5297) (issued April 25, 2014).

408. *Id.* at 2.

409. *See, e.g.*, Erik Eckholm, *One Court, Three Judges and Four States with Gay Marriage Cases*, NEW YORK TIMES (Aug. 6, 2014), http://www.nytimes.com/2014/08/07/us/one-court-three-judges-and-four-states-with-gay-marriage-cases.html.

410. 772 F.3d 388 (6th Cir. 2014). The Sixth Circuit Court of Appeals combined six cases from the four states in its jurisdiction. The style of the Tennessee case was renamed from *Tanco v. Haslam* to *DeBoer v. Snyder*.

411. Brief of Plaintiffs-Appellees [in *Tanco* case] at 12-15, *DeBoer*, 772 F.3d 388 (No. 14-5297) (filed June 10, 2014).

412. *See supra* Section IV.B.

413. 388 U.S. 1 (1967).

414. 434 U.S. 374 (1978).

415. 482 U.S. 78 (1987).

416. 539 U.S. 558 (2003).

417. 133 S. Ct. 2675 (2013).

government.[418] The plaintiffs also argued that Tennessee violated their constitutional rights under the Equal Protection Clause by denying recognition of only same-sex out-of-state marriages and their constitutional right to travel by forcing them to relinquish their marital status as a condition of relocating to Tennessee.[419]

Although the cases were not technically consolidated, oral argument was specially set for all the cases from the four Sixth Circuit states on August 6, 2014: Tennessee, Ohio, Michigan, and Kentucky. In all six cases on appeal from the four states, the plaintiffs had prevailed at the district court level on arguments involving either the unconstitutional nature of the state's refusal to issue marriage licenses and/or the state's refusal to recognize valid out-of-state marriages. In an unusual and rare move, the circuit court panel comprised of Judge Martha Craig Daughtrey, Judge Jeffrey Sutton, and Judge Deborah Cook, heard arguments from all four states, back-to-back and without a break, on the afternoon of August 6, 2014, taking the states in alphabetical order.[420] It would be three months to the day before the court announced its opinion.

On November 6, 2014, the Sixth Circuit Court of Appeals released a single opinion applicable to all four states.[421] Breaking with the otherwise uniform courts of appeal, a divided panel held 2-1 that each state's ban did not violate the United States Constitution and thus reversed the district court holdings.[422] Addressing the merits, and contrary to every other court in the country that had considered the issue, the Sixth Circuit noted that it was bound by the United States Supreme Court's twelve-word holding from the 1972 case, *Baker v. Nelson*,[423] which dismissed a same-sex couple's constitutional challenge for "want of [a] substantial federal question."[424]

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418. Brief of Plaintiffs-Appellees [in *Tanco* case], *supra* note 411, at 50-51.

419. *Id.* at 47.

420. *See* Eckholm, *supra* note 409.

421. Although the Sixth Circuit's opinion identified each of the six cases from the four states individually, it named the Michigan case, *DeBoer v. Snyder*, first in the list of names since it was the first of the four states to file for review in the Sixth Circuit. Thus, subsequent references to the six cases, including *Tanco*, utilized the *DeBoer* name. *See DeBoer*, 772 F.3d 388 (6th Cir. 2014).

422. *See id.*

423. *Id.* at 400 (citing Baker v. Nelson, 409 U.S. 810 (1972)).

424. *Baker*, 409 U.S. at 810. In *Baker*, the Supreme Court, acting under its mandatory appellate jurisdiction, dismissed a same-sex couple's challenge to Minnesota's denial of a marriage license "for want of [a] substantial federal question." *Id.*; *see* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

In *Baker*, the Supreme Court dismissed an appeal from a judgment of the Minnesota Supreme Court holding that the State of Minnesota was not required to issue a marriage license to a same-sex couple.[425] The Sixth Circuit majority interpreted *Baker* to generally support "the right of the people of a State to define marriage as they see it."[426] Specifically, the court of appeals rejected petitioners' reliance on Supreme Court cases recognizing the fundamental nature of the right to marry,[427] the constitutional right of two consenting adults to engage in intimate sexual relations,[428] and the right of married couples to have their marriages respected by another sovereign[429] and, thereby, reversed each of the district court holdings.[430]

Judge Sutton, writing for the 2-1 majority, declined to address the constitutional issues presented by the parties, and instead favored a legislative approach to decide the scope of civil marriage.[431] Concluding that neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment required a State's marriage laws to include same-sex couples, Sutton's majority opinion noted, "Not one of the plaintiffs' theories . . . makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."[432] According to the majority, the constitutional issue presented from all four states boiled down to a question of who should be able to decide on same-sex marriage—the electorate or the judiciary.[433]

Holding that same-sex marriage was a matter to be worked out through the democratic process and without regard for the constitutional protections of the Bill of Rights, the Sixth Circuit majority concluded that issuance of same-sex marriage licenses

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425. *Baker*, 409 U.S. at 810.

426. *DeBoer*, 772 F.3d at 400.

427. *Id.* at 411 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

428. *Id.* at 411-12 (citing Zablocki v. Redhail, 434 U.S. 374 (1978)).

429. *Id.* at 418-20 (citing United States v. Windsor, 133 S. Ct. 2675 (2013)).

