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THE SAME SEX MARRIAGE DEBATE FOR DUMMIES: A BREAKDOWN OF THE TWENTY- FIRST CENTURY'S FIRST CIVIL RIGHTS MOVEMENT

*Marc Anthony Consalo**

June 8, 1977: Florida Governor Rubin Askew signed a bill which banned same-sex couples from getting married or adopting children in the State of Florida.¹

May 29, 1997: Florida Governor Lawton Chiles withdrew his opposition to a bill that becomes law banning the State of Florida from recognizing same-sex marriages.²

November 4, 2008: By a sixty-two percent margin, Florida voters passed a constitutional amendment banning same-sex marriage within the state.³

February 28, 2014: Jim Brenner and Chuck Jones file suit against Governor Rick Scott demanding that the state recognize their 2009 marriage from Canada.⁴

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¹ Rene Stutzman, *Key Day For Same-Sex Marriage in Florida*, ORLANDO SENTINEL, (2015), available at <http://www.orlandosentinel.com/news/breaking-news/os-gay-marriage-florida-timeline-20150105-story.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

July 17, 2014–August 5, 2014: Judges from Monroe, Miami-Dade, Broward and Palm Beach counties independently ruled Florida’s ban on same-sex marriage is unconstitutional but stay enforcement of their rulings for appeals.⁵

August 21, 2014: United States District Judge Robert Hinkle ruled in *Brenner v. Scott* that Florida’s ban on same sex marriage is unconstitutional: he stayed his ruling but also puts a cap on how long it will last—ninety days after the United States Supreme Court weighs in on state same-sex marriage bans.⁶

Oct. 6, 2014: The United States Supreme Court refused to take up *Brenner v. Scott*, triggering Judge Hinkle’s ninety-day countdown to same-sex marriage in Florida on January 6th.⁷

January 6, 2015: Same-sex marriages became legal in the State of Florida.⁸

The above timeline offers a glimpse of the ups and downs that the same sex marriage debate has faced on its road to legalization in the State of Florida. It is important to understand that at the time of writing this article while currently legal, same-sex marriage still faces challenges in both the Eleventh Federal Judicial Circuit and potentially the United States Supreme Court.⁹ No matter what decision the courts ultimately reach on the topic, like the Civil Rights movement of the 1960’s, it is important to understand the conflict as it shapes not only our legal landscape but also our future as Floridians.

This article will attempt to break down the debate between opponents and proponents of same-sex marriage. It will begin by briefing the cases of *Loving v. Virginia* and *United States v. Windsor*.¹⁰ These cases are cited repeatedly as grounds for the decision to invalidate same sex-marriage bans.¹¹ Next, this article will explain the opponent’s position in support of a ban against same-sex marriage, and the

⁵ *Id.*

⁶ *Id.*; *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1294 (2014).

⁷ *Brenner*, 999 F. Supp. 2d at 1294; *Armstrong v. Brenner*, 135 S. Ct. 890 (2014); Stutzman, *supra* note 1.

⁸ Stutzman, *supra* note 1.

⁹ See Matt Ford, *The Supreme Court Will Decide If ‘Gay Marriage’ is Just ‘Marriage’*, THE ATLANTIC, (2015), available at <http://www.theatlantic.com/politics/archive/2015/01/Supreme-Court-to-Hear-Four-Cases-on-Same-Sex-Marriage/384610/>.

¹⁰ See 388 U.S. 1 (1967); 133 S. Ct. 2675 (2013).

¹¹ See *Brenner*, 999 F. Supp. 2d at 1286–87, 1289–91.

proponent's opposing arguments against the ban. Finally, this article will provide an analysis of the *Brenner v. Scott*¹² decision, its implications for the State of Florida, and its potential path to the United States Supreme Court.

LOVING V. VIRGINIA, 388 U.S. 1 (1967).

It is ironic that the paramount case used in support of same-sex marriage involves a party named Loving.¹³ The case centered on the relationship between seventeen-year-old Mildred Jeter, who was black, and her childhood sweetheart, twenty-three-year-old white construction worker, Richard Loving.¹⁴ The two resided in Virginia, but journeyed to Washington D.C. in 1958 to be wed.¹⁵ After the ceremony, they returned to Virginia to live as a married couple.¹⁶ At the time, the State of Virginia had outlawed marriage between blacks and whites—known as “miscegenation” laws—the couple risked arrest and imprisonment due to their relationship.¹⁷

In October of 1958, a grand jury was empaneled to investigate the Lovings.¹⁸ Soon after, the grand jury issued an indictment, which charged the Lovings with violating Virginia's ban on interracial marriages.¹⁹ Left with no alternatives, on January 6, 1959, the Lovings pleaded guilty to the charge.²⁰ They were sentenced to one year in jail; suspended on the condition that the Lovings leave Virginia and not return for twenty-five years.²¹ In rendering his decision, the trial judge stated the following at the time of sentencing:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.²²

The focus of the Lovings' convictions centered on sections 258 and 259 of the Virginia Code.²³ Section 258 read:

¹² *Id.* at 1278.

