

## SAME-SEX MARRIAGE AND DUE PROCESS TRADITIONALISM

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### INTRODUCTION

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution provide that the federal and state governments shall not deprive persons of life, liberty, or property without due process of law.<sup>1</sup> More than a guarantee of procedural due process, it is now well settled that a “substantive component” of the clauses protects “individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them.’”<sup>2</sup> Government cannot “infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>3</sup> Substantive due process<sup>4</sup> law and doctrine are thus established (but, for some, controversial) features of constitutional law.<sup>5</sup> In a recent ruling, the Sixth Cir-

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1. See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”); *id.*, amend. XIV § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law”).

2. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

3. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

4. “Substantive due process” is a phrase “that borders on oxymoron.” AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 119 (2012); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (“[S]ubstantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”).

5. See *McDonald v. City of Chicago*, 561 U.S. 742, 811, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring in part and concurring in the judgment) (“The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.”); see also PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 147 (1982) (“Substantive due process is not a function of politically ag-

cuit rejected a challenge to anti-same-sex marriage laws and held, among other things, that the Due Process Clause did not provide or protect a fundamental right to marry a person of the same sex.<sup>6</sup>

Do state constitutional provisions and statutes prohibiting same-sex marriage infringe on a fundamental liberty interest protected by the Due Process Clause? In three recent decisions, the United States Courts of Appeals for the Fourth and Tenth Circuits answered that question in the affirmative.<sup>7</sup> In each case, a majority of a three-judge panel determined that the claimed right to same-sex marriage was fundamental and that the state's ban of such marriages did not withstand strict scrutiny judicial review.<sup>8</sup> This construction of the Due Process Clause prevailed over dissenting judges' determinations that the asserted right to same-sex marriage was not fundamental because such marriage was not deeply rooted in the nation's history and tradition, and was not implicit in the concept of ordered liberty.<sup>9</sup>

In the aforementioned appeals courts' rulings one finds an interpretative disagreement also found in the Supreme Court of the United States' substantive due process decisions. Over the years the Court and individual Justices have debated the pertinent framing of a particular due process claim and the level of generality governing the judicial inquiry into the constitutionality of the governmental action at issue.<sup>10</sup> As a judge enjoys discretion in framing the due process inquiry and in choosing the appropriate generalization to characterize a right,<sup>11</sup> the framing and generali-

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gressive judges who have lost their heads and are acting as would-be legislators, abandoning any sense of judicial self-restraint. Rather, the doctrine is the necessary product of the superimposition onto a state system of *plenary* authority, of a federal court system committed to preserving those individual liberties that animated the *limited* federal Constitution.”).

6. Deboer v. Snyder, 2014 U.S. App. LEXIS 21191, at \*55 (6th Cir. Nov. 6, 2014).

7. See *infra* Part IV.A; Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); Bishop v. Smith, 760 F.3d 1070, 1096 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); Kitchen v. Herbert, 755 F.3d 1193, 1199 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

8. See Bostic, 760 F.3d at 377–84; Bishop, 760 F.3d at 1079; Kitchen, 755 F.3d at 1218–19.

9. See Bostic, 760 F.3d at 385 (Niemeyer, J., dissenting); Bishop, 760 F.3d at 1109, 1112–13 (Kelly, J., dissenting); Kitchen, 755 F.3d at 1234 (Kelly, J., dissenting).

10. See Patrick S. Shin, *Discrimination Under a Description*, 47 GA. L. REV. 1, 33–34 & n.105–06, 36 & n.114 (2012).

11. *Id.* at 33.

ty determinations can be outcome-influential, if not outcome-determinative.<sup>12</sup>

For example, in *Bowers v. Hardwick* the Court narrowly framed the due process issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”<sup>13</sup> Thereafter, in *Lawrence v. Texas*, the Court framed the question in a case challenging state-law criminalization of same-sex intimate conduct more broadly: “[W]hether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause.”<sup>14</sup> *Lawrence* concluded that *Bowers*’ framing revealed the Court’s inability to perceive the extent of the threatened liberty interest.<sup>15</sup> As can be seen, the framing of the claimed right—which can be influenced by an interpreter’s value choices and objectives—is a critical descriptive and normative matter.<sup>16</sup>

How should the asserted right to same-sex marriage be framed and characterized? Consider the Tenth Circuit’s *Kitchen v. Herbert* decision, wherein the majority opinion asked “whether the liberty interest protected in this case includes the right to marry, and whether that right is limited . . . to those who would wed a person of the opposite sex.”<sup>17</sup> The dissenting judge asked a different question, which he also answered in the negative: whether the claimed right to same-sex marriage was deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty.<sup>18</sup> Asking whether a man who wishes to marry a man, or a woman who seeks to marry a woman, has the same right to marry enjoyed by opposite-sex couples is critically different from the narrower question of whether marrying a person of

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12. See generally Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 846–47 (2013) (discussing the discretionary nature of traditionalist methodology as employed by Supreme Court Justices and federal appeals court judges).

13. 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

14. 539 U.S. at 564.

15. *Id.* at 567 (citing *Bowers*, 478 U.S. at 190).

16. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73 (1991).

17. 755 F.3d 1193, 1208 (10th Cir. 2014).

18. See *id.* at 1230, 1234 (Kelly, J., dissenting).

the same sex is a right already recognized in the nation's history and tradition.<sup>19</sup> The significance of the chosen framings for the analysis and resolution of the same-sex marriage issue is manifest, since the results of any fundamental rights inquiry rests completely on the characterization of the rights in question.<sup>20</sup> It is thus not surprising that the *Kitchen* majority struck down and that the dissent would have upheld the challenged laws.<sup>21</sup>

This article examines the role that tradition and traditionalism have long played, and continue to play, in the Supreme Court's substantive due process jurisprudence, and considers the implications of due process traditionalism<sup>22</sup> for judicial resolution of cases presenting due process challenges to state prohibitions of same-sex marriage.<sup>23</sup> Part I considers the ways in which tradition—

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19. *Latta v. Otter*, No. 14-35420, 2014 WL 4977682, at \*12 (9th Cir. Oct. 7, 2014) (Reinhardt, J., concurring).

20. See Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1490 (2008).

21. 755 F.3d at 1199 (holding that the Due Process Clause allows couples of the same sex to have the same fundamental rights as couples of the opposite sex who wish to marry); *id.* at 1230 (Kelly, J., dissenting) (stating that the fundamental right to marry does not extend to same-sex couples).

22. See CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 93–96 (2009) (discussing “due process traditionalism” and the justifications for this approach).

23. This article focuses on due process and same-sex marriage. *Baskin v. Bogan* sets out an equal protection analysis where Judge Richard Posner, writing for a unanimous three-judge panel, concluded that Indiana's and Wisconsin's same-sex marriage bans violate the Equal Protection Clause as they

discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously.

766 F.3d. 648, 656–57 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014). Accordingly, the “discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny, which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases.” *Id.* at 656. Having decided the matter on equal protection grounds, Judge Posner did not engage the plaintiffs' additional argument that the states' bans violate a fundamental right protected by the Due Process Clause. *Id.* at 656–57. The plaintiffs contended “that the right to choose whom to marry is indeed a fundamental right;” the states argued that the Supreme Court has recognized the right to marry in cases wherein the right to choose involved a choice “within the class of persons eligible to marry, thus excluding children, close relatives, and persons already married—and, the states contended, persons of the same sex.” *Id.* at 657 (citing *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990); *Zablocki v. Redhail*, 434 U.S. 374, 385–86 (1978)). The plaintiffs responded that the “good reasons for ineligibility to marry children, close relatives, and the already married” do not apply to same-sex couples who wish to marry. *Id.* at 657; see also *Latta*, 2014 WL 4977682, at \*1 (holding that Idaho and Nevada prohibitions of same-sex marriage violate the Equal Pro-

understood as the label for the accumulated practices that we no longer scrutinize and that we accept without question<sup>24</sup>—has long been a factor referenced by the Court and individual Justices in substantive due process cases.<sup>25</sup> Part II focuses on due process traditionalism. More than a reference to tradition, this methodology interprets and applies the Constitution “in accordance with the long-standing and evolving practices, experiences, and tradition of the nation.”<sup>26</sup> Burkean in its foundation, traditionalism looks for answers to contemporary legal questions in history and tradition.<sup>27</sup> As Part II discusses, the identification and application of the pertinent and operative tradition and history has been the subject of a longstanding, ongoing, and important debate among the Justices. Part III turns to traditionalism and the Court’s sexual orientation jurisprudence. It examines the Court’s decisions in *Bowers* and *Lawrence* and its invalidation of a provision of the federal Defense of Marriage Act in *United States v. Windsor*.<sup>28</sup>

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tection Clause). See generally Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281 (2011) (discussing that tradition is sufficient justification to uphold discriminatory laws such as the ban on same-sex marriage when challenged under the Equal Protection Clause); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014) (examining the jurisprudential implications of due process and equal protection in same-sex marriage).

24. David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1036 (1991).

25. See generally Ronald J. Krotoszynski, Jr., *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923 (2006) (discussing the Supreme Court’s inconsistent use of the tradition test as applied to fundamental rights and proposing state counting as a means of defining “tradition”).

26. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133 (1998).

27. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 81 (Frank M. Turner ed., 2003). Burke cautioned that current generations should not ignore the past

lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it among their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society. . . . By this unprincipled facility of changing the state as often, and as much, and in as many ways, as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.

*Id.*

28. *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2696 (2013) (holding that the Defense of Marriage Act is invalid); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (stating that the word “liberty” in the Fifth and Fourteenth Amendments takes down oppressive laws); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that the

With the backdrop of the preceding parts in mind, Part IV examines the Fourth and Tenth Circuits' recent decisions striking down anti-same-sex-marriage laws in Virginia, Oklahoma, and Utah, and the Sixth Circuit's validation of such laws in Kentucky, Michigan, Ohio, and Tennessee. It also explores the ways in which the judicial framing and description of the claimed liberty interest play a critical role in the outcomes reached by those courts. Part V concludes with brief closing remarks and predicts that a majority of the current Court will someday conclude that same-sex couples have the same fundamental right to marry enjoyed by opposite-sex couples.

## I. TRADITION

Being cognizant of tradition means being aware of established structures of social life and conventions as communicated to others who may accept these structures or conventions without question.<sup>29</sup> Sources of tradition include laws, government practices, and even statements by persons that claim to represent social mores.<sup>30</sup> For a traditionalist, "one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed . . . over time."<sup>31</sup>

This part surveys the Supreme Court's references to, and uses of, traditions in substantive due process cases.

### A. *Early Cases*

The Supreme Court and the individual Justices have referred to and relied upon tradition in substantive due process cases challenging certain governmental conduct.<sup>32</sup> For example, in the infamous *Dred Scott v. Sandford* decision (the cradle of substantive due process),<sup>33</sup> the Court looked to history and tradition as it con-

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morality of homosexuality is inadequate to invalidate anti-sodomy laws).

29. J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 85 (1998).

30. Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 181–82 (1993).

31. David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 891 (1996).

32. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 192 (1996) ("[I]t is traditional for Supreme Court Justices to rely on tradition. . . .").

33. Cass R. Sunstein, *The Dred Scott Case: With Notes on Affirmative Action, The*

cluded that enslaved persons of African descent and their progeny were not, and could not, be citizens under the meaning of the Constitution.<sup>34</sup> The Court relied on several instruments including the relevant histories and legislation at the time, the language provided in the Declaration of Independence, and the public history of European States.<sup>35</sup> The Court declared that blacks had long been viewed in an inferior light, unfit to affiliate with whites, either socially or politically; so inferior, that they lacked any rights that whites must respect.<sup>36</sup> During this period, this view was “fixed and universal in the civilized portion of the white race [and was] regarded as an axiom in morals as well as in politics.”<sup>37</sup>

Court decisions addressing discrimination against women also referenced traditional and discriminatory views. In *Bradwell v. State*, the Court held that the state of Illinois did not violate the Fourteenth Amendment when it denied a married woman the right to practice law.<sup>38</sup> Concurring Justice Joseph Bradley argued that the inherent timidness of women rendered them unfit for a number of occupations and that the “family organization . . . founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”<sup>39</sup> A woman’s “paramount destiny and mission” was “to fulfil [*sic*] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things.”<sup>40</sup> In *Muller v. Oregon* the Court upheld the conviction of an employer for violating a state law by allowing a female employee to work more than ten hours in one day.<sup>41</sup> The Court stated that “history discloses the fact that woman has always been dependent upon man [and must] look to him for pro-

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*Right to Die & Same-Sex Marriage*, 1 GREEN BAG 2D 39, 40 (1997), available at [http://www.greenbag.org/v1n1/v1n1\\_sunstein.pdf](http://www.greenbag.org/v1n1/v1n1_sunstein.pdf); see also AMAR, *supra* note 4 (noting that *Dred Scott* is one of the “most notorious” Supreme Court opinions).

34. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857).

35. *Id.* at 407.

36. *Id.*

37. *Id.*

38. 83 U.S. (16 Wall.) 130, 139 (1872).

39. *Id.* at 141 (Bradley, J., concurring).

40. *Id.* at 141–42.

41. 208 U.S. 412, 418, 423 (1908).

tection.”<sup>42</sup> The state was therefore justified in enacting legislation to safeguard women from “the greed [and] the passion” of men.<sup>43</sup>

Consider the tradition referent and criminal law proceedings. *Twining v. New Jersey* rejected the argument that the Fifth Amendment’s exemption from compulsory self-incrimination was one of the fundamental rights that the Fourteenth Amendment safeguarded against state action.<sup>44</sup> Noting that “[f]ew phrases of the law are so elusive of exact apprehension” as the Due Process Clause, the Court declared that what constitutes

due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>45</sup>

The self-incrimination privilege, according to the *Twining* Court, “has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law.”<sup>46</sup>

*Snyder v. Massachusetts*, holding that a defendant’s presence at a jury view of a crime scene was not a constitutionally protected right, opined that a state was “free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>47</sup> In *Palko v. Connecticut* the Court held that the privilege against double jeopardy was not applicable to the states via the Due Process Clause.<sup>48</sup> Speaking for the Court, Justice Benjamin Nathan Cardozo asked whether the claimed privilege was “implicit in the concept of ordered liberty.”<sup>49</sup> He wrote that due process protects only those rights making up “the

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42. *Id.* at 421–22.

43. *Id.* at 422.

44. 211 U.S. 78, 99 (1908), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964).

45. *Id.* at 99–100.