430. *DeBoer*, 772 F.3d at 421.

431. *Id.*

432. *Id.* at 402-03.

433. *Id.* at 396 ("And all come down to the same question: Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?"). "Even if we grant the premise and assume that same-sex marriage will be recognized one day in all fifty States, that does not tell us how—whether through the courts or through democracy." *Id.* at 402. "From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen." *Id.* at 395.

and/or recognition of plaintiffs' marriages should be achieved, if at all, only through the political process.[434] Although the majority acknowledged the national progress toward marriage equality, it nonetheless found that Article III courts did not have a place in that progress:

> In just eleven years, nineteen States and a conspicuous District, accounting for nearly forty-five percent of the population, have exercised their sovereign powers to expand a definition of marriage that until recently was universally followed going back to the earliest days of human history. That is a difficult timeline to criticize as unworthy of further debate and voting. When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers.[435]

Applying rational basis review, the majority identified two rationales that supported the laws from all four states. "[S]tart[ing] from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage . . . to regulate sex, most especially the intended and unintended effects of male-female intercourse," the majority found that "nature's laws (that men and women complement each other biologically), . . . created the policy imperative" behind male-female marriage laws.[436] Additionally, the majority found a state's desire to "wait and see" before changing a centuries-old societal norm to be a rational basis for upholding same-sex marriage bans.[437]

Declining to apply any type of heightened review, the court denied finding any "animus" behind the challenged laws[438] and did not find that the cases presented a "setting in which 'political powerlessness' require[d] 'extraordinary protection from the majoritarian political process.'"[439] The 2-1 majority opinion further rejected the Tennessee plaintiffs' constitutional right to travel

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434. *Id.* at 421 ("Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.").

435. *Id.*

436. *Id.* at 404-05.

437. *Id.* at 406.

438. *Id.* at 408-10.

439. *Id.* at 415 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

argument, finding that, because the Tennessee Anti-Recognition Laws discriminated against all same-sex couples equally, the right to travel was not violated.[440]

In her dissent, Judge Martha Craig Daughtrey found the 1972 *Baker* decision to be a "dead letter."[441] She observed:

> Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same-sex marriage that could prompt a grant of *certiorari* by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens.[442]

Alluding to the "circuit split," Judge Daughtrey recognized the Supreme Court's certiorari denial a month earlier to petitions filed

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440. *Id.* at 420.

441. *Id.* at 430 (Daughtrey, J., dissenting). Expressing her displeasure with the majority deferring to the democratic process, Judge Daughtrey noted:

> Today, my colleagues seem to have fallen prey to the misguided notion that the intent of the framers of the United States Constitution can be effectuated only by cleaving to the legislative will and ignoring and demonizing an independent judiciary. Of course, the framers presciently recognized that two of the three co-equal branches of government were representative in nature and necessarily would be guided by self-interest and the pull of popular opinion. To restrain those natural, human impulses, the framers crafted Article III to ensure that rights, liberties, and duties need not be held hostage by popular whims.

Id. at 436 (Daughtrey, J., dissenting). Indeed, Judge Daughtrey felt so strongly that the case was wrongly decided that she commented:

> More than 20 years ago, when I took my oath of office to serve as a judge on the United States Court of Appeals for the Sixth Circuit, I solemnly swore to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams.

Id. at 436-37 (Daughtrey, J., dissenting) (internal citation omitted).

442. *Id.* at 430 (Daughtrey, J., dissenting).

by Utah, Oklahoma, Virginia, and Indiana out of the Tenth, Fourth, and Seventh Circuit Courts of Appeals.[443] The Sixth Circuit reversal of district court holdings in Tennessee, Michigan, Ohio, and Kentucky provided the necessary split between circuits for a United States Supreme Court hearing.[444]

With just over a week to file a certiorari petition in order to make the deadline for consideration during the Supreme Court's 2014 Term, each state put together individual petitions for certiorari, addressing the single Sixth Circuit opinion. Tennessee, Michigan, and Ohio filed their petitions on November 14, 2014, while Kentucky filed its petition on November 18, 2014.[445] The Tennessee petitioners asked the United States Supreme Court to consider whether the United States Constitution protects a "fundamental right to marry," whether Tennessee's refusal to recognize same-sex marriages from other jurisdictions unlawfully restricts the right to travel, and whether the Court's dismissal of *Baker v. Nelson* is binding precedent.[446] The State of Tennessee filed a brief in opposition to plaintiffs' petition on December 15, 2014.[447]

X. THE SUPREME COURT—*TANCO* BECOMES *OBERGEFELL V. HODGES*

On January 16, 2015, the Supreme Court consolidated the *Tanco* case with those from Ohio, Michigan, and Kentucky, and granted review.[448] The combined style of the case was renamed, based solely on filing order, from *DeBoer v. Snyder* in the Sixth Circuit to *Obergefell v. Hodges* at the Supreme Court.[449] The Court certified

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443. *See supra* Section VII; *see also DeBoer*, 772 F.3d at 428-430 (Daughtrey, J., dissenting).

444. The opinion from the Sixth Circuit Court of Appeals directly conflicted with decisions of the courts of appeals for the Fourth, Seventh, Ninth, and Tenth Circuits, each of which had held that it was unconstitutional for states to categorically exclude same-sex couples from marriage. *See supra* Section VII.