¹³ *See Loving*, 388 U.S. at 2.

¹⁴ *See Loving*, 388 U.S. at 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See Loving*, 388 U.S. at 3.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 4–5.

Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20–59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.²⁴

Section 259, which provided what the penalty for miscegenation would be, stated: “*Punishment for marriage.* — If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”²⁵ After their conviction, the Lovings moved to Washington D.C.²⁶ On November 6, 1963, they filed a motion in the Virginia state court to vacate the judgment and set aside the sentence.²⁷ Their argument centered on the Fourteenth Amendment’s Equal Protection Clause.²⁸ The trial court took no action on the motion, therefore, on October 28, 1964, the Lovings initiated a class action lawsuit.²⁹ It was filed in the United States District Court for the Eastern District of Virginia.³⁰ The suit asked that a three-judge panel be convened to review the statutes and find Virginia’s anti-miscegenation statutes unconstitutional.³¹ The Lovings also sought an injunction against state officials preventing the enforcement of their convictions.³²

On January 22, 1965, the state trial judge denied the November 6, 1963 motion to vacate.³³ The Lovings appealed this decision to the Supreme Court of Appeals of Virginia.³⁴ On February 11, 1965, the court in the class action suit stayed its case to allow the Lovings to present their constitutional claims to the highest state court.³⁵ The Supreme Court of Appeals of Virginia affirmed the state trial court’s decision.³⁶ It upheld the constitutionality of the anti-miscegenation statutes and

²⁴ *Id.* at 4.

²⁵ *Id.* (emphasis in original).

²⁶ *See Loving*, 388 U.S. at 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *See Loving*, 388 U.S. at 3.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 3–4.

affirmed their sentences.³⁷ The Lovings appealed this decision to the United States Supreme Court.³⁸

In April 1967, the United States Supreme Court heard the parties' arguments.³⁹ The issue presented to the Court was whether statutes preventing marriages between individuals of different races violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁴⁰ The Court ruled that the statutes were unconstitutional.⁴¹ In making its decision, the Court addressed Virginia's concerns that the regulation of marriage was a state's rights issue, and that only the states held this power under the Tenth Amendment.⁴² While the Court conceded that a state does have police powers to regulate marriage, those powers still must comply with the requirements of the Fourteenth Amendment.⁴³ Virginia's argument was that indeed, its "miscegenation" laws did comply with such federal regulations as it punished whites and blacks equally for the crime.⁴⁴

The second argument by Virginia was that even if the Equal Protection Clause does not outlaw miscegenation statutes, because of their reliance on racial classifications, there was still a rational basis for a state to discriminate against interracial marriages.⁴⁵ Virginia conceded there was lack of scientific evidence on the issue, but asked that the Court "defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages."⁴⁶

The Court rejected Virginia's argument that any rational basis for the statute should result in its survival.⁴⁷ A clear distinction had been made in precedent regarding the analysis of laws concerning discrimination based on race or other defining characteristics.⁴⁸ In *Loving*, it was clear that the only discernable quality used to outlaw the marriage between a white man and a black woman was the color of their skin.⁴⁹ Thus, in recognizing this fundamental truth regarding Virginia's

³⁷ *Id.*

³⁸ *See Loving*, 388 U.S. at 4.

³⁹ *Id.* at 1.

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 12.

⁴² *Id.* at 7.

⁴³ *Id.*

⁴⁴ *See Loving*, 388 U.S. at 8.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 10–12.

⁴⁹ *Id.* at 11.

“miscegenation” laws, the Court announced that the right to marry was a fundamental right guaranteed to citizens by the Constitution.⁵⁰

Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See also Maynard v. Hill*, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under 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.⁵¹

UNITED STATES V. WINDSOR, 133 S. CT. 2675 (2013).

In 2007, Edith Windsor and Thea Spyer were lawfully married in Ontario, Canada.⁵² They had been a couple since the early 1960’s and registered as domestic partners in New York in 1993.⁵³ Soon after their wedding, the two returned to New York to cohabit as a married couple.⁵⁴ Sadly, Spyer passed away in 2009.⁵⁵ At the time of her death, she left her entire estate to Windsor.⁵⁶ Windsor sought to utilize the estate tax exemption for surviving spouses, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.”⁵⁷ This would have enabled her to avoid paying over \$363,000.00 to the government; however, she was unable to do so under federal law.⁵⁸ The Defense of Marriage Act (“DOMA”) excluded same-sex partners from the definition of “spouse” as that term is used in federal statutes.⁵⁹ Specifically, Section Three of DOMA reads:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’

⁵⁰ *See Loving*, 388 U.S. at 12.