46. *Id.* at 113.

47. 291 U.S. 97, 105 (1934).

48. 302 U.S. 319, 328 (1937), *overruled* by *Benton v. Maryland*, 395 U.S. 784 (1969).

49. *Id.* at 324–25.



very essence of a scheme of ordered liberty” such that “neither liberty nor justice would exist if they were sacrificed.”<sup>50</sup> As the immunity from compulsory self-incrimination could be sacrificed without affecting justice, the asserted privilege was not ranked as fundamental.<sup>51</sup> As this article demonstrates, *Snyder’s* rooted-in-tradition formulation and *Palko’s* concept-of-ordered-liberty approach are important components of one variation of contemporary due process traditionalism.<sup>52</sup>

Plaintiffs’ tradition-based substantive due process challenges to state regulation of educational and parental control matters prevailed in *Meyer v. Nebraska*<sup>53</sup> and *Pierce v. Society of Sisters*.<sup>54</sup> *Meyer* struck down a Nebraska law prohibiting the teaching of a foreign language to students who had not passed the eighth grade.<sup>55</sup> The Court noted that liberty

denotes 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.<sup>56</sup>

The Court concluded that the statute at issue deprived students of the liberty and right to learn a foreign language, noting that Americans have always esteemed education and learning as matters of great importance, requiring diligent promotion.<sup>57</sup>

In *Pierce*, the Court applied *Meyer* in holding that an Oregon statute requiring public school attendance by children between the ages of eight and sixteen “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>58</sup> Liberty “excludes any

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50. *Id.* at 325–26.

51. *Id.* at 325.

52. *See supra* notes 47–49 and accompanying text.

53. 262 U.S. 390 (1923).

54. 268 U.S. 510 (1925).

55. 262 U.S. at 396–97, 403.

56. *Id.* at 399.

57. *Id.* at 400.

58. 268 U.S. at 531, 534–35 (citing *Meyer*, 262 U.S. at 401–03).

general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”<sup>59</sup>

### B. *The 1960s*

In the 1960s the Court referenced tradition as it considered lawsuits alleging that state laws criminalizing certain reproductive practices and choices violated the Due Process Clause.

*Poe v. Ullman* accepted for review, and then dismissed as not justiciable, a challenge to a Connecticut statute making it a crime to use or give medical advice concerning the use of contraceptives.<sup>60</sup> Dissenting, Justice John Marshall Harlan II set out his view of the meaning of the clause.<sup>61</sup> According to Justice Harlan, “The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”<sup>62</sup> This balance “is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. *That tradition is a living thing.*”<sup>63</sup> Justice Harlan cautioned that judges should not venture into the realm of “unguided speculation”<sup>64</sup> and “may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function.”<sup>65</sup> He also made clear his view that there could be no substitute for judgment and restraint in this area<sup>66</sup> and his recog-

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59. *Id.* at 535. The Court, referencing *Meyer* and *Pierce*, has noted that “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *see also* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“[T]he ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one’s children”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

60. 367 U.S. 497, 497–98, 508–09 (1961).

61. *Id.* at 542 (Harlan, J., dissenting).

62. *Id.*

63. *Id.* (emphasis added).

64. *Id.* at 542.

65. *Id.* at 544 (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)).

66. *Id.* at 542.

dition of “considerations deeply rooted in reason and in the compelling traditions of the legal profession.”<sup>67</sup>

The Court subsequently invalidated the Connecticut anti-contraceptive use statute in *Griswold v. Connecticut*.<sup>68</sup> The Court held that the law intruded on the right of marital privacy located in the “penumbras” of the Bill of Rights “formed by emanations from those guarantees that help give them life and substance.”<sup>69</sup> The Court observed that marriage was an institution “older than the Bill of Rights” and “an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”<sup>70</sup> Joining the Court’s opinion and relying on the Ninth Amendment,<sup>71</sup> Justice Arthur Goldberg argued that judges should look to tradition and the collective conscience of the American people when determining whether a principle is to be considered a fundamental right.<sup>72</sup> Justice Hugo Black found the statute “abhorrent, just viciously evil, but not unconstitutional.”<sup>73</sup> “I like my privacy as well as the next one,” he wrote, “but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”<sup>74</sup> It was not “the duty of this Court to keep the Constitution in tune with

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67. *Id.* at 545 (quoting *Rochin*, 342 U.S. at 171). Interestingly, Justice Harlan would not have provided due process protection against state laws disapproving of certain sexual conduct. He argued that society was traditionally concerned with the “moral soundness of its people” and believed that “to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.” *Id.* at 546. In his view, laws regarding marriage and prohibiting sexual intimacies between persons of the same sex, fornication, and adultery “form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.” *Id.*

68. 381 U.S. 479, 480, 485–86 (1965).

69. *Id.* at 484 (noting that zones of privacy are created by the First, Third, Fourth, Fifth, and Ninth Amendments).

70. *Id.* at 486; *see also* *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons violates the Equal Protection Clause).

71. *See* U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

72. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

73. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 557 (1st ed. 1994).

74. *Griswold*, 381 U.S. at 510 (Black, J., dissenting).

the times.”<sup>75</sup> Justice Black argued that the makers of the Constitution saw a need for revision and provided for it in the Article V amendment procedures.<sup>76</sup> He further opined that this method of change was “good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.”<sup>77</sup>

*Loving v. Virginia* considered the right of different-race couples to marry.<sup>78</sup> Virginia law prohibited and criminalized only interracial marriages involving white persons.<sup>79</sup> The state argued that its law was grounded in the contention that “for over 100 years, since the Fourteenth Amendment was adopted, numerous states—as late as 1956, the majority of the states—and now even 16 states, have been exercising [the] power [to prohibit interracial marriages] without any question being raised as to the authority of the state to exercise this power.”<sup>80</sup> Striking down this tradition-based antimiscegenation statute, a unanimous Court held that Virginia’s law, “designed to maintain White Supremacy,” prohibited “generally accepted conduct if engaged in by members of different races.”<sup>81</sup> Delivering the opinion for the Court, Chief Justice Earl Warren wrote, “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.”<sup>82</sup> He added that “[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>83</sup>

### C. *The 1970s*

*Roe v. Wade* contained references to tradition and the Court held that a Texas anti-abortion statute was unconstitutional.<sup>84</sup>

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75. *Id.* at 522.

76. *Id.*; see U.S. CONST. art. V.

77. *Griswold*, 381 U.S. at 522 (Black, J., dissenting).

78. 388 U.S. 1, 2 (1967).

79. *Id.* at 4–5 & nn.3–4.

80. Transcript of Oral Argument at 41, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), reprinted in 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1000 (Philip B. Kurland & Gerhard Casper eds., 1975).

81. *Loving*, 388 U.S. at 11.

82. *Id.* at 12.

83. *Id.*

84. 410 U.S. 113, 166 (1973).

Justice Harry Blackmun's opinion for the Court, concluding that the abortion right was not traditionally proscribed, examined "[a]ncient attitudes," the origins of the Hippocratic Oath, common law, English statutory law, and the laws of the states.<sup>85</sup> A woman's choice to terminate a pregnancy "was present in this country well into the 19th century," Justice Blackmun wrote, and "[e]ven later, the law continued for some time to treat less punitively an abortion procured in early pregnancy."<sup>86</sup>

Justice William Rehnquist presented a different understanding of tradition. He argued that a half-century of abortion restrictions in a majority of the states was "a strong indication . . . that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>87</sup> Justice Rehnquist noted that at least thirty-six state or territorial laws limited abortion in 1868, the year of the adoption of the Fourteenth Amendment; that the laws of twenty-one states in effect in 1868 were still in effect at the time of the Court's decision in *Roe*; and that the Texas law that the Court reviewed was first enacted in 1857 and was essentially the same law that the *Roe* Court invalidated.<sup>88</sup> In Rehnquist's view, the asserted right to an abortion was not a deeply rooted tradition and the state's prohibition was constitutional.<sup>89</sup>

Family and tradition were discussed in *Moore v. City of East Cleveland*.<sup>90</sup> Inez Moore, a woman who lived in her East Cleveland home with her son and two grandsons (the grandsons were first cousins, not brothers), challenged a city ordinance limiting the occupancy of a dwelling unit to members of a nuclear family.<sup>91</sup> The Court struck down the ordinance.<sup>92</sup> Justice Lewis Powell, Jr.'s plurality opinion noted that defining the scope and reach of the Due Process Clause "has at times been a treacherous field for this Court" and a cause "for concern lest the only limits to . . . judicial intervention become the predilections of those who happen . . . to

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85. *Id.* at 130–41.

86. *Id.* at 140–41.

87. *Id.* at 174 (Rehnquist, J., dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

88. *See id.* at 174–77.

89. *Id.*

90. 431 U.S. 494, 504 (1977).

91. *Id.* at 495–96.

92. *Id.* at 506.

be Members of this Court.”<sup>93</sup> He grounded the opinion in his understanding of the tradition and history of the family, a tradition including the nuclear family as well as “uncles, aunts, cousins, and especially grandparents sharing a household.”<sup>94</sup> As extended family households were part of the nation’s traditions, the city could not constitutionally standardize children and adults by forcing them to dwell in narrowly defined family units.<sup>95</sup>

In his dissent, Justice Byron Raymond White criticized Justice Powell’s approach as suggesting “a far too expansive charter . . . . What the deeply rooted traditions of the country are is arguable, which of them deserve the protection of the Due Process Clause is even more debatable.”<sup>96</sup> Justice White warned that the plurality’s analysis would unduly broaden the scope of substantive due process review:

The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, . . . the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.<sup>97</sup>

The Court identified pertinent and operative traditions as it decided substantive due process cases brought by plaintiffs claiming that certain state actions had unconstitutionally infringed upon their liberty interests.<sup>98</sup> The traditions of purported black inferiority and the supposed domesticity of women founded in the divine ordinance were referenced and given constitutional significance in Court decisions that validated rank and overt govern-

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93. *Id.* at 502 (plurality opinion).

94. *Id.* at 504.

95. *Id.* at 505–06. Justice Stevens’ concurrence provided the fifth vote for the Court’s judgment.

96. *Id.* at 549 (White, J., dissenting).

97. *Id.* at 544.

98. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 786–87, 795 (1983) (discussing the Judeo-Christian tradition of legislative prayer).

mental discrimination.<sup>99</sup> Criminal defendants' invocations of constitutional protections were rejected on tradition-based grounds, while tradition supported the claims of parents seeking freedom from state interference with certain educational and parental decision matters.<sup>100</sup> Disagreements between Justices as to whether and how tradition should be considered and employed can be seen in *Griswold's* concurring and dissenting opinions, in Justice Blackmun's and Justice Rehnquist's opinions in *Roe*, and in *Moore's* plurality and dissenting opinions.<sup>101</sup>

In turning to tradition to resolve constitutional issues, the Justices were not restricted in their determination of (what they deemed to be) the relevant tradition. That freedom to choose and the discretion to identify a tradition can be outcome-influential, and even outcome-dispositive, for "tradition' can be invoked in support of almost any cause" and "[t]here is obvious room to maneuver, along continua of both space and time, on the subject of which tradition to invoke."<sup>102</sup> As John Ely observed:

Whose traditions count? America's only? Why not the entire world's? . . . And what is the relevant time frame? All of history? Anticonstitutional only? Prior to the ratification of the provision whose construction is in issue? . . . And who is to say that the "tradition" must have been one endorsed by a majority? Is Henry David Thoreau an invocable part of American tradition? John Brown? John Calhoun? Jesus Christ? It's hard to see why not.<sup>103</sup>

## II. TRADITIONALISM

Traditionalism refers to an analysis in which a constitutional provision is interpreted and applied "in accordance with the longstanding and evolving practices, experiences, and tradition of the nation."<sup>104</sup> More than just a reference to tradition, a jurist employ-

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99. See *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (discussing the tradition of the domesticity of women and strict gender roles); *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (discussing the tradition of purported black inferiority in the United States).

100. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214, 232 (1972) (holding that Amish children may not be compelled to attend school past the eighth grade, against their parents' wishes); *Meyer v. Nebraska*, 262 U.S. 390, 400–03 (1923) (discussing the traditional parental right to control a child's education, as applied to foreign languages).

101. See *supra* notes 68–77, 84–97 and accompanying text.

102. ELY, *supra* note 4, at 60.

103. *Id.*

104. McConnell, *supra* note 26, at 1133.

ing traditionalist methodology focuses on certain aspects of the nation's tradition and history as she looks to the past while seeking answers to contemporary constitutional controversies.<sup>105</sup>

This part focuses on four Supreme Court decisions in which the Justices articulated differing views on, and formulations of, due process traditionalism.

#### A. *Michael H. v. Gerald D.*

In *Michael H. v. Gerald D.*, the Court held that a California law's presumption that a child born to a married woman was a child of the marriage did not violate the due process rights of the biological father of the child who was not married to the mother.<sup>106</sup>

Justice Antonin Scalia's plurality opinion stated that the purpose of the Due Process Clause was to "prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."<sup>107</sup> To limit and guide judicial interpretation of the clause, the Court had required that the claimed liberty interest be fundamental, as well as an interest that society has traditionally protected.<sup>108</sup> Thus, the Due Process Clause provided only for fundamental protections deeply rooted in American traditions.<sup>109</sup>

Justice Scalia found it inconceivable that the relationship between the biological father and the child "has been treated as a protected family unit under the historic practices of our society, or . . . has been accorded special protection."<sup>110</sup> In his view, the tradition protecting the marital family unit from the biological father's claim was found in the common law as indicated in a 1569 work by Henry de Bracton, in Blackstone's and Kent's respective commentaries, and in a 1957 American Law Reports annotation on the presumption of the legitimacy of children conceived and

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105. *See id.* (finding that traditionalism requires courts to preserve continuity with the past when interpreting the Constitution).

106. 491 U.S. 110, 124–27 (1989).

107. *Id.* at 122 n.2 (plurality opinion).

108. *Id.* at 122.

109. *Id.*; *see also id.* at 123 (noting the "insistence that the asserted liberty interest be rooted in history and tradition").