445. *See Obergefell v. Hodges*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/ (last visited Mar. 23, 2016).

446. *See* Petition for a Writ of Certiorari [in *Tanco* case], Obergefell v. Hodges, 135 S. Ct. 2584 (2015), (No. 14-562) (filed November 14, 2014).

447. *See* Brief in Opposition [in *Tanco* case], *Obergefell*, 135 S. Ct. 2584 (No. 14-562) (filed December 15, 2014).

448. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted, sub nom.* Obergefell v. Hodges, 135 S. Ct. 1039 (2015). The Court noted that the petitions for writs of certiorari in No. 14-556 (Ohio), No. 14-571 (Michigan), and No. 14-574 (Kentucky) were also granted. *Obergefell*, 135 S. Ct. at 1039. The cases were consolidated and the petitions for writs of certiorari were granted limited to two questions. *Id.*

449. *Id.*

only two questions for review, questions that succinctly summarized the basic issues presented. The first, addressing issues from Kentucky and Michigan: "Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?"[450] The second, addressing issues from Tennessee, Ohio, and Kentucky: "Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?"[451]

A. Tennessee Petitioners' Arguments

The Tennessee petitioners argued that the Non-Recognition Laws were a violation of equal protection, due process, and interstate travel rights guaranteed by the Constitution.[452] Specifically, petitioners asserted that their lawful out-of-state marriages were rendered legal nullities under Tennessee state law upon their relocation to the state.[453] The petitioners claimed that by forcing them to legally surrender their marriages as a condition of entry into the State, Tennessee violated their Fourteenth Amendment rights.[454] Comparing the "injustices effected by Tennessee's Non-Recognition Laws"[455] to those inflicted by the federal DOMA's Section 3, the petitioners asked for the same outcome as the Court held in *Windsor*.[456]

Asserting that the Constitution shields the privacy of the marital couple from state interference, the Tennessee petitioners argued that the Court should find that the Constitution affords the same liberty and dignity protection to the existing same-sex marriages of petitioners.[457] The petitioners also argued that Tennessee's Non-Recognition Laws should be subject to strict scrutiny under the Due Process Clause because they impermissibly infringed on the couples' fundamental right to marry—or, in their cases, to remain married.[458] Asserting that the Non-Recognition Laws were not compatible with

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450. *Id.*

451. *Id.*

452. *See* Brief for Petitioners [in *Tanco* case], *Obergefell*, 135 S. Ct. 2584 (No. 14-562) (filed February 27, 2015).

453. *Id.* at 11-12.

454. *Id.* at 17-39.

455. *Id.* at 17.

456. *Id.* at 22-23.

457. *Id.* at 21-23. "The right to marry includes the right to *be* married—that is, the right to be in an *enduring*, legally protected family unit, entitled to privacy and ongoing respect from the state." *Id.* at 17.

458. *Id.* at 18-21.

the Court's marital precedents, petitioners argued that the laws deprived them of liberty and privacy interests in violation of the fundamental right to marry under the Due Process Clause.[459]

Addressing their Equal Protection argument, the Tennessee petitioners asserted that because Tennessee Non-Recognition Laws were an unusual departure from Tennessee's long-standing practice of recognizing all marriages that were entered into validly, with rare exceptions, the laws merited, at the least, the same "careful consideration" applied in *Windsor*.[460] The petitioners argued that heightened scrutiny was appropriate because the laws discriminated on the basis of sex,[461] "both because they classify on the basis of sex . . . and because they impose and perpetuate gender-based expectations and stereotypes."[462] Further, because the laws also discriminated based on sexual orientation, the petitioners requested that strict scrutiny be applied to the Court's analysis.[463]

In addition, Tennessee petitioners argued that the Non-Recognition Laws impermissibly burdened their right to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict [that] movement."[464] Noting that the classification burdened the constitutional right to travel, the petitioners asserted that strict scrutiny was the appropriate level of scrutiny for the Court to apply.[465] Finally, the Tennessee petitioners declared that the Non-Recognition Laws would fail any level of scrutiny applied by the Court and pointed out that the laws also frustrated principles of federalism by "erect[ing] barriers that preclude same-sex couples and their children from enjoying the full rights of national citizenship."[466] Based on those arguments, the Petitioners requested that the Court resolve the split in the circuits and, following the Court's precedent, find that the constitutional guarantees should be applied to same-sex couples as well as opposite-sex couples.

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459. *Id.* at 19.

460. *Id.* at 30-34.

461. *Id.* at 34-39.

462. *Id.* at 15.

463. *Id.* at 39-45.

464. *Id.* at 25 (quoting Saenz v. Roe, 526 U.S. 489, 499 (1999)); *see also id.* at 23-29 (discussing Tennessee petitioners' right to travel argument).

465. *Id.* at 14-15 (citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).

466. *Id.* at 16-17; *see id.* at 45-57 (asserting Tennessee petitioners' justifications for heightened scrutiny).

B. Tennessee Respondents' Arguments

The State of Tennessee argued that same-sex couples who married outside of the state were permissibly stripped of the legal recognition of those marriages because Tennessee traditionally excluded such couples from marriage.[467] Arguing that the Fourteenth Amendment does not require a state to recognize an out-of-state same-sex marriage, the State of Tennessee asserted that states have always had authority under the Constitution not to recognize marriages licensed in other states,[468] that a state is not required to recognize an out-of-state same-sex marriage as a matter of substantive due process,[469] and that a state is not required to recognize an out-of-state same-sex marriage as a matter of equal protection[470] or as the basis of the right to travel.[471]

Arguing in favor of the traditional definition of marriage, Tennessee asserted that its laws should be subject to a rational basis review and that Tennessee's Non-Recognition Laws satisfied a rational basis review.[472] The rationale Tennessee provided to avoid strict scrutiny included: that there was no discrimination on the basis of sex, and that sexual orientation did not trigger heightened scrutiny.[473] Respondents concluded their argument by declaring that States' recognition of same-sex marriage should rightly be left to each state.[474]

C. The Majority Decision

On June 26, 2015, exactly two years to the day of the *Windsor* decision, the United States Supreme Court announced its landmark decision in *Obergefell v. Hodges*.[475] In a 5-4 decision authored by Justice Kennedy and joined by Justices Ginsberg, Breyer, Sotomayor, and Kagan, the Supreme Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and Equal Protection Clause of the

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467. *See* Brief of Respondents [in *Tanco* case], Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-562) (filed March 27, 2015).

468. *Id.* at 10-15.

469. *Id.* at 16-27.

470. *Id.* at 28-33.

471. *Id.* at 33-36.

472. *Id.* at 37-40.

473. *Id.* at 41-46.

474. *Id.* at 46-49.

475. 135 S. Ct. 2584 (2015).

United States Constitution.[476] Finding that state bans on same-sex marriage were an unconstitutional violation of the Fourteenth Amendment, the Court overruled *Baker v. Nelson*[477] and required all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages performed in other jurisdictions.[478] Justice Kennedy's majority opinion began by addressing the liberty interest unconstitutionally affected by state laws and constitutions that both prevented the issuance of marriage licenses to same-sex couples and the recognition of valid out-of-state same-sex marriages:

> The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.[479]

The majority opinion noted that prior to an analysis of "the principles and precedents that govern these cases," it would address the history of marriage—"the subject now before the Court."[480] Noting that "the annals of human history reveal the transcendent importance of marriage," the Court acknowledged the "nobility and dignity" that accompanies the marital status.[481] Not only did the Court address those who hold marriage as a sacred part of their religious faith, but it also addressed those in the secular realm who find meaning in the union:

> Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.[482]

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476. *Id.* at 2602-03.
477. *Id.* at 2605.
478. *Id.* at 2607-08.
479. *Id.* at 2593.
480. *Id.*
481. *Id.* at 2593-94.
482. *Id.* at 2594.

Building on the oral argument discussion surrounding the concept that marriage has existed for "millennia," the majority focused on the "centrality of marriage to the human condition" and that the bonds of marriage "[s]ince the dawn of history," has "transformed strangers into relatives, binding families and societies together."[483] The Court recognized that the history of marriage and the many references through "religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms," address a union between "two persons of the opposite sex."[484]

Acknowledging that "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed,"[485] the *Obergefell* majority addressed whether the same fundamental right to marry rationale that applies to opposite-sex couples should also apply to same-sex couples.[486] In order to make that determination, the Court identified and analyzed four principles, concluding that same-sex couples are entitled to the same fundamental right to marry under the Fourteenth Amendment of the Constitution.[487]

Identifying and discussing these four principles, the majority wrote, "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[488] The "second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[489] The third principle is that the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[490] The fourth and final principle stated by the Court is that case law and national tradition clarify that marriage is "a keystone of our [Nation's] social order."[491]

The Court noted that states contribute to the fundamental nature of the marital relationship by providing legal and social

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483. *Id.*

484. *Id.*

485. *Id.* at 2598.

486. *Id.* at 2598-99.

487. *Id.* at 2599-602.

488. *Id.* at 2599 (noting that "[t]his abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause").

489. *Id.*

490. *Id.* at 2600.

491. *Id.* at 2601.

benefits.[492] Thus, same-sex couples unable to marry in the state they reside in are denied a "constellation of benefits" that the same state has provided to opposite-sex married couples.[493] The Court acknowledged that the petitioners' "immutable nature dictates that same-sex marriage is their only real path to this profound commitment."[494] Addressing the discriminatory nature of the state bans, the Court noted, "It demeans gays and lesbians for the State to lock [same-sex couples] out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[495] Further identifying the history of discrimination and the societal misunderstanding of the gay person as a human being deserving of dignity and equal treatment under the Constitution, the Court clarified, "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[496]

Noting that the Equal Protection and Due Process Clauses are "connected in a profound way" the Court stated, "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other."[497] Noting that the recognition of "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged" the Court, relying on equal protection principles used in the past to strike down laws wrote:

> [T]he 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 respondent 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.[498]

Based on that inequality and the "long history" of discrimination and disapproval of gay people, the Court found that the denial of

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492. *Id.* at 2601-02.
493. *Id.* at 2601.
494. *Id.* at 2594.
495. *Id.* at 2602.
496. *Id.*
497. *Id.* at 2603.
498. *Id.* at 2603-04.

marriage equality "works a grave and continuing harm" and subordinated and disrespected gay citizens.[499] Concluding that "the right to marry is a fundamental right inherent in the liberty of the person," the Court held that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[500]

The majority opinion acknowledged arguments in favor of the democratic process and further legislation, litigation, and debate—but dismissed the position that petitioners should wait to take part in a constitutional right.