110. *Id.* at 124.



born in wedlock.<sup>111</sup> As for the framing of the right at issue, Justice Scalia set out the following methodology: “We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”<sup>112</sup> Consulting the most specific tradition was necessary because general traditions offered limited guidance and gave judges unfettered discretion to shape society’s views.<sup>113</sup>

Justice Sandra Day O’Connor, joined by Justice Anthony Kennedy, did not agree with Justice Scalia’s interpretive approach.<sup>114</sup> She argued that Justice Scalia’s most-specific-level analysis “sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause . . . that may be somewhat inconsistent with our past decisions in this area.”<sup>115</sup> The Court had previously characterized right-protecting traditions at general levels and not necessarily at the most specific level possible.<sup>116</sup> Noting with approval Justice Harlan’s traditionalist approach in *Poe v. Ullman*, Justice O’Connor declined to “foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”<sup>117</sup>

Justice William Brennan, Jr. also critiqued Justice Scalia’s approach. Tradition “can be as malleable and as elusive as ‘liberty’ itself,” and in looking for “an interest ‘deeply rooted in the country’s traditions’ . . . [he] would not stop . . . at Bracton, or Blackstone, or Kent, or even the American Law Reports” in conducting his search.<sup>118</sup> In recognizing that tradition was relevant to the Court’s previous rulings in cases involving marriage, childbearing, childrearing, and other practices and interests, Justice Brennan stated that “the Due Process Clause would seem an empty promise if it did not protect them.”<sup>119</sup> But he objected to Justice

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111. *See id.* at 124–26.

112. *Id.* at 127–28 n.6.

113. *Id.* at 128 n.6. For an excellent discussion and critique of Justice Scalia’s *Michael H.* analysis, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085–98 (1990).

114. *Michael H.*, 491 U.S. at 132 (O’Connor, J., concurring in part).

115. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 446–47 (1972)); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

116. *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 94–95 (1987); *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

117. *Id.*; *see also supra* notes 60–67 and accompanying text.

118. *Michael H.*, 491 U.S. at 137 (Brennan, J., dissenting).

119. *Id.* at 139; *see also supra* Part I.

Scalia acting “as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.”<sup>120</sup> Proclaiming that “[w]e are not an assimilative, homogeneous society, but a facilitative, pluralistic one,”<sup>121</sup> Justice Brennan stated:

The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.<sup>122</sup>

## B. *Cruzan v. Missouri Department of Health*

Whether Nancy Beth Cruzan, a patient in a persistent vegetative state, had a due process “right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment” was the question addressed by the Court in *Cruzan v. Missouri Department of Health*.<sup>123</sup> More specifically, the Court asked whether the Constitution prohibited Missouri’s procedural requirement that an incompetent person’s wishes regarding the withdrawal of life-sustaining treatment be proved by clear and convincing evidence.<sup>124</sup>

Speaking for the Court and upholding the state’s evidentiary requirement, Chief Justice Rehnquist opined that a state is not “required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.”<sup>125</sup> The state “may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements.”<sup>126</sup> Recognizing the substantiality of the individual

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120. *Michael H.*, 491 U.S. at 140–41.

121. *Id.* at 141.

122. *Id.*

123. *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 266, 269 (1990).

124. *Id.* at 280.

125. *Id.*

126. *Id.* at 281.

and societal interests in this area, the Chief Justice determined that the state “may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual’s life-sustaining treatment.”<sup>127</sup>

Unlike Chief Justice Rehnquist’s opinion for the Court, Justice Scalia’s concurrence turned to tradition. Justice Scalia argued that a claimant seeking to maintain a substantive due process claim must demonstrate “that the State has deprived him of a right historically and traditionally protected against state interference.”<sup>128</sup> Referencing English common law, criminal law at the time of the 1868 ratification of the Fourteenth Amendment, and other developments, he concluded that “there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”<sup>129</sup>

The dissenting Justices also relied on references to tradition, albeit ones different from that identified by Justice Scalia. Justice Brennan argued that “[t]he right to be free from medical attention without consent, to determine what shall be done with one’s own body, is deeply rooted in this Nation’s traditions.”<sup>130</sup> Further, Justice Stevens stated:

Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly “so rooted in the traditions and conscience of our people as to be ranked as fundamental” and indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator.<sup>131</sup>

### C. Planned Parenthood of Southeastern Pennsylvania v. Casey

The Justices continued their debate over whether and how due process traditionalism should be employed in *Planned*

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127. *Id.* at 283.

128. *Id.* at 294 (Scalia, J., concurring) (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989)).

129. *Id.* at 294–95 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotations omitted).

130. *Id.* at 305 (Brennan, J., dissenting).

131. *Id.* at 343 (Stevens, J., dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (explaining further that “[o]ur ethical tradition has long regarded an appreciation of mortality as essential to understanding life’s significance”).

*Parenthood of Southeastern Pennsylvania v. Casey*.<sup>132</sup> Reaffirming the central holding of *Roe v. Wade*<sup>133</sup> in their joint and plurality opinion, Justices O'Connor, Kennedy, and Souter stated that “[i]t is tempting, as a means of curbing the discretion of federal judges, . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.”<sup>134</sup> Resisting that temptation, the plurality opined: “Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”<sup>135</sup> Citing Justice Harlan’s dissent in *Poe*, the joint opinion stated that “[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.”<sup>136</sup>

In addition, the joint opinion declared that the Court’s “obligation is to define the liberty of all, not to mandate [its] own moral code.”<sup>137</sup> Liberty involves “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”<sup>138</sup> It includes “the right to 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.”<sup>139</sup>

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132. 505 U.S. 833, 980–81 (1992) (Scalia, J., concurring) (disagreeing with the joint opinion’s position regarding the constitutional protection of liberty).

133. See generally *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (holding that before viability, a woman has the right to obtain an abortion without undue interference from the state, and that after viability, the state may regulate abortions except in cases to preserve the life or health of the mother).

134. *Casey*, 505 U.S. at 843–47. Justice Stevens and Justice Blackmun both concurred in part. *Id.* at 911, 922.

135. *Id.* at 848.

136. *Id.* at 849; see *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); see also *supra* notes 61–67 and accompanying text.

137. *Casey*, 505 U.S. at 850.

138. *Id.* at 851.

139. *Id.*

Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, expressed his belief that *Poe* “can and should be overruled” because it was incorrectly decided.<sup>140</sup> He noted that abortion after “quickening” was a common law offense and that in 1868, abortion was prohibited by law in twenty-eight of the thirty-seven states and eight territories; was prohibited or restricted by nearly all of the states at the beginning of the twentieth century; and was proscribed by twenty-one laws in effect in 1973, the year of the *Roe* decision.<sup>141</sup> He concluded, “On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as ‘fundamental’ under the Due Process Clause.”<sup>142</sup>

Writing separately, Justice Scalia opined that the issue before the Court was “not whether the power of a woman to abort her unborn child is a ‘liberty’ in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both.”<sup>143</sup> Rather, for Justice Scalia, the question was whether the power of a woman to abort her unborn child was a constitutionally protected liberty, to which the answer was an emphatic “no.”<sup>144</sup> He reached that conclusion for two reasons: “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”<sup>145</sup>

#### D. *Washington v. Glucksberg*

Unable to convince a majority of the Court to adopt the traditionalist analysis set out in his *Casey* dissent,<sup>146</sup> Chief Justice Rehnquist secured five votes, including Justice O’Connor’s, and

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140. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

141. *See id.* at 952.

142. *Id.* at 952–53. Justice Blackmun criticized the Chief Justice’s “stunted conception of individual liberty” and “exclusive reliance on tradition as a source of fundamental rights.” *Id.* at 940 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

143. *Id.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part).

144. *Id.*

145. *Id.*

146. *Id.* at 944.

wrote for the majority in *Washington v. Glucksberg*.<sup>147</sup> In that case the plaintiffs contended that the liberty interest of the Due Process Clause extended to and protected the “liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference.”<sup>148</sup> Not accepting this framing of the issue, Chief Justice Rehnquist asked whether the protections that the Due Process Clause provides included a right to assisted suicide.<sup>149</sup>

Chief Justice Rehnquist set out the two elements of the substantive due process analysis:

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” . . . and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest.<sup>150</sup>

As for history and tradition, Chief Justice Rehnquist noted that assisted suicide is a crime in most states and in most western democracies.<sup>151</sup> He cited Bracton’s treatise and Blackstone’s *Commentaries on the Laws of England* to support the proposition that suicide and assisted suicide were punished under “the Anglo-American common-law tradition.”<sup>152</sup> Chief Justice Rehnquist stated that this view was adopted by the American colonies and early state legislatures and courts, and that by the time of the Fourteenth Amendment’s adoption, assisted suicide was illegal in almost every state.<sup>153</sup> In addition, a 1980 version of the Model Penal Code prohibited such conduct, and the ban was generally reaffirmed by voters and legislatures.<sup>154</sup>

Employing a restrained methodology, Chief Justice Rehnquist concluded that the asserted right to assisted suicide found no

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147. 521 U.S. 702, 704 (1997).

148. *Id.* at 724 (quoting Brief of Respondents at 10, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 708925).

149. *Id.* at 724.

150. *Id.* at 720–21 (internal citations omitted).

151. *Id.* at 710.

152. *Id.* at 711–12.

153. *Id.* at 715.

154. *Id.* at 715–16.

support in the nation's traditions.<sup>155</sup> The "consistent and almost universal tradition . . . has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."<sup>156</sup> Accordingly, assisted suicide is not a fundamental right protected by the Due Process Clause.<sup>157</sup>

As Randy Barnett has noted, the first step of the "*Glucksberg* Two-Step"<sup>158</sup> (a step borrowed from *Bowers v. Hardwick*)<sup>159</sup> does not indicate whether a right has "to be *both* deeply rooted in tradition *and* implicit in the concept of ordered liberty, or just one or the other[.] . . . Perhaps most importantly, does a liberty need to have been legally protected in our traditions or merely traditionally unregulated?"<sup>160</sup> *Glucksberg's* second step, requiring a careful description of the asserted fundamental liberty interest, is problematic given that a particular liberty can be accurately defined in various ways.<sup>161</sup> Barnett notes that in the Ninth Circuit's decision in *Raich v. Gonzales*,<sup>162</sup> the plaintiff argued that she had a fundamental right to use cannabis "*to preserve her life*. If any right is fundamental, this would surely seem to be."<sup>163</sup> The gov-

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155. *Id.* at 723. A restrained methodology "tends to rein in the subjective elements that are necessarily present in due process judicial review" and "avoids the need for complex balancing of competing interests in every case." *Id.* at 722.

156. *Id.* at 723.

157. *Id.* at 728; *see also* *Vacco v. Quill*, 521 U.S. 793, 808–09 (1997) (holding that the New York statute prohibiting assisted suicide did not violate the Equal Protection Clause).

158. Barnett, *supra* note 20, at 1488–89.

159. 478 U.S. 186, 191–92 (1986). For more on *Glucksberg's* reliance on *Bowers*, *see* Neal Devins, *Ideological Cohesion and Precedent (Or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other)*, 86 N.C. L. REV. 1399, 1410 (2008); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 465 n.565 (2011).

160. Barnett, *supra* note 20, at 1489.

161. *Id.*

162. 500 F.3d 850 (9th Cir. 2007). In this case, Angel McClary Raich, diagnosed with several serious medical conditions, contended that she had a constitutionally protected right to use medicinal marijuana and "a fundamental right to 'mak[e] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life.'" *Id.* at 855, 864. Not agreeing with Raich's framing, the court reframed and narrowed the question before it as "whether the liberty interest specially protected by the Due Process Clause embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed." *Id.* at 864. Having added "the centerpiece—the use of marijuana—to Raich's proposed right," the court concluded that its framing of the claimed fundamental right was not deeply rooted in the nation's history and tradition and was not "implicit in the concept of ordered liberty." *Id.* at 864, 866. The Court concluded, "[f]or the time being, this issue remains in 'the arena of public debate and legislative action.'" *Id.* at 866.

163. Barnett, *supra* note 20, at 1489.

ernment argued that the case involved “the *right to obtain and use marijuana*, which it then denied is either implicit in the concept of ordered liberty or deeply rooted in the nation’s history or traditions.”<sup>164</sup> Making the critically important point that “the outcome of a fundamental rights analysis turns entirely on the description of the liberty in question,” Barnett states that “[t]he dirty little secret of constitutional law is that, purely as a descriptive matter,” the plaintiff’s and the government’s framings “were *both* correct,” as the plaintiff was preserving her life and using medicinal marijuana.<sup>165</sup>

One could have understandably concluded that the Court would employ *Glucksberg*’s two-step analysis in subsequent substantive due process cases.<sup>166</sup> However, in *County of Sacramento v. Lewis*, the Court did not apply that methodology, holding that a police officer did not violate the due process guarantee by causing the death of a suspect during a high-speed chase.<sup>167</sup> The Court’s majority applied the “shocks the conscience” test set out in *Rochin v. California* and other cases.<sup>168</sup> Justice Scalia noted this departure from *Glucksberg*; he argued that the Court’s decision was a “throwback to highly subjective substantive-due-process methodologies” and “resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th’ ol’ ‘shocks-the-conscience’ test.”<sup>169</sup> Adhering to *Glucksberg* and refusing to “fashion a new due process right out of thin air,”<sup>170</sup> Justice Scalia asked not “whether the police conduct here at issue

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164. *Id.* at 1490.

165. *Id.* Barnett also noted that there are several “other accurate ways of defining the liberty: a right to use any substance that is necessary to preserve one’s life, a right to take any measures to preserve one’s life, a right to use marijuana, a right to act in any way that does not harm others, etc.” *Id.*

166. See Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 672.

167. 523 U.S. 833, 854–55 (1998).

168. *Id.* at 846, 855; see *id.* at 855–56 (Rehnquist, J., concurring); see also *Washington v. Glucksberg*, 521 U.S. 702, 705 (1997) (indicating that Chief Justice Rehnquist delivered the Court’s opinion).

169. *Lewis*, 523 U.S. at 861 (Scalia, J., concurring in judgment). He noted, “For those unfamiliar with classical music, I note that the exemplars of excellence in the text are borrowed from Cole Porter’s ‘You’re the Top.’” *Id.* at 861 n.1.