> There have been referenda, legislative debates, and grassroots campaigns as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. . . . This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.[501]

The Court agreed that the proper resolution was not in further efforts through state legislative means and the democratic process.[502] Mirroring Judge Daughtrey in the Sixth Circuit Court of Appeals, the majority stated, "[T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."[503]

Invoking the 1986 *Bowers* case, the Court acknowledged that the holding was wrong at the time it was made and that it harmed people both when it happened and afterwards by denying them a fundamental right.[504] Comparing *Bowers* with the 2015 *Obergefell* case, the Court stated, "A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment."[505] Concluding that "the Constitution requires States to recognize same-sex marriages validly performed out of State," the majority announced that since "same-sex couples may [now] exercise the fundamental right to marry in all States . . . there is no lawful basis for a State to refuse to recognize a lawful

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499. *Id.* at 2604.

500. *Id.*

501. *Id.* at 2605.

502. *Id.* at 2605-06 ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.").

503. *Id.* at 2605.

504. *Id.* at 2606 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

505. *Id.*

same-sex marriage performed in another State on the ground of its same-sex character."[506]

Less than three decades after the *Bowers* Court upheld the constitutionality of a Georgia statute criminalizing consensual same-sex adult intimacy,[507] the *Obergefell* Court reversed the Sixth Circuit and held that same-sex couples had a constitutional right to marry and to have valid out-of-state marriages recognized.[508] Not only did the majority acknowledge the dignity of the same-sex couples and their constitutional entitlement to enjoy in the "rights and responsibilities intertwined with marriage,"[509] the Court also addressed the children of those couples and the harms they suffered as a result of same-sex marriage bans and anti-recognition laws:

> Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[510]

D. The Dissents

While the Court's majority opinion effectively nullified all state laws that barred same-sex unions or denied recognition to legally valid same-sex unions performed in equality states, the final ruling was far from unanimous. Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito all authored individual dissents. Each expressed concern over the Court's majority holding, including how the decision was reached and its future implications.

Chief Justice Roberts, joined by Justices Scalia and Thomas, made a substantive case that there is no explicit right to marry in the Constitution, but it is a fundamental right inferred into the guarantees of Due Process and Equal Protection under the Fourteenth Amendment.[511] Stating that "[t]he majority's decision is an act of will, not legal judgment," Roberts analogized the *Obergefell*

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506. *Id.* at 2607-08.
507. *Bowers*, 478 U.S. 186.
508. *Obergefell*, 133 S. Ct. at 2604-08.
509. *Id.* at 2606.
510. *Id.* at 2600-01.
511. *See id.* at 2611-26 (Roberts, C.J., dissenting).

opinion to *Lochner v. New York*.[512] He further argued that the democratic process was the proper method for implementing, or not implementing, same-sex marriages state by state.[513] Accusing the majority of "clos[ing] the debate and enact[ing] their own vision of marriage as a matter of constitutional law," Roberts predicted that taking the issue out of the democratic process would "cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."[514]

Justice Scalia, joined in his dissent by Justice Thomas, called the decision a "threat to American democracy."[515] Stating that "[t]he substance of today's decree is not of immense personal importance to me," Scalia diminished the majority's holding, the immense constitutional importance of both Article III judges and the Supreme Court justices, and the role of the United States Supreme Court: "It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."[516] Scalia's remarks demoted the position and significance of every Justice on the Court to a mere "nine lawyers" in disagreement. The "Ruler" Scalia writes of is actually the majority members on the United States Supreme Court, an Article III interpreter of the United States Constitution.

Justice Thomas, joined in his dissent by Justice Scalia, referred to the majority opinion as, "the dangerous fiction of treating the Due Process Clause as a font of substantive rights."[517] Arguing that liberty is "freedom from government action, not entitlement to government benefits," Thomas accused the majority of "invok[ing] our Constitution in the name of a 'liberty' that the Framers would not have recognized, to the detriment of the liberty they sought to protect."[518] Addressing the dignity interest, Thomas asserted that "the Constitution contains no 'dignity' Clause, and even if it did, the government would be incapable of bestowing dignity."[519] Further expressing his disagreement with the majority and asserting that the decision distorted the Nation's founding principles, Thomas

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512. *Id.* at 2612 (Roberts, C.J., dissenting) (citing Lochner v. New York, 198 U.S. 45 (1905)).

513. *Id.* at 2611-12 (Roberts, C.J., dissenting).

514. *Id.* at 2612 (Roberts, C.J., dissenting).

515. *Id.* at 2626 (Scalia, J., dissenting).

516. *Id.* at 2626-27 (Scalia, J., dissenting).

517. *Id.* at 2631 (Thomas, J., dissenting).

518. *Id.* (Thomas, J., dissenting).

519. *Id.* at 2639 (Thomas, J., dissenting).

expressed that "the government cannot bestow dignity, and it cannot take it away."[520]

Justice Alito, joined by Justices Scalia and Thomas, predicted that the majority opinion would be "used to vilify Americans who are unwilling to assent to the new orthodoxy."[521] Asserting that the majority opinion "usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage," Alito alleged an "abuse of its authority" by the majority.[522] Dismissing the constitutional arguments of the petitioners, Alito instead declared that the majority decision evidenced a lack of "judicial self-restraint and humility" in a desire to reach "a noble end by any practicable means."[523]

Although the four dissenters, for differing reasons, expressed that the *Obergefell* decision was wrongly decided, the five justices in the majority were all that was needed to reverse the Sixth Circuit, officially overrule *Baker*, and bring marriage equality to the entire nation. On June 26, 2015, in the landmark civil rights case, marriage equality and recognition officially became the law of the land.

XI. IMMEDIATE IMPACT IN TENNESSEE—IMPLEMENTING THE *TANCO* DECISION

The effect of the *Obergefell/Tanco* decision in Tennessee was immediate and substantial. Within approximately ninety minutes after the decision was announced, the Attorney General and the Governor of Tennessee issued a statement expressing bitterness with the case outcome, but acknowledging that the Supreme Court "has spoken and we respect its decision."[524] They went on to make clear that the State would not attempt to block marriages and gave county clerks across the state the green light to issue marriage licenses to same-sex couples.[525] The Attorney General advised clerks

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520. *Id.* (Thomas, J., dissenting).

521. *Id.* at 2642 (Alito, J., dissenting).

522. *Id.* at 2642-43 (Alito, J., dissenting).

523. *Id.* at 2643 (Alito, J., dissenting).

524. Dave Boucher, *Gay Marriage: Tennessee Reacts to Landmark Decision*, TENNESSEAN (June 26, 2015, 2:25 PM), http://www.tennessean.com/story/news/2015/06/26/reaction-supreme-court-gay-marriage-case/29271663/.

525. Stacey Barchenger, *Gay Marriage: TN Plaintiffs Proud of Court's Decision*, TENNESSEAN (June 27, 2015, 9:34 AM), http://www.tennessean.com/story/news/2015/06/26/supreme-court-gay-marriage/29263767/.

to follow the decision and said that his "best advice in these instances is pretty simple: do not discriminate."[526]

By noon on June 26, 2015, clerks all across Tennessee were receiving calls from same-sex couples that wanted to marry. The Robertson County Clerk stated she was waiting for guidance from the state as to the "effective date" of the ruling, and the Montgomery County Clerk said that she would start issuing licenses as soon as the Attorney General told her "the effective date."[527] The first same-sex marriage license in Tennessee was issued in Shelby County around 11:30 a.m. on June 26, 2015.[528] Within four hours of the ruling, Davidson County issued its first marriage licenses and Mayor Megan Barry (then Councilwoman-at-Large and Mayoral candidate) had officiated at the first same-sex wedding at the Clerk's office.[529] In addition, more than half the counties in Tennessee issued same-sex marriage licenses the day of the decision—and twenty-four same-sex marriage licenses were issued in Davidson County alone.[530] It has been estimated that 200 same-sex couples all across Tennessee got married on the Friday that the decision was issued.[531]

In Chattanooga, the Hamilton County Clerk announced that he would issue licenses immediately and added that the clerk's role regarding marriage licenses was simply "administrative" and that clerks "don't have the ability to choose which duties to perform."[532] By Monday, June 29, 2015, Knoxville Mayor Madeline Rogero decided to light up the Henley Bridge in Knoxville in a rainbow of light, the same as was done at the White House, the Empire State

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526. *Id.*

527. Nicole Young, *State AG's Office to Counties: Start Issuing Marriage Licenses to Same-sex Couples*, TENNESSEAN (June 26, 2015, 1:04 PM), http://www.tennessean.com/story/news/Local/robertson/2015/06/26/state-ags-office-counties-start-issuing-sex-marriage-licenses/29341039.

528. Katie Fretland, *Supreme Court Rules Same-Sex Marriage is Constitutional Right, Weddings Proceed in Memphis*, COMMERCIAL APPEAL (June 26, 2015), http://www.commercialappeal.com/news/government/supreme-court-rules-same-sex-marriage-is-constitutional-right-weddings-proceed-in-memphis-ep-1154066-324377761.html.

529. Barchenger, *supra* note 525.

530. *Id.*

531. Andy Sher, *So, Say You're a Gay Couple and You Want Gov. Haslam to Perform Your Marriage Ceremony . . .*, CHATTANOOGA TIMES FREE PRESS (June 28, 2015), http://www.timesfreepress.com/news/local/story/2015/jun/28/so-say-youre-gay-couple-and-you-want-gov-hasl/311892/.

532. Andy Sher et al., *Gay Marriage Decision Prompts Celebration, Resistance in Chattanooga*, CHATTANOOGA TIMES FREE PRESS (June 27, 2015), http://www.timesfreepress.com/news/local/story/2015/jun/27/gay-marriage-decisiprompts-celebration-resist/311813/.