170. *Id.* at 862 (quoting *Carlisle v. United States*, 517 U.S. 416, 429 (1996)).



shocks my unelected conscience,” but “whether our Nation has traditionally protected the right respondents assert.”<sup>171</sup>

#### E. *McDonald v. City of Chicago*

A more recent example of the Court’s traditionalist methodology is found in *McDonald v. City of Chicago* in which the Court asked whether the right to keep and bear arms proscribed in the Second Amendment is included in the due process concept and whether this right “is fundamental to *our* scheme of ordered liberty” or is “deeply rooted in this Nation’s history and tradition.”<sup>172</sup>

By a 5-4 vote, the Court in *McDonald* held that the Due Process Clause incorporates the Second Amendment right to self-defense that the Court recognized in *District of Columbia v. Heller*.<sup>173</sup> Speaking for the majority, Justice Samuel Alito, Jr. observed that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day.”<sup>174</sup> He traced the origins of this right from the 1689 English Bill of Rights to Blackstone’s 1765 statement that “the right to keep and bear arms was ‘one of the fundamental rights of Englishmen,’” and to the American colonies.<sup>175</sup> The Court noted that “[t]he right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights,” with nine states adopting their own constitutional provisions protecting the right to keep and bear arms in the post-ratification period.<sup>176</sup>

Shifting the focus to the 1850s and then to the years following the Civil War, Justice Alito expressed that the efforts of the thirty-ninth Congress to protect the right to keep and bear arms manifested the fundamental nature of the right.<sup>177</sup> The Freed-

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171. *Id.*

172. 561 U.S. 742, 764, 767, 130 S. Ct. 3020, 3025, 3036 (2010) (quoting *Glucksberg*, 521 U.S. at 721); see U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”).

173. *McDonald*, *id.* at 767, 130 S. Ct. at 3036 (citing *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

174. *Id.*

175. *Id.* at 768, 130 S. Ct. at 3036–37 (internal citations omitted).

176. *Id.*, 130 S. Ct. at 3037. Those nine states joined four other states with pre-ratification Second Amendment analogues. *Id.* at 769, 130 S. Ct. at 3037.

177. *Id.* at 771, 130 S. Ct. at 3039–40.

men's Bureau Act of 1866 provided that "*the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery."<sup>178</sup> This legislation responded to efforts to disarm African Americans who had served in the Union army, as well as state militias' attempts to take firearms from newly freed enslaved persons.<sup>179</sup> Moreover, Justice Alito continued, the Civil Rights Act of 1866 sought to protect citizens' right to keep and bear arms, and debates over the Fourteenth Amendment and evidence in the period following the 1868 ratification of that provision "only confirm[] that the right to keep and bear arms was considered fundamental."<sup>180</sup>

Dissenting, Justice Stevens criticized Justice Alito's "mode of intellectual history, culling selected pronouncements and enactments from the 18th and 19th centuries to ascertain what Americans thought about firearms."<sup>181</sup> A liberty guarantee exclusively recognizing only those rights deeply rooted in tradition would merely "ratify those rights that state actors have *already* been according the most extensive protection."<sup>182</sup> As Justice Stevens remarks,

That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently "rooted"; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty.<sup>183</sup>

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178. *Id.* at 773, 130 S. Ct. at 3040 (quoting Freedmen's Bureau Act of 1866, ch. 200, § 14, 14 Stat. 173, 176–77).

179. *See id.* at 774–75, 130 S. Ct. at 3039–40 (discussing the efforts to disarm freed slaves and Congress' attempts to stop this practice).

180. *Id.* at 776, 130 S. Ct. at 3040–41.

181. *Id.* at 873, 130 S. Ct. at 3097 (Stevens, J., dissenting).

182. *Id.* at 875, 130 S. Ct. at 3098.

183. *Id.* at 876, 130 S. Ct. at 3098–99; *see also id.* at 906, 130 S. Ct. at 3116–17 ("At what level of generality should one frame the liberty interest in question? What does it mean for a right to be 'deeply rooted in this Nation's history and tradition'? By what standard will that proposition be tested? Which types of sources will count, and how will

Justice Stevens found no substantive due process case that so much as suggests that “liberty” circumscribes either a right of self-defense or a right to keep and bear arms.<sup>184</sup> He acknowledged that while there might be some truth to the notion that Americans’ interest in keeping and bearing arms, and the states’ recognition of the interest, is a “deeply rooted” principle in some respects, it is “equally true that the States have a long and unbroken history of regulating firearms.”<sup>185</sup> State restrictions on the right to keep and bear arms “short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right. ‘Federalism is a far ‘older and more deeply rooted tradition than is a right to carry,’ or to own, ‘any particular kind of weapon.’”<sup>186</sup>

In a separate dissent, Justice Stephen Breyer expressed his concern about “the reefs and shoals that lie in wait for those non-expert judges who place virtually determinative weight upon historical considerations.”<sup>187</sup> He argued that the Court should look to other factors as well as history, including “the basic values that underlie a constitutional provision and their contemporary significance” as well as “the relevant consequences and practical justifications that might, or might not, warrant removing an important question from the democratic decisionmaking process.”<sup>188</sup> With regard to the issue before the Court, Justice Breyer remarked that the question was “not whether there are references to the right to bear arms for self-defense throughout this Nation’s history—of course there are—or even whether the Court should incorporate a simple constitutional requirement that firearms regulations not unreasonably burden the right to keep and bear arms.”<sup>189</sup> Rather, the question is “whether there is a consensus that *so substantial* a private self-defense right as the one described in *Heller* applies to the States.”<sup>190</sup> Surveying the historical record, he rejected the notion that the right to bear arms for self-

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those sources be weighed and aggregated? There is no objective, neutral answer to these questions. There is not even a theory . . . of how to go about answering them.” (internal citations omitted).

184. *Id.* at 893, 130 S. Ct. at 3109.

185. *Id.* at 899, 130 S. Ct. at 3112.

186. *Id.*

187. *Id.* at 916, 130 S. Ct. at 3122 (Breyer, J., dissenting).

188. *Id.*

189. *Id.* at 930, 130 S. Ct. at 3130.

190. *Id.*

defense is fundamental. Justice Breyer wrote that the evidence showed that both states and municipalities have consistently regulated firearms throughout American history and that courts have likewise consistently upheld these regulations.<sup>191</sup> That record did not support the majority's conclusion that the right to keep and bear arms is deeply rooted in American history and tradition.<sup>192</sup>

The Court's decisions discussed in this part are important exemplars of due process traditionalism and different variations and applications of the methodology. In *Michael H.*, a majority of the Court did not adopt Justice Scalia's call for deciding substantive due process cases by reference to the most specific level at which a tradition protecting or denying an asserted right could be identified.<sup>193</sup> *Cruzan's* validation of Missouri's procedural requirement governing an incompetent person's wishes regarding the withdrawal of life-sustaining treatment did not follow a traditionalist analysis; references to and reliance on various traditions were made in the concurring and dissenting opinions.<sup>194</sup> In *Casey*, a Court majority did not agree with the proposition that the constitutionally protected sphere of liberty was limited to the provisions of the Bill of Rights or those practices protected when the Fourteenth Amendment was ratified in 1868.<sup>195</sup> And in *Glucksberg*, the Court, adopting a purportedly objective traditionalist approach, declared that the Due Process Clause protects only those carefully described fundamental rights and liberties which were deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty.<sup>196</sup> That traditionalist and historical approach guided the five-Justice majority's incorporation analysis in *McDonald*.<sup>197</sup>

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191. *Id.* at 931, 130 S. Ct. at 3131.

192. *Id.*

193. *See supra* notes 112–22 and accompanying text.

194. *See supra* notes 123–31 and accompanying text.

195. *See supra* notes 132–45 and accompanying text.

196. *See supra* notes 147–57 and accompanying text. As Katharine Bartlett has observed, “tradition does not provide an objective basis for deciding substantive due process claims. . . . Tradition is not fixed, nor can it be easily or reliably retrieved. It represents not fixed facts, but accumulated values that cannot be ascertained through some precise, scientific method.” Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 545 (2012).

197. *See supra* notes 172–80 and accompanying text.

Does *Glucksberg*, coming as it does after *Casey* and followed in *McDonald*, set forth the controlling traditionalist analysis to be applied in substantive due process cases, including cases challenging discrimination on the basis of sexual orientation? As discussed in the next part, the Court has answered this question differently.

### III. TRADITIONALISM AND THE COURT'S SEXUAL ORIENTATION JURISPRUDENCE

The Supreme Court considered substantive due process challenges to laws that discriminate on the basis of sexual orientation in three cases. As discussed in this part, a deeply divided Court issued decisions upholding one and striking down two of the challenged laws, with the Justices formulating and applying different traditionalist methodologies.

#### A. *State Criminalization of Same-Sex Sexual Intimacy*

##### 1. *Bowers v. Hardwick*

*Bowers v. Hardwick*<sup>198</sup> rejected a due process challenge to a Georgia statute providing that “[a] person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.”<sup>199</sup> Writing for a five-Justice majority,<sup>200</sup> Justice White framed the issue before the Court as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”<sup>201</sup>

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198. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

199. GA. CODE ANN. § 16-6-2(a)(1) (2011); *Bowers*, 478 U.S. at 189. Persons convicted of violating this law were subject to imprisonment of not less than one or more than twenty years. § 16-6-2(b)(1); .

200. *Bowers*, 478 U.S. at 187. Justice Powell, one of the five votes upholding the Georgia statute, later stated that he “probably made a mistake” when he voted with the *Bowers* majority. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 530 (1994).

201. *Bowers*, 478 U.S. at 190. This framing of the issue is “somewhat problematical, because the statute on its face applied to all forms of sodomy, heterosexual as well as homosexual.” ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 117 (1990).

Asking the question in that way answers it. Justice White determined that there was no “fundamental right to engage in homosexual sodomy” because sodomy proscriptions are derived from ancient roots and because sodomy was a common-law criminal offense “forbidden by the laws of the original 13 States when they ratified the Bill of Rights” in 1791.<sup>202</sup> He noted that when the Fourteenth Amendment was adopted in 1868, only five of the thirty-seven existing states did not criminalize sodomy. He also pointed out that “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.”<sup>203</sup> Given this history, Justice White concluded that any claim that the right to engage in sodomy was “deeply rooted in th[e] Nation’s history and tradition,” or otherwise inherent in the notion of ordered liberty, would be facetious at best.<sup>204</sup>

Justice Blackmun’s dissent, joined by Justices Brennan, Marshall, and Stevens, rejected Justice White’s framing of the issue.<sup>205</sup> Justice Blackmun reasoned that the case was not about the right to engage in homosexual sodomy, but was instead concerned with the right to be left alone, free from exposure to criminal sanctions enforced against homosexuals but not heterosexuals.<sup>206</sup> He also rejected the proposition that “either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court’s scrutiny.”<sup>207</sup> Further, Justice Blackman noted that

“[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” I believe we must analyze respondent Hardwick’s claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of

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202. *Bowers*, 478 U.S. at 191–92.

203. *Id.* at 193–94.

204. *Id.* at 194.

205. *See id.* at 199 (Blackmun, J., dissenting).

206. *Id.* at 199–200.

207. *Id.* at 210.

their lives, it must do more than assert that the choice they have made is an “abominable crime not fit to be named among Christians.”<sup>208</sup>

Like Justice Blackmun, Justice Stevens rejected the majority’s traditional-therefore-constitutional analysis that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”<sup>209</sup> Justice Stevens looked to a tradition different from that identified by Justice White. He explained, “Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.”<sup>210</sup> While society has a right to encourage individuals to adhere to certain traditions in matters involving affection and gratification, liberty “surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.”<sup>211</sup>

Criticized as presenting a “flat and disdainful” review of the historical record, *Bowers* illustrates the critical importance of the Court’s identification and articulation of what a majority of the Justices deemed to be the pertinent tradition by which the constitutionality of an at-issue state law is to be evaluated.<sup>212</sup> The Court gave operational effect to certain historical practices and markers and employed a count-the-states approach as it validated Georgia’s criminalization of same-sex sexual conduct.<sup>213</sup> Interestingly, and tellingly, its reliance on (and its understanding of) traditional prohibitions of sodomy was flawed. As Richard Posner has noted, common law sodomy was limited to anal intercourse and did not include fellatio, the conduct for which Michael Hardwick was ar-

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208. *Id.* at 199–200 (quoting *Herring v. State*, 46 S.E. 876, 882 (Ga. 1904)); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

209. *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting).

210. *Id.* at 217 (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 720 (7th Cir. 1975)) (internal quotations omitted).

211. *Id.* at 217–18.

212. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 90 (2003).

213. *See Bowers*, 478 U.S. at 192–94.

rested.<sup>214</sup> The classification of oral sex as proscribed sodomy occurred in the late nineteenth century, long after the ratification of the Bill of Rights and subsequent to the ratification of the Fourteenth Amendment.<sup>215</sup>

## 2. *Lawrence v. Texas*

*Bowers* was reexamined in *Lawrence v. Texas*,<sup>216</sup> wherein the Court considered the constitutionality of a Texas statute criminalizing “deviate sexual intercourse with another individual of the same sex.”<sup>217</sup> By a 5-4 vote, the Court concluded that the statute violated the Due Process Clause.<sup>218</sup>

Justice Kennedy’s opinion for the Court opened with the following paragraph:

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.<sup>219</sup>

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214. RICHARD A. POSNER, *SEX AND REASON* 343 (1992).

215. *Id.*

216. 539 U.S. 558 (2003).

217. TEX. PENAL CODE ANN. § 21.06 (West 1994).

218. *Lawrence*, 539 U.S. at 558, 561, 578. Justice Kennedy did not decide the case on equal protection grounds. He noted, “Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.” *Id.* at 575. Interestingly, he did state that both “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects” as the criminalization of same-sex sexual conduct “in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” *Id.* This language “sounds almost entirely in equal protection.” Post, *supra* note 212, at 99.

Justice O’Connor, declining to overrule *Bowers*, analyzed the case under the Equal Protection Clause. She found an equal protection violation in the Texas law’s differential treatment of same-sex deviate sexual intercourse, which was criminalized, and different-sex deviate sexual intercourse, which was not. *Lawrence*, 539 U.S. at 579, 581 (O’Connor, J., concurring in judgment).

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



He then framed the issue before the Court as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause.”<sup>220</sup> Recall that the *Bowers* Court asked whether the Constitution “confers a fundamental right upon homosexuals to engage in sodomy.”<sup>221</sup> In Justice Kennedy’s view, the *Bowers* framing revealed the Court’s failure to consider the scope of the liberty at issue.<sup>222</sup> Justice Kennedy explained that “[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>223</sup>

Reconsidering *Bowers*, Justice Kennedy disagreed with the Court’s 1986 view that anti-sodomy laws have “ancient roots.”<sup>224</sup> He did not find a “longstanding history in this country of laws directed at homosexual conduct as a distinct matter,” because early sodomy laws were instead directed at prohibiting nonprocreative sexual conduct generally and were not specifically targeted at homosexuals.<sup>225</sup> Applying a desuetude analysis,<sup>226</sup> he reasoned that the absence of enforcement of anti-sodomy laws against consenting adults who engaged in such conduct in private was significant; the infrequency of prosecutions questions the legitimacy of the notion that society endorsed “rigorous and systematic punishment” of persons engaging in same-sex intimate conduct.<sup>227</sup> Moreover, Justice Kennedy continued, states did not target same-sex sodomy until the last third of the twentieth century, and state laws criminalizing such conduct did not occur prior to the 1970s,

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220. *Id.* at 564; see also JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 266 (2013) (noting that Justice Kennedy “frame[d] the right asserted quite abstractly”).

221. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

222. *Lawrence*, 539 U.S. at 567.

223. *Id.*

224. *Id.*; see *supra* note 202 and accompanying text.

225. *Lawrence*, 539 U.S. at 568.

226. The desuetude doctrine “forbids the use of old laws lacking current public support, to require more in the way of accountability and deliberation.” CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 27 (1999).

227. *Lawrence*, 539 U.S. at 569–70. Disagreeing with Justice Kennedy, Justice Scalia argued that “it is entirely unsurprising that evidence of enforcement would be hard to come by” where sexual activity occurs “on private premises with the doors closed and windows covered.” *Id.* at 597 (Scalia, J., dissenting).

with only nine states doing so at the time of the Court's decision.<sup>228</sup>

Having questioned *Bowers*' traditionalist analysis, Justice Kennedy made clear that history and tradition "are the starting point but not in all cases the ending point of the substantive due process inquiry."<sup>229</sup> Significantly, he did not look back to colonial times or to 1791 or 1868. He identified, instead, American laws and traditions in the last fifty years as the relevant time period, and found there to be "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>230</sup> Looking beyond the United States and to a broader civilization, Justice Kennedy explained that *Bowers* had been rejected in decisions by the European Court of Human Rights<sup>231</sup> and noted that "[o]ther nations . . . have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."<sup>232</sup> Noting that the *Casey* and *Romer* decisions had deeply eroded the foundations of *Bowers*, Justice Kennedy overruled *Bowers*, concluding that it was decided incorrectly and should therefore not remain binding precedent.<sup>233</sup>

Making clear the limits of *Lawrence*, Justice Kennedy pointed out that the case did not involve minors, "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused," or "public conduct or prostitution."<sup>234</sup> Nor did the case address formal governmental recognition of homosexual relationships.<sup>235</sup> *Lawrence* involved two adults who

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228. *Id.* at 570 (majority opinion).

229. *Id.* at 572.

230. *Id.* at 571–72.

231. *Id.* at 576 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981)).

232. *Id.*

233. *Id.* at 576, 578; see *supra* notes 132–42 and accompanying text. In *Romer v. Evans*, the Court, in an opinion by Justice Kennedy, held that the Equal Protection Clause was violated by a Colorado constitutional amendment prohibiting state or local antidiscrimination laws, policies, or actions protecting gays, lesbians, or bisexuals. 517 U.S. 620, 634–36 (1996). The Court concluded that the amendment was not rationally related to a legitimate government purpose as it was "born of animosity toward the class of persons affected," was "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests," and was "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 634–35.

234. *Lawrence*, 539 U.S. at 578.

235. *Id.*

consensually “engaged in sexual practices common to a homosexual lifestyle;” they were “entitled to respect for their private lives,” lives that should not be demeaned by the criminalization of their private behavior under a law furthering “no legitimate state interest which can justify [the state’s] intrusion into the personal and private life of the individual.”<sup>236</sup>

Justice Kennedy closed his opinion with an unmistakably forward-looking approach to the Due Process Clause:

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 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.<sup>237</sup>

Dissenting, Justice Scalia adhered to *Bowers* and applied the traditionalist analysis set forth in *Washington v. Glucksberg*.<sup>238</sup> He argued that the right to engage in homosexual sodomy was not fundamental and that Justice Kennedy erred in concluding that there was no longstanding tradition of legal proscriptions of that conduct.<sup>239</sup> *Bowers* referred to an established tradition of “prohibiting *sodomy in general*,” whether performed by same-sex or different-sex couples.<sup>240</sup> Whether the law criminalized homosexuals in particular or homosexuals or heterosexuals generally was irrelevant, as under either view the prohibition of sodomy excluded that conduct from those rights “deeply rooted in this Nation’s history and tradition.”<sup>241</sup> As for the majority’s “emerging awareness” analysis and focus on the past half-century, Justice Scalia urged that “an ‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition[s]’” and that “[c]onstitutional entitlements do not spring into existence because

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236. *Id.*

237. *Id.* at 578–79.

238. *Id.* at 586 (Scalia, J., dissenting); see *supra* notes 143–46 and accompanying text.

239. *Id.* at 588, 594–596; see *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986); see also *supra* Part II.D.

240. *Lawrence*, 539 U.S. at 596.

241. *Id.* (quoting *Bowers*, 478 U.S. at 192).

some States choose to lessen or eliminate criminal sanctions on certain behavior.”<sup>242</sup>

For Justice Scalia, the Court’s decision had implications for the same-sex marriage issue. In his view, the Court’s opinion “dis-mantle[d] the structure of constitutional law that ha[d] permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”<sup>243</sup> Asking “what justification [there could] possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution’” in light of the Court’s decision, he opined that encouraging procreation was not such a justification “since the sterile and the elderly are allowed to marry.”<sup>244</sup> The case before the Court did not involve same-sex marriage “only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.”<sup>245</sup>

*Lawrence* repudiated the particular form of traditionalism employed in *Bowers*—and, one could argue, precedential support for the deeply rooted/implicit-in-ordered-liberty step of the *Glucksberg* analysis.<sup>246</sup> Looking for a current-day answer to the question of the constitutionality of same-sex intimate conduct, *Lawrence*’s “emerging awareness” analysis looked back for the principles of liberty as understood by more recent generations rather than looking as far back as the *Glucksberg* approach—the laws of the thirteen states at the time of the 1791 ratification of the Bill of Rights or the Fourteenth Amendment as adopted in 1868, etc.<sup>247</sup> Formally interring *Bowers*, the Court made clear that the due process rights of current generations are not restricted to or bound by long past views regarding the legality of same-sex sexual intimacy, and it squarely rejected the proposition that the government’s traditional and historical proscription of this conduct provides constitutional grounds for its prohibition.<sup>248</sup>

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242. *Id.* at 597–98.

243. *Id.* at 604.

244. *Id.* at 605.

245. *Id.*

246. *Id.* at 572, 576 (majority opinion); see *supra* note 159 and accompanying text.

247. Compare *Lawrence*, 539 U.S. at 571–72, 579 (looking back at the past half century), with *Washington v. Glucksberg*, 521 U.S. 702, 710–11 (1997) (looking back at the past 700 years).

248. *Lawrence*, 539 U.S. at 578–79.

### B. *The DOMA Decision*

In 2013, exactly ten years after its decision in *Lawrence*, the Court issued its much-anticipated ruling in *United States v. Windsor* in which the Court considered a due process challenge to Section 3 of the Defense of Marriage Act (DOMA).<sup>249</sup> Section 3 provides that the term “marriage” in the United States Code “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.”<sup>250</sup>

This DOMA provision was challenged by Edith Windsor, a New York resident who married Thea Spyer in Ontario, Canada, in 2007 and lived with Spyer in New York City.<sup>251</sup> New York deemed the marriage to be valid as New York state law recognizes marriages performed in other jurisdictions and permits same-sex marriages.<sup>252</sup> Spyer died in 2009, leaving her estate to Windsor, but because of DOMA, Windsor was not considered a surviving spouse qualifying for the marital exemption from the federal estate tax.<sup>253</sup> She paid \$363,053 in estate taxes and filed a refund suit against the federal government, alleging that DOMA’s definition of marriage unconstitutionally deprived her of the liberty protected by the Fifth Amendment to the Constitution.<sup>254</sup>

In yet another 5-4 decision, the Court, per Justice Kennedy, held that DOMA Section 3 violated the Due Process Clause.<sup>255</sup> Confining the opinion and holding to same-sex marriages recognized by state laws, Justice Kennedy concluded that DOMA was “motivated by an improper animus or purpose,” that is, “the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage.”<sup>256</sup> DOMA’s

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249. 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2683, 2693 (2013).

250. 1 U.S.C. § 7 (2012); *see also* 28 U.S.C. § 1738C (2012).

251. *Windsor*, 570 U.S. at \_\_\_, 133 S. Ct. at 2682.

252. *Id.* at \_\_\_, 133 S. Ct. at 2689.

253. *Id.* at \_\_\_, 133 S. Ct. at 2682.

254. *See id.* \_\_\_, 133 S. Ct. at 2683.

255. *Id.* at \_\_\_, 133 S. Ct. at 2696. Justice Kennedy was joined by Justices Ginsberg, Breyer, Sotomayor, and Kagan. *Id.* at \_\_\_, 133 S. Ct. at 2681.

256. *Id.* at \_\_\_, 133 S. Ct. at 2693, 2695–96. DOMA violates basic due process and equal protection principles applicable to the federal government; and “[t]he Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.” *Id.* at \_\_\_, 133 S. Ct. at 2693 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

“avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”<sup>257</sup>

Justice Kennedy argued that DOMA’s history of enactment and statutory text demonstrate “interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power.”<sup>258</sup> The principal effect of DOMA “is to identify a subset of state-sanctioned marriages and make them unequal.”<sup>259</sup> The law creates

two contradictory marriage regimes within the same State [and] DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.<sup>260</sup>

Furthermore, in treating same-sex marriage as second-tier, DOMA “humiliates tens of thousands of children now being raised by same-sex couples.”<sup>261</sup>

What role did tradition and history play in the Court’s decision and analysis? Justice Kennedy noted 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. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight.<sup>262</sup>

Justice Kennedy observed that both historically and traditionally, the definition and the regulation of marriage have fallen under the control of the individual states.<sup>263</sup> State authority in this area “dates to the Nation’s beginning; for ‘when the Constitution

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257. *Id.* at \_\_\_, 133 S. Ct. at 2693.

258. *Id.*

259. *Id.* at \_\_\_, 133 S. Ct. at 2694.

260. *Id.*

261. *Id.*; *see also id.* at \_\_\_, 133 S. Ct. at 2695 (discussing the financial harm DOMA has caused to children of same-sex couples).

262. *Id.* at \_\_\_, 133 S. Ct. at 2689.

263. *Id.* at \_\_\_, 133 S. Ct. at 2689–90.

was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.”<sup>264</sup> While this power and authority must be exercised in ways that respect a person’s constitutional rights, the “regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’”<sup>265</sup> DOMA’s federal definition of marriage thus departed from “traditions of family localism.”<sup>266</sup>

Having focused on the states’ sovereign power and virtually exclusive authority to define and regulate marriage, Justice Kennedy ultimately determined that it was unnecessary to decide whether DOMA’s “federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.”<sup>267</sup> New York’s decision to recognize and allow same-sex marriages conferred upon same-sex couples “a dignity and status of immense import” and “enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.”<sup>268</sup> In giving the “lawful conduct” of same-sex couples seeking to marry a “lawful status,” New York’s law “reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”<sup>269</sup>

A dissenting Justice Scalia, speaking for himself, Justice Thomas, and Chief Justice Roberts, complained that Justice Kennedy “does not argue that same-sex marriage is ‘deeply rooted in this Nation’s history and tradition,’ a claim that would of course be quite absurd. So would the further suggestion . . . that a world

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264. *Id.* at \_\_\_, 133 S. Ct. at 2691 (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930)).

265. *Id.* (quoting *Sosna v. Iowa* 419 U.S. 393, 404 (1975)). That the definition and regulation of marriage is a state matter does not mean that the federal government cannot regulate marriage in furtherance of federal policy. Justice Kennedy noted that Congress “can make determinations that bear on marital rights and privileges” and in doing so “has deferred to state-law policy decisions with respect to domestic relations.” *Id.* at \_\_\_, 133 S. Ct. at 2690–91.

266. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 87–88 (2013).

267. *Windsor*, 570 U.S. at \_\_\_, 133 S. Ct. at 2692.

268. *Id.*

269. *Id.* at \_\_\_, 133 S. Ct. at 2692–93.

in which DOMA exists is one bereft of ‘ordered liberty.’”<sup>270</sup> According to Justice Scalia, the Constitution does not forbid governmental enforcement of traditional moral and sexual norms, and the Constitution “neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.”<sup>271</sup>

Responding to Justice Kennedy’s conclusion that the motivation for DOMA was to demean and stigmatize same-sex couples, Justice Scalia stated that “to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans *this institution*.”<sup>272</sup> In his view, DOMA does nothing “more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history.”<sup>273</sup>

Not believing Justice Kennedy’s confinement of the Court’s opinion and holding to state-sanctioned same-sex marriages—the “only thing that will ‘confine’ the Court’s holding is its sense of what it can get away with”—Justice Scalia argued that it is inevitable that the Court will “reach the same conclusion with regard to state laws denying same-sex couples marital status.”<sup>274</sup> The Court, “which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the ‘personhood and dignity’ which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures’ irrational and hateful

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270. *Id.* at \_\_\_, 133 S. Ct. at 2706–07 (Scalia, J., dissenting) (internal citations omitted) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

271. *Id.* at \_\_\_, 133 S. Ct. at 2707; see *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (“Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”); *id.* at 166 (“[T]here cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”).

272. *Windsor*, 570 U.S. at \_\_\_, 133 S. Ct. at 2708 (Scalia, J., dissenting).

273. *Id.* at \_\_\_, 133 S. Ct. at 2709.

274. *Id.*



failure to acknowledge that ‘personhood and dignity’ in the first place.”<sup>275</sup> Justice Scalia added,

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.<sup>276</sup>

In a separate dissent, Justice Alito observed that “any ‘substantive’ component to the Due Process Clause protects only ‘those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . as well as ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>277</sup> He continued,

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.<sup>278</sup>

For Justice Alito, those seeking judicial validation of same-sex marriage do not seek “the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.”<sup>279</sup>

In *Windsor*, Justices Kennedy, Scalia, and Alito all make tradition-based arguments for their respective positions.<sup>280</sup> Where they differ is in the selection of the operative and governing tradition. For Justice Kennedy and the majority, a state’s authority to define and regulate marriage, a power dating back to the nation’s

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275. *Id.* at \_\_\_, 133 S. Ct. at 2710.

276. *Id.*

277. *Id.* at \_\_\_, 133 S. Ct. at 2714 (Alito, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

278. *Id.* at \_\_\_, 133 S. Ct. at 2715 (internal citations omitted) (citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003)).

279. *Id.*

280. *See id.* at \_\_\_, 133 S. Ct. at 2691–92 (majority opinion); *id.* at \_\_\_, 133 S. Ct. at 2706–08 (Scalia, J., dissenting); *id.* at \_\_\_, 133 S. Ct. at 2714–19 (Alito, J., dissenting).

beginning, is the pertinent tradition.<sup>281</sup> For Justices Scalia and Alito the claimed right to same-sex marriage is not deeply rooted in the nation's history and tradition and therefore is not constitutionally protected.<sup>282</sup>

While Justices Scalia's and Alito's traditionalist positions would permit prohibitions of same-sex marriage, Justice Kennedy's opinion points in different directions. He speaks of two issues: (1) the liberty and dignity of individuals seeking to enter into same-sex marriages and the federal government's unconstitutional interference with the equal dignity of such marriages; and (2) the states' virtually exclusive authority to define and regulate marriage.<sup>283</sup> The position Justice Kennedy ultimately will take when he is faced with a direct clash between a liberty-based claim to marry a person of the same sex and a state's prohibition of same-sex marriages is a matter of great interest for those seeking to invalidate or defend same-sex marriage bans.

#### IV. THE SAME-SEX MARRIAGE ISSUE

Do state-law bans on same-sex marriage violate the Due Process Clause? Justice Scalia has argued that, in light of *United States v. Windsor*, it is inevitable that the Court will strike down laws prohibiting same-sex marriage.<sup>284</sup> The accuracy of that observation will soon be known if Justice Ginsburg's recent prediction that the Court will take up the issue of same-sex marriage in 2015 or 2016 comes true.<sup>285</sup>

If and when the Court takes up the same-sex marriage issue, the Justices will address the question of whether same-sex marriage is a fundamental liberty interest protected by the Due Process Clause. As in its prior due process traditionalism cases, the Court's framing of the inquiry will play a critical role in the analysis and adjudication of the issue. Will the Court ask and answer

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281. See *id.* at \_\_\_, 133 S. Ct. at 2691 (majority opinion).

282. See *id.* at \_\_\_, 133 S. Ct. at 2707 (Scalia, J., dissenting); *id.* at 2714–15 (Alito, J., dissenting).

283. See *id.* at \_\_\_, 133 S. Ct. at 2691, 2694–96 (majority opinion).

284. See *supra* text accompanying notes 274–76.

285. German Lopez, *Justice Ginsburg: Supreme Court Will Take Up Same-Sex Marriage by 2016*, VOX (Aug. 1, 2014, 12:01 PM), <http://www.vox.com/2014/8/1/5959381/gay-marriage-supreme-court-2015-2016>.

in the affirmative the question of whether the fundamental right to marry encompasses same-sex marriage and subject same-sex marriage bans to strict scrutiny judicial review? Or will the Court instead ask and answer in the negative the question of whether same-sex marriage is a right deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, and therefore uphold such laws as rationally related to legitimate state interests?

The aforesaid questions have been considered and answered by two federal courts of appeals presented with substantive due process challenges to anti-same-sex-marriage laws in Utah, Oklahoma, and Virginia. Those courts' treatment of the same-sex marriage issue provide useful exemplars of the adjudicative role that due process traditionalism will or will not play in any future Court ruling on this important subject.

#### A. *A Fundamental Right To Marriage?*

In two recent rulings the United States Court of Appeals for the Tenth Circuit considered the constitutionality of Utah statutory and constitutional provisions defining marriage as the "legal union of a man and a woman,"<sup>286</sup> and Oklahoma's constitutional ban on same-sex marriage.<sup>287</sup>

In *Kitchen v. Herbert*, the Tenth Circuit affirmed the district court's grant of summary judgment in favor of plaintiffs challenging Utah's same-sex marriage ban.<sup>288</sup> The court, in an opinion by Judge Carlos Lucero, joined by Judge Jerome Holmes, asked whether a state may "constitutionally deny a citizen the benefit or protection of the laws of the State based solely upon the sex of

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286. See UTAH CODE ANN. § 30-1-4.1(a) (LexisNexis 2013) ("It is the policy of this state to recognize as marriage only the legal union of a man and a woman."); see also UTAH CONST. art. I, § 29 ("Marriage consists only of the legal union between a man and a woman.")

287. OKLA. CONST. art. II, § 35(A) (noting that marriage "shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups"); see also *id.* § (B)–(C) (stating that a same-sex marriage "performed in another state shall not be recognized as valid and binding in this state" and any person who knowingly issues a marriage license in violation of this provision is guilty of a misdemeanor).

288. *Kitchen v. Herbert*, 755 F.3d 1193, 1199–200 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

the person that citizen chooses to marry[.]”<sup>289</sup> The court answered no, explaining that

the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state’s marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.<sup>290</sup>

The state’s defense of its same-sex marriage proscription warrants examination and comment. Utah argued that the Supreme Court’s marriage precedents established only the fundamental right to opposite-sex marriage.<sup>291</sup> Rejecting that argument, Judge Lucero argued that the Court has described marriage “at a broader level of generality than would be consistent with [Utah’s] argument.”<sup>292</sup> The court looked to *Loving v. Virginia*, where the issue “was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was ‘the freedom of choice to marry.’”<sup>293</sup> In *Zablocki v. Redhail*, an equal protection case striking down a state law prohibiting persons with child support arrearages from marrying, the Court held that the law was unconstitutional given its “serious intrusion into [the] freedom of choice in an area in which we have held such freedom to be fundamental.”<sup>294</sup> As Judge Lucero noted, the right discussed in *Zablocki* “was characterized as the right to marry, not as the right of child-support debtors to marry.”<sup>295</sup> Further, in *Turner v. Safley*, the Court invalidated a prison rule prohibiting inmates from marrying absent the prison superintendent’s permission.<sup>296</sup> Judge Lucero stated that “[t]he right at issue was never framed as ‘inmate marriage’; the Court simply asked whether the fact of incarceration made it impossible for inmates to benefit from the ‘important attributes of marriage.’”<sup>297</sup>

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289. 755 F.3d at 1198.

290. *Id.* at 1199.

291. *Id.* at 1209.

292. *Id.*

293. *Id.* at 1210 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

294. 434 U.S. 374, 387, 390–91 (1978).

295. *Kitchen*, 755 F.3d at 1210.

296. *Turner v. Safley*, 482 U.S. 78, 82, 96–97, 99 (1987).

297. *Kitchen*, 755 F.3d at 1211 (quoting *Turner*, 482 U.S. at 95).

Relying on *Washington v. Glucksberg*,<sup>298</sup> the state also argued that the right to same-sex marriage was not deeply rooted in the nation's traditions because "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."<sup>299</sup> Judge Lucero rejected the state's contention that *Glucksberg*'s "careful description" instruction required the conclusion that "the term 'marriage' by its very nature excludes same-sex couples."<sup>300</sup> Judge Lucero reasoned that *Glucksberg* defined the scope of the claimed right independent of the identity of the right-holder, as the Court asked whether liberty under the Due Process Clause included the right to commit suicide and the right to assistance in doing so.<sup>301</sup> Accordingly, Judge Lucero defined the claimed right to marry independent of the sexes of the two persons seeking to marry; thus, the issue before the court concerned the right to enter into, not same-sex marriage, but marriage.<sup>302</sup>

Judge Lucero further determined that the state's position was foreclosed by *Lawrence v. Texas*.<sup>303</sup> Recall that *Lawrence* overruled *Bowers v. Hardwick* and rejected the *Bowers* Court's framing of the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."<sup>304</sup> *Lawrence* determined that this framing did not "appreciate the extent of the liberty at stake" and that it "misapprehended the claim of liberty there presented."<sup>305</sup> Instead, it reframed the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause."<sup>306</sup> Noting this difference in framing, Judge Lucero concluded that *Law-*

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298. 521 U.S. 702, 727 (1997).

299. *Kitchen*, 755 F.3d at 1209 (quoting *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2689 (2013)).

300. *Id.* at 1215 (citing *Glucksberg*, 521 U.S. at 721).

301. *Id.*

302. *See id.* at 1215–16.

303. *Id.* at 1217 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

304. *Lawrence*, 539 U.S. at 566–67, 578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986)).

305. *Id.* at 567.

306. *Id.* at 564.

rence indicated the approach that Utah advocated to be too narrow and “[j]ust as it was improper to ask whether there is a right to engage in homosexual sex, we do not ask whether there is a right to participate in same-sex marriage.”<sup>307</sup>

Judge Lucero mentioned an additional aspect of *Lawrence* in his opinion. Recall Justice Kennedy’s statement that “persons in every generation can invoke [the] principles [of the Due Process Clause] in their own search for greater freedom.”<sup>308</sup> Articulating his own generational analysis, Judge Lucero stated:

A generation ago, recognition of the fundamental right to marry as applying to persons of the same sex might have been unimaginable. A generation ago, the declaration by gay and lesbian couples of what may have been in their hearts would have had to remain unspoken. Not until contemporary times have laws stigmatizing or even criminalizing gay men and women been felled, allowing their relationships to surface to an open society. As the district court eloquently explained, “it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian.” Consistent with our constitutional tradition of recognizing the liberty of those previously excluded, we conclude that plaintiffs possess a fundamental right to marry and to have their marriages recognized.<sup>309</sup>

This finding of fundamentality is significant, for it triggered and subjected Utah’s ban to strict scrutiny judicial review. Assuming that the three justifications advanced by the state—all link marriage and procreation—were compelling,<sup>310</sup> Judge Lucero concluded that those interests were not narrowly tailored.<sup>311</sup> Utah’s same-sex marriage prohibition did

not differentiate between procreative and non-procreative couples [as] Utah citizens may choose a spouse of the opposite sex regardless of the pairing’s procreative capacity. The elderly, those medically unable to conceive, and those who exercise their fundamental right

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307. *Kitchen*, 755 F.3d at 1217–18.

308. *Lawrence*, 539 U.S. at 578–79; *Kitchen*, 755 F.3d at 1218.

309. *Kitchen*, 755 F.3d at 1218 (internal citations omitted).

310. *Id.* The state argued that the definition of marriage as the legal union of one man and one woman furthered its interests in the following ways: (1) “fostering a child-centric marriage culture;” (2) “children being raised by their biological mothers and fathers—or at least by a married mother and father—in a stable home;” and (3) “ensuring adequate reproduction.” *Id.* at 1219 (internal quotations omitted). The common denominator in each of these justifications “is the claim that allowing same-sex couples to marry ‘would break the critical conceptual link between marriage and procreation.’” *Id.*

311. *Id.* at 1218–19.

not to have biological children are free to marry and have their out-of-state marriages recognized in Utah.<sup>312</sup>

Thus, the state “may not impinge upon the exercise of a fundamental right as to some, but not all, of the individuals who share a characteristic urged to be relevant.”<sup>313</sup>

As for the state’s argument that its interest in childbearing and childrearing is furthered by channeling procreative couples into committed relationships, Judge Lucero did not find a sufficient causal connection between the same-sex marriage proscription and the state’s goals.<sup>314</sup> Rejecting the additional argument that recognizing same-sex marriages would have drastic consequences for Utah’s opposite-sex married couples, Judge Lucero noted that “it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.”<sup>315</sup>

Additionally, the state urged that the same-sex marriage ban was justified by “gendered parenting preferences” and contended that children are parented differently by men and women.<sup>316</sup> Not persuaded, Judge Lucero reasoned that “a prohibition on same-sex marriage is not narrowly tailored toward the goal of encouraging gendered parenting styles. The state does not restrict the right to marry or its recognition of marriage based on compliance with any set of parenting roles, or even parenting quality.”<sup>317</sup> While every opposite-sex couple, regardless of their style of parenting, is allowed to marry, every same-sex couple, irrespective of their parenting style, is prohibited from marrying.<sup>318</sup> Moreover, noting *Windsor*’s declaration that restricting same-sex marriage harms the children of same-sex couples,<sup>319</sup> Judge Lucero found that the ban sends a damaging message to the children of same-sex couples and that such collateral consequences imply that “the

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312. *Id.* at 1219.

313. *Id.* at 1221.

314. *Id.* at 1222.

315. *Id.* at 1223; *see also id.* at 1224 (noting that the court could not “imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child”).

316. *Id.* at 1224.

317. *Id.* at 1224–25.

318. *Id.* at 1225.

319. *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2694 (2013).

fit between the means and the end is insufficient to survive strict scrutiny.<sup>320</sup>

The state's fourth justification for the ban—the accommodation of religious freedom and the reduction of the potential for civic and religion-related strife—also failed as the court explained that “public opposition cannot provide cover for a violation of fundamental rights.”<sup>321</sup> While same-sex couples had to “be accorded the same legal status presently granted to married couples, . . . religious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit. . . . Our opinion does not intrude into that domain or the exercise of religious principles in this arena.”<sup>322</sup>

In the second Tenth Circuit decision *Bishop v. Smith*, the same three-judge panel that decided *Kitchen* struck down Oklahoma's constitutional ban on same-sex marriage.<sup>323</sup> Again writing for the majority, Judge Lucero set forth the core holdings of both *Kitchen* and *Bishop*: “State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry, and arguments based on the procreative capacity of some opposite-sex couples do not meet the narrow tailoring prong.”<sup>324</sup>

In so holding, the court rejected the defendant court clerk's argument “that children have an interest in being raised by their biological parents.”<sup>325</sup> Assuming that that interest is compelling, Judge Lucero concluded that “a prohibition on same-sex marriage is not narrowly tailored to achieve that end.”<sup>326</sup> Oklahoma law allows a child to be raised by persons who are not the child's biological parents and “permits infertile opposite-sex couples to marry despite the fact that they, as much as same-sex couples, might

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320. *Kitchen*, 755 F.3d at 1226; see Franklin, *supra* note 23, at 878–79 (“The children of same-sex couples are not the only ones harmed by” the message “that heterosexuality is preferable to homosexuality. . . . Courts have observed that other children suffer as well, as the stigma such laws perpetuate encourages ‘[s]chool-yard bullies’ to continue ‘psychologically [grinding] children with apparently gay or lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice.’”).

321. *Kitchen*, 755 F.3d at 1227.

322. *Id.*

323. See *id.* at 1198; *Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014).

324. *Bishop*, 760 F.3d at 1080.

325. *Id.* at 1081.