Building, and Cinderella's Castle at Disney World in Orlando, Florida.[533] By that Monday afternoon, only the second business day after the ruling, more than ninety percent of Tennessee counties had confirmed that they were issuing licenses to same-sex couples.[534]

There were also some signs of resistance in Tennessee. After the decision was issued, the Wayne County Clerk said that his office would get out of the marriage business altogether and would stop issuing marriage licenses, regardless of the sexual orientation of the couples.[535] In August, the Chancery Court for Hamilton County refused to award a divorce to an opposite-sex couple—after a four-day trial—ruling that the *Obergefell* decision removed his authority to decide divorces.[536] The Washington Post described his actions as "the judicial equivalent of a high school student tearing up his term paper because he got a bad grade" or "more accurately, throwing it back at his teacher and telling her to revise it herself."[537] Chancellor Jeffery Atherton wrote:

> The Tennessee Court of Appeals has noted that *Obergefell v. Hodges*, . . . affected what is, and must be recognized as, a lawful marriage in the State of Tennessee. This leaves a mere trial level Tennessee state court judge in a bit of a quandary. With the U.S. Supreme Court having defined what must be recognized as a marriage, it would appear that Tennessee's judiciary must now await the decision of the U.S. Supreme Court as to what is *not* a marriage, or better stated, when a marriage is *no longer* a marriage.[538]

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533. Chuck Campbell, *Henley Bridge Gets Rainbow-lit for Marriage Equality*, KNOXVILLE NEWS SENTINEL (June 30, 2015), http://www.knoxnews.com/entertainment/pop-culture/henley-bridge-gets-rainbow-lit-for-marriage-equality-ep-116 6054017-362161781.html.

534. M.J. Slaby, *No Rush as Local Same-Sex Couples Start to Apply for Marriage Licenses*, KNOXVILLE NEWS SENTINEL (June 30, 2015), http://www.knoxnews.com/news/local/no-rush-as-local-same-sex-couples-start-to-apply-for-marriage-licenses-ep-11 65957135-362162051.html.

535. Sher, *supra* note 532.

536. *See* Bumgardner v. Bumgardner, No. 14-0626 (Hamilton Cty. Ch. Ct. Aug. 28, 2015).

537. Michael E. Miller, *Tenn. Judge Refuses to Grant Straight Couple a Divorce Because . . . Gay Marriage*, WASHINGTON POST (Sept. 4, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/04/tenn-judge-refuses-to-grant-straight-couple-a-divorce-because-of-gay-marriage/.

538. *Bumgardner*, No. 14-0626, at 3-4 (citations omitted).

After significant publicity, mostly negative, the chancellor reversed himself a few weeks later and granted the divorce.[539] On December 18, 2015, he was also publicly reprimanded by the Tennessee Board of Judicial Conduct.[540]

Similarly, in Blount County, the County Commission introduced a resolution seeking protection from "God's wrath" because of the *Obergefell* decision "that both slams the Supreme Court and begs for God to spare the county when He eventually . . . destroys America over same sex marriage."[541] Also during the fall of 2015, Representative Mark Pody and Senator Mae Beavers, both Tennessee Republicans, filed the so-called "Tennessee Natural Marriage Defense Act" in the Tennessee legislature, seeking to have Tennessee law continue to define marriage as only between one man and one woman, regardless of the requirements of the United States Constitution as interpreted by the United States Supreme Court.[542]

Six months after the ruling, however, the sky has not fallen in, and "God's wrath" has not descended on Tennessee or any other part of the country as a result of the *Obergefell* ruling.[543] Marriages, both same- and opposite-sex, as well as divorces, continue to happen all over the state without any chaos, confusion, or problems.

XII. FUTURE ISSUES IN TENNESSEE POST-*TANCO*

The *Obergefell/Tanco* decision was a huge step forward for equal treatment of lesbians and gay men under the United States Constitution—but, like other landmark civil rights cases, it did not end discrimination or change all minds.[544] Same-sex couples are

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539. Zack Peterson, *Judge Who Cited Gay Marriage Ruling Grants Signal Couple a Divorce After All*, CHATTANOOGA TIMES FREE PRESS (Sept. 20, 2015), http://www.timesfreepress/news/local/story/2015/sep/20/judge-who-cited-gay-marriage-ruling-grants-si/326115/.

540. *See* Letter from Christ Craft, Bd. Chair of the Tenn. Bd. of Judicial Conduct, to Jeffrey Atherton, Chancellor of Hamilton Cty., Tenn. (Dec. 18, 2015), *available at* http://www.tba.org/sites/default/files/letterofreprimand_atherton_123015.pdf.

541. Doug Criss, *Tennessee County Seeks Protection from 'God's Wrath' over Same-Sex Marriage*, CNN (Oct. 6, 2015, 9:55 AM), http://www.cnn.com/2015/10/06/us/tennessee-blount-county-same-sex-resolution/.

542. *See* Dave Boucher, *Lawmakers File 'Tennessee Natural Marriage Defense Act,'* TENNESSEAN (Sept. 17, 2015, 5:10 PM), http://www.tennessean.com/story/news/politics/2015/09/17/lawmakers-file-tennessee-natural-marriage-defense-act/32570645 /.

543. *See* Criss, *supra* note 541.

544. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954). Although the Supreme Court held that "separate but equal" schools violated the guarantee of equal protection in the United States Constitution—public schools segregated by race continued into the late 1960s, fifteen years after the Supreme Court held them to be

marrying—and divorcing—all across Tennessee, but implementation issues continue. The "devil is in the details" certainly applies to this significant clarification of the law.

Issues have already arisen regarding the State-generated forms for divorce, adoption, and other matters. The issue of how to address the parties when they are not "husband and wife," but rather wife and wife or husband and husband, has vexed many courts and litigants. Should forms be changed to say "spouse one" and "spouse two"? Should forms use a dual term that embraces both same- and opposite-sex couples, like "Husband/Spouse One" or "Wife/Spouse Two"? The same issue exists for adoption forms—should they say "parent one" and "parent two" or use some dual term to recognize both types of parents? There are not yet answers to these questions, but various groups are investigating and evaluating how to resolve them. For instance, the LGBT Section of the Tennessee Bar Association (TBA) proposed a resolution ("Proposed Recommendation") to the TBA to adopt as its official policy to ask the Tennessee Administrative Office of the Courts to review all Tennessee laws, regulations, rules, and forms to ensure that they are consistent with the mandate of *Obergefell/Tanco*.[545] At the January 2016 meeting of the House of Delegates, a majority of the Board approved the Proposed Recommendation with amended language to Paragraph One.[546]

In addition, despite the clarity of the basic ruling in *Obergefell* and the well-established meaning of the Supremacy Clause of the United States Constitution, scattered resistance continues in some parts of the state, mostly in rural areas.[547] Resolutions resisting the *Obergefell* decision continue to be introduced—and even passed—in various county commissions. These resolutions ask the Tennessee General Assembly to enforce the definition of marriage in the Tennessee Constitution limiting marriage to one man and one woman, despite the United States Supreme Court's ruling that such

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unconstitutional.

545. *See* Tennessee Bar Association, Lesbian, Gay, Bisexual and Transgender (LGBT) Section, Proposed Recommendation, *available at* http://www.tba.org/sites/default/files/LGBT%20Section%20Policy%20Recommendation_0.pdf.

546. *See* Report and Recommendation of LGBT Section on TBA Policy (on file with author).

547. *See, e.g.*, Tom Humphrey, *Legislator Suggests Eliminating State Marriage Licenses*, KNOXVILLE NEWS SENTINEL (Dec. 28, 2015), http://www.knoxnews.com/news/politics/legislator-suggests-eliminating-state-marriage-licenses-27e7712a-fb2e-3f20-e053-0100007f4e19-363591361.html (discussing a Tennessee state representative's proposal to eliminate issuance of marriage licenses altogether and revert back to a common-law state on marriage).

a definition is unconstitutional. The resolutions also ask the Tennessee General Assembly to refuse to accept the Supreme Court's "lawless" opinion in *Obergefell* as "a binding precedent for any parties other than those involved" in that case—even though there is no legal authority for allowing individual states to nullify binding precedent of the United States Supreme Court.[548] Such a resolution was actually passed in Johnson County and has been introduced in other Tennessee counties.[549]

Even with the tremendous step forward taken by the *Obergefell/Tanco* decision, in terms of completing the transition from viewing lesbians and gay men as "deviant" or "criminal" to full-fledged citizens entitled to equal treatment and equal respect under the law, discrimination continues and much more needs to be done. For example, in Tennessee, a same-sex couple can now legally marry but can still be fired from their jobs, in most instances, simply because they are gay since there are not yet any statutory protections from discrimination based on sexual orientation under either federal or Tennessee law (discrimination based on sexual orientation is not covered by the Civil Rights Act of 1964, and twenty-eight states—including Tennessee—still have no statewide protections against discrimination based on sexual orientation or gender identity).[550]

Obergefell/Tanco was a major civil rights victory—but like other such victories, full implementation and full acceptance will take time.

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548. Sue Guinn Legg, *Unicoi County Advances Resolution Opposing Gay Marriage*, JOHNSON CITY PRESS (Dec. 29, 2015, 10:09 AM), http://www.johnsoncitypress.com/Local/2015/12/28/Unicoi-County-to-draft-resolution-opposing-gay-marriage.html?ci=featured&lp=2&ti=.

549. *Id.*

550. *See* Jennifer Calfas, *Employment Discrimination: The Next Frontier for LGBT Community*, USA TODAY (Aug. 1, 2015, 7:49 AM), http://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/.

CONCLUSION

As the fourth Supreme Court opinion authored by Justice Kennedy that advanced LGBT rights, the *Obergefell* ruling furthered Justice Kennedy's legacy as a champion of full equality for gay and lesbian people.[551] The majority opinion's penultimate paragraph affirms the dignity, respect, and humanity finally afforded to gay individuals. Those same citizens who were, less than three decades earlier, referred to and treated as deviant or as criminals,[552] were finally afforded the dignity they deserve:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.
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> The judgment of the Court of Appeals for the Sixth Circuit is reversed.
>
> *It is so ordered.*[553]

"It is so ordered." And, indeed, it is.

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551. *See* United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

552. *See supra* notes 5-7 and accompanying text.

553. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).