326. *Id.*



raise non-biological children.”<sup>327</sup> Having disregarded a child’s interest in being raised by her biological parents in other contexts, the court clerk “[did] not explain why same-sex marriage poses a unique threat such that it must be treated differently from these other circumstances.”<sup>328</sup> Moreover, Judge Lucero noted that members of same-sex couples, like members of opposite-sex couples, have a constitutional right to choose not to bear or beget a child.<sup>329</sup> The court stated that “Oklahoma has barred all same-sex couples, regardless of whether they will adopt, bear, or otherwise raise children, from the benefits of marriage while allowing all opposite-sex couples, regardless of their child-rearing decisions, to marry.”<sup>330</sup> That “regime falls well short of establishing ‘the most exact connection between justification and classification’” and is not narrowly tailored.<sup>331</sup>

Consider the Fourth Circuit’s recent decision in *Bostic v. Schaefer*<sup>332</sup> where it held that Virginia’s constitutional and statutory anti-same-sex-marriage provisions<sup>333</sup> violate the Due Process Clause.<sup>334</sup> The plaintiffs argued that the right to marry belongs to an individual “who enjoys the right to marry the person of his or her choice.”<sup>335</sup> Virginia, relying on *Glucksberg*, contended that “traditionally, states have sanctioned only man-woman marriages” and that “in light of this history, the right to marry does not include a right to same-sex marriage.”<sup>336</sup>

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327. *Id.*

328. *Id.*

329. *See id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

330. *Id.*

331. *Id.* at 1081–82 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

332. *See generally* 760 F.3d 352, 384 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014) (concluding “that the Virginia Marriage Laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.”).

333. The Virginia Constitution provides “[t]hat only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.” VA. CONST. art. I, § 15-A. Pursuant to a state statute, “marriage between persons of the same sex is prohibited [and a]ny marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.” VA. CODE ANN. § 20-45.2 (Repl. Vol. 2008 & Cum. Supp. 2014).

334. *See Bostic*, 760 F.3d at 384 (finding that the Virginia Marriage Laws also violated the Equal Protection Clause).

335. *Id.* at 375.

336. *Id.* at 375–76.

The court's opinion, written by Judge Henry Floyd and joined by Judge Roger Gregory, framed the issue before it as "whether the Virginia Marriage Laws infringe on a fundamental right."<sup>337</sup> Judge Floyd did not dispute that for most of this nation's history, states have refused to allow same-sex marriages.<sup>338</sup> But this was irrelevant, he concluded, because "*Glucksberg's* analysis applies only when courts consider whether to recognize new fundamental rights. . . . Because we conclude that the fundamental right to marry encompasses the right to same-sex marriage, *Glucksberg's* analysis is inapplicable here."<sup>339</sup>

Like the Tenth Circuit in *Kitchen*, Judge Floyd observed that the Supreme Court's *Loving*, *Zablocki*, and *Turner* decisions "demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms."<sup>340</sup> These cases did not explain marriage as "the right to interracial marriage,' 'the right of people owing child support to marry,' [or] 'the right of prison inmates to marry.'"<sup>341</sup> He argued instead that

they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right. . . . If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.<sup>342</sup>

Virginia argued that the aforementioned Supreme Court marriage decisions involved opposite-sex couples and were therefore inapposite.<sup>343</sup> Disagreeing, Judge Floyd noted that *Lawrence* "expressly refused to narrowly define the right at issue as the right of 'homosexuals to engage in sodomy,' concluding that doing so would constitute a 'failure to appreciate the extent of the liberty at stake.'"<sup>344</sup> *Lawrence* "identified the right at issue . . . as a matter of choice [and determined] that gays and lesbian[s, like other individuals], enjoy the right to make [their own] decisions regard-

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337. *Id.* at 375.

338. *Id.* at 376.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 376–77.

343. *Id.* at 377.

344. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 566–67 (2003)).

ing their personal relationships.”<sup>345</sup> *Windsor*’s holding that Section 3 of DOMA was unconstitutional was based partly “on that provision’s disrespect for the ‘moral and sexual choices’ that accompany a same-sex couple’s decision to marry.”<sup>346</sup> In Judge Floyd’s view, both *Lawrence* and *Windsor* demonstrate that “the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships.”<sup>347</sup>

Judge Floyd expressed his belief that the Supreme Court would not

accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned. Accordingly, we decline [Virginia’s] invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry.<sup>348</sup>

Having held that the right to enter into a same-sex marriage is a fundamental right, the Fourth Circuit strictly scrutinized the state’s proffered justifications for its anti-same-sex marriage laws: (1) a federalism-based interest in controlling the definition of marriage; (2) the history and tradition of opposite-sex marriage; (3) the protection of the institution of marriage; (4) encouraging responsible procreation; and (5) the promotion of optimal childrearing.<sup>349</sup> Judge Floyd concluded that none of these interests excused the state’s deprivation of liberty and infringement of the right to marry.<sup>350</sup> Regarding the history and tradition justification, he concluded that the preservation of the traditional and historical status quo is not a compelling interest, stating that “[t]he Supreme Court has made it clear that, even under rational basis review, the ‘[a]ncient lineage of a legal concept does not give it immunity from attack.’”<sup>351</sup> Further,

[t]he closely linked interest of promoting moral principles is similarly infirm in light of *Lawrence*: “the fact that the governing majority

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345. *Id.* (citing *Lawrence*, 539 U.S. at 567).

346. *Id.* (quoting *United States v. Windsor*, 570 U.S. \_\_\_, \_\_\_, 133 S. Ct. 2675, 2694 (2013)).

347. *Id.*

348. *Id.*

349. *See id.* at 377–78.

350. *Id.* at 379–84.

351. *Id.* at 380 (quoting *Heller v. Doe*, 509 U.S. 312, 326 (1993)).

in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”<sup>352</sup>

In its recent ruling in *Latta v. Otter*, the United States Court of Appeals for the Ninth Circuit, in an opinion by Judge Stephen Reinhardt, held that Idaho’s and Nevada’s constitutional and statutory provisions preventing same-sex couples from marrying violated the Equal Protection Clause.<sup>353</sup> Writing separately, Judge Reinhardt also would have held that the fundamental right to marriage recognized by the Supreme Court in *Loving*, *Zablocki*, and *Turner* includes the right to marry a person of one’s choice and “applies to same-sex marriage just as it does to opposite-sex marriage.”<sup>354</sup> Noting that the case turned on how the claimed fundamental right was described, he reasoned that in the aforementioned cases the Court referred to “the general right of people to marry, rather than a narrower right defined in terms of those who sought the ability to exercise it.”<sup>355</sup> Thus, the Court’s applicable precedents did not ask whether a new and narrow right should be recognized, or whether the class affected by the at-issue prohibition of marriage enjoyed a right as that right had been previously defined; the pertinent question, Judge Reinhardt determined, was whether there was a sufficiently compelling justification for denying the plaintiffs’ claimed right.<sup>356</sup>

Idaho and Nevada contended that the denial of a right to marry a person of the same sex did not deprive gays and lesbians of the freedom to marry, “as they are still free to marry individuals of the opposite sex.”<sup>357</sup> Characterizing that contention as “uncomprehending” and “unavailing,” Judge Reinhardt argued that *Loving* rebutted the states’ argument.<sup>358</sup> He argued that Mildred Jeter and Richard Loving were not completely prohibited from marriage as they were both free to marry individuals of their own race; however, they were both denied the freedom to marry the

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352. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003)).

353. *Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17668, 2014 WL 4977682, at \*1 (9th Cir. Oct. 7, 2014).

354. *Id.* at \*11 (Reinhardt, J., concurring).

355. *Id.* at \*12.

356. *See id.*

357. *Id.*

358. *Id.*

individual of their choice, which in their case happened to be the other.<sup>359</sup> Gays and lesbians enjoy the same freedom, for “[a] limitation on the right to marry another person, whether on account of race or for any other reason, is a limitation on the right to marry.”<sup>360</sup>

For Judge Reinhardt, defining the right to marry as the right to marry an individual of the opposite sex makes the same error that the Court committed in *Bowers v. Hardwick*.<sup>361</sup> He noted, “Fundamental rights defined with respect to the subset of people who hold them are fundamental rights misdefined.”<sup>362</sup> The question for resolution is not whether persons have a fundamental right to marry a person of the same sex, but whether a person has a fundamental right to marry “the one he or she loves. Once the question is properly defined, the answer follows ineluctably: yes.”<sup>363</sup>

#### B. *A Fundamental Right To Same-Sex Marriage?*

As noted in the preceding section, majorities of three-member panels in the Tenth and Fourth Circuits held that state laws prohibiting same-sex marriage violated the Fourteenth Amendment’s Due Process Clause.<sup>364</sup> In each case a dissenting judge reached the opposite conclusion, asking and answering in the negative the question whether the claimed right to same-sex marriage is fundamental, i.e., deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty.

The Sixth Circuit has issued a decision rejecting, and creating a circuit split in, the views of the Tenth and Fourth Circuits. In *DeBoer v. Snyder*<sup>365</sup> the court upheld Kentucky, Michigan, Ohio, and Tennessee laws prohibiting same-sex marriage.<sup>366</sup> Writing for

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359. *Id.*

360. *Id.*

361. *See id.* at \*13; *see also supra* notes 209–13 and accompanying text.

362. *Latta*, 2014 WL 4977682, at \*13.

363. *Id.*

364. *See supra* Part IV.A.

365. Nos. 14-1341, -3057, -3464, -5291, -5297, at \*1, \*26–27, 2014 WL 5748990 (6th Cir. Nov. 6, 2014).

366. *See* KY. CONST. § 233A (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.”); MICH. CONST. art. I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a

the court and joined by Judge Deborah Cook, Judge Jeffrey Sutton rejected, among other arguments, the plaintiffs' argument that the challenged laws violated their fundamental right to marry, opining that "something can be fundamentally important without being a fundamental right under the Constitution."<sup>367</sup> The question for the court is "whether our nation has treated the right as fundamental and therefore worthy of protection under substantive due process [and] the test is whether the right is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"<sup>368</sup>

Determining that the right to marriage or to gay marriage does not appear in the Constitution, Judge Sutton assessed the argument that the proposed right to same-sex marriage "turns on bed-rock assumptions about liberty [and that t]his too does not work."<sup>369</sup> He pointed out that the Massachusetts Supreme Judicial Court's 2003 decision was the first state high court redefinition of marriage to include same-sex marriage.<sup>370</sup> Judge Sutton further observed that the Supreme Court of the United States's *Loving v. Virginia* decision confirmed that "marriage" referred to traditional opposite-sex and not same-sex marriage.<sup>371</sup> In outlawing interracial marriage bans the Court "addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage."<sup>372</sup> Reasoning that one must query "whether the old reasoning applies to the new setting," Judge Sutton concluded that *Loving's* fundamental-rights decision did not dictate the outcome of current challenges to same-sex marriage bans.<sup>373</sup> To "shoehorn new meanings into old

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marriage or similar union for any purpose."); OHIO CONST. art. XV, § 11 ("[A valid marriage is] only a union between one man and one woman. . . ."); TENN. CONST. art. XI, § 18 ("[A] relationship of one man and one woman shall be the only legally recognized marital contract in this state.").

367. *DeBoer*, 2014 WL 5748990 at \*16.

368. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

369. *Id.*

370. *Id.*; see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

371. *DeBoer*, 2014 WL 5748990, at \*16 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

372. *Id.* In the wake of *Loving*, states could no longer lawfully define marriage as the union of persons of the same race. See *id.*

373. *Id.* at \*17.

words” would give “evolving-norm lexicographers . . . a greater say over the meaning of the Constitution than judges.”<sup>374</sup>

Consider also Judge Paul Kelly, Jr.’s rejection of the majority’s due process analysis in his dissent from the *Kitchen* ruling.<sup>375</sup> Noting that the plaintiffs contended that they were relying on “a fundamental right to marriage simpliciter” and not “a fundamental right to same-gender marriage,” he cited *Glucksberg* and opined that “given the ephemeral nature of substantive due process, recognition of fundamental rights requires” both a precise definition of the right and its being a notion deeply rooted in the Nation’s history and tradition.<sup>376</sup> Because same-sex marriage is a recent phenomenon, it did not meet the prescribed standard that “for centuries ‘marriage’ has been universally understood to require two persons of opposite gender.”<sup>377</sup> Moreover, while same-sex marriage may one day “become part of this country’s history and tradition, . . . that is not a choice this court should make.”<sup>378</sup> Having determined that there is no fundamental right to same-sex marriage, Judge Kelly argued that the challenged provisions of the Utah constitution and statute should be upheld as rationally related to “responsible procreation,” “effective parenting,” and “the desire to proceed cautiously in this evolving area.”<sup>379</sup>

Dissenting again in *Bishop v. Smith*, Judge Kelly stated: “When it comes to deciding whether a state has violated a fundamental right to marriage, the substantive due process analysis must consider the history, legal tradition, and practice of the institution.”<sup>380</sup> Discussing “western marriage,” he set out four identifying features of that institution: (1) exclusivity, (2) monogamy, (3) non-familial pairs, and (4) gender complementarity, distinct from procreation.<sup>381</sup> He noted that this historically rooted practice is the basis for most state laws.<sup>382</sup> In fact, “[t]he core marital

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374. *Id.*

375. *Kitchen v. Herbert*, 755 F.3d 1193, 1230 (10th Cir. 2014) (Kelly, J., dissenting), *cert. denied*, 135 S. Ct. 265 (2014).

376. *Id.* at 1234 (Kelly, J., dissenting).

377. *Id.*

378. *Id.*

379. *Id.* at 1230.

380. 760 F.3d 1070, 1112 (10th Cir. 2014) (Kelly, J., dissenting), *cert. denied*, 135 S. Ct. 271 (2014).

381. 760 F.3d at 1113 (Kelly, J., dissenting).

382. *Id.*

norms throughout Oklahoma's history have included these elements."<sup>383</sup> Judge Kelly argued that polygamous and incestuous relationships do not satisfy these elements and do not qualify for marriage.<sup>384</sup> Nor, in his view, does same-sex marriage.<sup>385</sup>

Judge Kelly also rejected the argument that those who would deny the right to same-sex marriage on historical grounds "might just as easily have argued that interracial couples are by definition excluded from the institution of marriage."<sup>386</sup> According to Judge Kelly, no one could have made the argument in *Loving v. Virginia* that racial homogeneity was "an essential element of marriage."<sup>387</sup>

But Virginia did make that argument in *Loving*. In the 1967 oral argument before the Supreme Court, Virginia's counsel stated that Virginia's antimiscegenation law served "a legitimate legislative objective of preventing the sociological and psychological evils which attend interracial marriages."<sup>388</sup> Thus, and contrary to Judge Kelly's supposition, racial homogeneity was deemed essential to the prevention of the purported evils related to and caused by racially heterogeneous marriages. Virginia thus believed that an essential element of marriage was the legal union of a racially homogeneous couple—more specifically, the legal union of a white man and a white woman.<sup>389</sup>

Dissenting from the Fourth Circuit's judgment in *Bostic v. Schaefer*, Judge Paul Niemeyer observed that the majority "has simply declared syllogistically that because 'marriage' is a fun-

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383. *Id.*; see also *id.* ("Removing gender complementarity from the historical definition of marriage is simply contrary to the careful analysis prescribed by the Supreme Court when it comes to substantive due process.").

384. *Id.*; see also *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting) (noting that state constitutions "to this day contain provisions stating that polygamy is 'forever prohibited.'"). For discussion and criticism of the efforts of same-sex marriage opponents to draw an analogy between same-sex marriage and polygamy, see Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1981–86 (2010).

385. See *Bishop*, 760 F.3d at 1113 (Kelly, J., dissenting).

386. *Id.* (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1216 (10th Cir. 2014)).

387. *Id.*

388. Transcript of Oral Argument at 20, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), reprinted in 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT, *supra* note 80, at 979.

389. *Cf. id.* at 991–94 (conceding that Virginia's antimiscegenation statutes were enacted on the premise that the white race was superior to other races and with the intention that it be kept "pure").



damental right protected by the Due Process Clause and ‘same-sex marriage’ is a form of marriage, Virginia’s laws declining to recognize same-sex marriage infringe the fundamental right to marriage and are therefore unconstitutional.”<sup>390</sup>

Relying on *Glucksberg*, Judge Niemeyer framed the question before the court as “whether the “liberty” specially protected by the Due Process Clause includes a right’ to same-sex marriage.”<sup>391</sup> The *Bostic* majority did not ask “the question necessary to finding a fundamental right—whether same-sex marriage is a right that is [so] ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.’”<sup>392</sup> The majority’s approach did not anticipate and failed to explain “why this broad right to marry . . . does not also encompass the ‘right’ of a father to marry his daughter or the ‘right’ of any person to marry multiple partners.”<sup>393</sup>

Considering the *Loving*, *Zablocki*, and *Turner* marriage cases, Judge Niemeyer opined that those decisions involved, not the “assertion of a brand new liberty interest,” but opposite-sex couples claiming a right to enter into traditional one man/one woman marriage.<sup>394</sup> Focusing on *Loving*, he stated that “the Court did not examine whether interracial marriage was, objectively, deeply rooted in our Nation’s history and tradition.”<sup>395</sup> Moreover, Judge Niemeyer continued, “*Loving* simply held that race, which is completely unrelated to the institution of marriage, could not be the basis of marital restrictions” and that the Virginia statute “struck down in *Loving* . . . had no relationship to the foundation-

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390. *Bostic v. Schaefer*, 760 F.3d 352, 385 (4th Cir. 2014) (Niemeyer, J., dissenting), *cert. denied*, 135 S. Ct. 308 (2014). According to Judge Niemeyer, the majority “fail[ed] to take into account that the ‘marriage’ that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly proposed relationship of a ‘same-sex marriage[]’ . . . a new notion that has not been recognized ‘for most of our country’s history.’” 760 F.3d at 386.

391. *Id.* at 389 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997)).

392. *Id.* at 386 (quoting *Glucksberg*, 521 U.S. at 721).

393. *Id.*

394. *Id.* at 390–91; *see also supra* Part IV.A.

395. 760 F.3d at 390 (Niemeyer, J., dissenting). While the *Loving* Court did not expressly set forth a *Glucksberg*-type traditionalist analysis, it is clear that “the limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it. Laws forbidding black-white marriage dated back to colonial times and were found in northern as well as southern colonies and states.” *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

al purposes of marriage, while the gender of the individuals in a marriage clearly does.”<sup>396</sup>

This attempt to distinguish *Loving* fails. That Judge Niemeyer believes that race is not related to marriage is not the point. Virginia law established the traditional and entrenched racist and white-supremacist marriage regime challenged in *Loving*.<sup>397</sup> The state argued that “[i]f this Court (erroneously, we contend) should undertake” an inquiry into the wisdom of the state’s antimiscegenation law, “it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view.”<sup>398</sup> The state also advised the Court of the Louisiana Supreme Court’s declaration that a

state statute which prohibits intermarriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened . . . with “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>399</sup>

In criminalizing different-race marriages, Virginia clearly determined that race was related to the state’s conception of a foundational purpose of marriage.<sup>400</sup> The state sought to protect and promote what it viewed as the right kind of marriage-related procreation, furthering its interest in maintaining white-supremacist racial purity.<sup>401</sup> Virginia was unabashedly concerned with the

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396. *Bostic*, 760 F.3d at 392 (Niemeyer, J., dissenting) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

397. See Brief for Appellants at 15, 20–21, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) (Feb. 17, 1967), reprinted in 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT, *supra* note 80, at 763, 768–69 (discussing the history of racism and white supremacy that led to Virginia’s antimiscegenation laws).

398. Brief on Behalf of Appellee at 41, *Loving v. Virginia*, 388 U.S. 1 (No. 395) (Mar. 20, 1967), reprinted in 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT, *supra* note 80, at 834.

399. *Id.* at 35, reprinted in 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT, *supra* note 80, at 828 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); *State v. Brown*, 108 So.2d 233, 234 (La. 1959)).

400. See *Loving*, 388 U.S. at 6–7.

401. See *id.* at 11.

propagation of mixed-race “half-breed children” and what the Virginia Supreme Court once called the problem of “a mongrel breed of citizens.”<sup>402</sup> Given these facts and racist realities, the suggestion that Virginia’s antimiscegenation law and same-race marriage regime had no relationship to the purpose of marriage is simply wrong, if not egregious.

Do laws prohibiting same-sex marriages unconstitutionally infringe the fundamental right to marry which is protected by the Due Process Clause? Is such a framing of this important constitutional issue correct or should the question be narrowed as whether the claimed right to same-sex marriage is a fundamental right deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty?

As discussed in this part, the majority opinions in the Tenth and Fourth Circuit decisions and Judge Reinhardt’s concurring opinion in *Latta* did not ask the latter question. Instead, and describing marriage at a broad level of generality, the issue was framed as one concerning the fundamentality of adjectiveless marriage. Like those plaintiffs who claimed the right to marry and not the right to interracial, child-support debtor, or inmate marriage, two persons of the same sex who wish to marry seek just that—marriage and not same-sex marriage. On that view, the same-sex plaintiffs who prevailed in *Kitchen*, *Bishop*, and *Bostic* sought and obtained the long-recognized fundamental right to marry enjoyed by opposite-sex couples.<sup>403</sup>

The Sixth Circuit’s *DeBoer* ruling and the dissenting Tenth and Fourth Circuits’ judges’ different and narrow framing of the issue mirrors the ongoing disagreement within the Supreme Court regarding the formulation and application of due process traditionalism. Judges Sutton, Kelly, and Niemeyer asked whether same-sex marriage—“a very recent phenomenon”<sup>404</sup> and “a new notion that has not been recognized for ‘most of our country’s histo-

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402. *Naim v. Naim*, 87 S.E.2d 749, 756 (1955).

403. See Robert Barnes, *Winning Plaintiffs Press Supreme Court to Take Up Same-Sex Marriage Cases*, WASH. POST (Aug. 27, 2014), [http://www.washingtonpost.com/politics/courts\\_law/winning-plaintiffs-press-supreme-court-to-take-up-same-sex-marriage-cases/2014/08/27/90336dc8-2e06-11e4-9b98-848790384093\\_story.html](http://www.washingtonpost.com/politics/courts_law/winning-plaintiffs-press-supreme-court-to-take-up-same-sex-marriage-cases/2014/08/27/90336dc8-2e06-11e4-9b98-848790384093_story.html).

404. *Kitchen v. Herbert*, 755 F.3d 1193, 1234 (10th Cir. 2014) (Kelly, J. dissenting), *cert. denied*, 135 S. Ct. 265 (2014).

ry”<sup>405</sup>—is a fundamental right that is deeply rooted in the nation’s history and tradition. Unsurprisingly, they answered that descriptive question in the negative and adopted a not-traditional-therefore-not-unconstitutional jurisprudential approach.

Due process traditionalism recognizing only those fundamental rights and liberties which are deeply rooted in this nation’s history and tradition unduly limits liberty to those interests already protected by state laws and constitutional provisions, and can insulate discriminatory traditions from judicial scrutiny. That is so because

[t]radition per se has no positive or negative significance. There are good traditions, bad traditions pilloried in . . . famous literary stories . . . , bad traditions that are historical realities such as cannibalism, foot-binding, and suttee, and traditions that from a public-policy standpoint are neither good nor bad (such as trick-or-treating on Halloween).<sup>406</sup>

Imagine that in *Loving v. Virginia* the Supreme Court held that the deep roots of antimiscegenation laws in the nation’s history and tradition established the constitutionality of such measures.<sup>407</sup> Such a result, passively deferential to the then-extant status quo, would have left in place a traditional, overtly racist, and white-supremacist marriage regime. *Loving* correctly invalidated Virginia’s same-race marriage regime, for “[t]radition per se . . . cannot be a lawful ground for discrimination—regardless of the age of the tradition.”<sup>408</sup> The long-recognized “freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>409</sup> The right belongs to the individual and not to the majority who, speaking through law, traditionally saw interracial marriage as a departure from, and a threat to, the state’s conception of the purported benefits of racially homogeneous marriages.

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405. *Bostic v. Schaefer*, 760 F.3d.352, 386 (4th Cir. 2014) (Niemeyer, J., dissenting), *cert. denied*, 135 S. Ct. 308 (2014).

406. *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

407. See Ronald Turner, *Were Separate-But-Equal and Antimiscegenation Laws Constitutional?: Applying Scalian Traditionalism to Brown and Loving*, 40 SAN DIEGO L. REV. 285, 291–92 (2003); see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies” Virginia’s miscegenation statutes).

408. *Baskin*, 766 F.3d at 666.

409. *Loving*, 388 U.S. at 12.

Grounding judicial analysis of the issue of the constitutionality of same-sex marriage prohibitions in a history and tradition of an opposite-sex-only marriage regime is similarly problematic. As the Court has made clear, “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,”<sup>410</sup> and each generation can invoke the principles of due process “in their own search for greater freedom.”<sup>411</sup> On this view, past and entrenched beliefs, practices, and conceptions do not dictate current constitutional meaning and are instead subject to judicial review and invalidation.

With respect to same-sex marriage, the argument and conclusion that the state can infringe individual choice and “impose a single heterosexual model of the family on all Americans . . . reflects and reinforces stereotyped conceptions of sexuality, gender, and the family, and in so doing, abrogates the right of gays and lesbians to make critical decisions about the organization of their lives.”<sup>412</sup> Liberty-restricting traditions do not define the scope and sphere of rights protected by the Due Process Clause. The individual’s liberty and decision whether to marry and who to marry is not and should not be infringed upon merely because the state has traditionally defined marriage as the legal union of a man and a woman.

## CONCLUSION

Tradition and traditionalism have long played and continue to play an important role in the Supreme Court’s substantive due process analysis and jurisprudence. With respect to the issue of same-sex marriage, it is likely that the Court will soon take up an issue of first impression—whether state laws prohibiting same-sex marriages are constitutional. When that occurs, the Justices will resume their ongoing debate regarding the outcome-influential, if not outcome-determinative, framing and definition of the claimed liberty interest. Do same-sex marriage bans unconstitutionally infringe on the fundamental right to marry? Or are such bans constitutional because the claimed right is not a

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410. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (internal quotations omitted)).

411. *Id.* at 578–79.

412. Franklin, *supra* note 23, at 888–89.

right that is deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty? As illustrated by the federal appeals courts' decisions, the significance of a Justice's discretion to frame the inquiry as the broader right to marry query or as the narrower right to same-sex marriage question is manifest, for the outcome reached will turn on that choice.<sup>413</sup>

Aware of the perils of prediction, and heeding Justice Ginsburg's observation that the Court will soon have before it a same-sex marriage case, this article submits that a majority of the currently constituted Supreme Court will someday hold that same-sex couples have the same fundamental right to marry enjoyed by opposite-sex couples. Counting to five,<sup>414</sup> I predict that five Justices—Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan—will hold, in an opinion written by Justice Kennedy,<sup>415</sup> that an individual's right to marry a person of the same sex is a fundamental liberty interest. Eschewing a *Glucksberg*-type traditionalist analysis, these Justices will focus, among other things, on the ways in which a same-sex marriage ban demeans and stigmatizes same-sex couples, interferes with the equal dignity of same-sex marriages, and causes the humiliation of children raised by same-sex couples. Finding that the right to same-sex marriage is fundamental, this group of Justices will strictly scrutinize the ban and will find the justifications proffered to date by states defending the opposite-sex-marriage-only regime insufficient. Four Justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—will conclude that same-sex marriage does not meet the deeply-rooted/implicit-in-ordered-liberty standard of due process

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413. See Barnett, *supra* note 20, at 1490.

414. See Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 32 (1997) ("Justice Brennan used to joke that a critical talent for a Supreme Court Justice was the ability to count to five.").

415. Justice Kennedy authored the majority opinions in the Court's three sexual orientation discrimination cases (*Romer*, *Lawrence*, and *Windsor*), all decided by 5-4 votes. Under the Court's informal rules, the Chief Justice, when in the majority, will write the majority opinion or assign that task to another Justice in the majority. See BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 423 (2014). When the Chief Justice is not in the majority, the senior Justice in the majority assigns the majority opinion. *Id.* On the current Court, Justice Scalia is the most senior Justice. *Id.* Scalia is "likely to be in the same voting clique as the conservative chief and so would seldom be in a position to assign an opinion." *Id.* Justice Kennedy, next in terms of seniority, assigns opinions when he is in the majority and Chief Justice Roberts is not. As Murphy notes, "All of this served to anoint Kennedy as the new 'shadow chief' on the Court. By exercising his combined powers as the Court's swing justice, he could become the institution's most powerful member." *Id.* at 424.

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fundamentality and will uphold laws banning such marriages as rationally related to legitimate state interests.

While this prediction will ultimately be proven right or wrong, a future Court decision recognizing or denying a fundamental right to same-sex marriage will be a landmark constitutional ruling.