⁵¹ *Id.*

⁵² U.S. v. Windsor, 133 S. Ct. 2675, 2682 (2013).

⁵³ *Id.* at 2683.

⁵⁴ *Id.* at 2682–83.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*; *see* 26 U.S.C. § 2056(a) (2015).

⁵⁸ *Windsor*, 133 S. Ct. at 2682–83.

⁵⁹ *Id.* at 2682.

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.⁶⁰

Windsor paid the taxes as instructed, but filed suit to challenge the constitutionality of the code; specifically, its limitation of the definition of the term marriage.⁶¹ She argued that DOMA violated the guarantee of equal protection, as applied to the Federal Government under the Fifth Amendment to the United States Constitution.⁶²

While the lawsuit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives that the Department of Justice would not defend the lawsuit, all but alluding to the unconstitutionality of Section Three of DOMA.⁶³ Although “the President . . . instructed the Department not to defend the statute in *Windsor*,”⁶⁴ he also decided, “that Section [Three] will continue to be enforced by the Executive Branch” and that the United States had an “interest in providing Congress a full and fair opportunity to participate in the litigation of those cases.”⁶⁵

In response, the Bipartisan Legal Advisory Group (“BLAG”) of the House of Representatives voted to intervene in the litigation and decided that it would defend the constitutionality of Section Three of DOMA.⁶⁶ Eventually, the District Court permitted BLAG to intervene as an interested party.⁶⁷ On appeal, the United States District Court and the Court of Appeals ruled in favor of Windsor by finding Section Three of DOMA unconstitutional.⁶⁸ They ordered the United States government to refund Windsor’s money.⁶⁹ After hearing arguments from both sides, the United States Supreme Court affirmed the decision of the lower court.⁷⁰

In reaching this decision, the Court began by pointing out that the State of New York already recognized same-sex marriages performed in other jurisdictions.⁷¹ Therefore, the legality of Windsor’s marriage was not at issue.⁷² The fact that New York recognized same-sex marriages

⁶⁰ *Id.* at 2683.

⁶¹ *Id.* at 2683.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Windsor*, 133 S. Ct. at 2683.

⁶⁵ *Id.* at 2684.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Windsor*, 133 S. Ct. at 2695-2696.

⁷¹ *Id.* at 2689.

⁷² *Id.*

also illustrated the belief held by many, the states should regulate this domain, not the Federal Government.⁷³

However, the Court was quick to reject this contention pointing out that during the same year it had affirmed a decision to allow a former spouse to retain life insurance proceeds under a federal program that gave her priority over the current wife by a second marriage.⁷⁴ This was an ideal example of the Federal Government preempting state law on the relationship of a husband and a wife and gave the Federal Government the ability to intervene in the instant case.⁷⁵ This case set a clear precedent for the argument that the Federal Government may trump the state's interest in regulating domestic relationships, clearly negating any Tenth Amendment issue.⁷⁶ Other precedents also existed involving federal laws governing marriages and families.⁷⁷ For instance, under 8 U.S.C. § 1186a(b)(1), immigration law invalidated marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant."⁷⁸ Also, Congress ordered that while state law would determine who qualifies as an applicant's spouse in establishing income-based criteria for social security benefits, common-law marriages would also be recognized, even though they may be illegal in a given state.⁷⁹ Therefore, while the Court admitted domestic law historically had been the sole province of the states, it did so with the understanding that federal constitutional protections and guarantees would still be honored.⁸⁰

In the *Windsor* case, the Court found that federal regulation did just the opposite.⁸¹ Section Three of DOMA ignored constitutional protections and negated New York's attempt to ensure equal protection to same-sex couples.⁸² In the Court's own words, "DOMA writes inequality into the entire United States Code."⁸³ The Court further explained these inequalities that DOMA placed on same sex couples.⁸⁴ Through its enactment, not only did DOMA prevent same-sex couples from enjoying the surviving-spouse exemption through inheritance laws

⁷³ *See id.* at 2690.

⁷⁴ *Id.* at 2690 (citing *Hillman v. Maretta*, 133 S. Ct. 1943, 1955 (2013)).

⁷⁵ *Hillman*, 133 S. Ct. at 1950 (citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001)).

⁷⁶ *Id.*

⁷⁷ *Windsor*, 133 S. Ct. at 2690.

⁷⁸ *Id.*; see 8 U.S.C. § 1186a(b)(1) (2006).

⁷⁹ *Windsor*, 133 S. Ct. at 2690.; see 42 U.S.C. § 1382c(d)(2).

⁸⁰ *Windsor*, 133 S. Ct. at 2690.

⁸¹ *Id.* at 2693.

⁸² *Id.*

⁸³ *Id.* at 2694.

⁸⁴ *Id.*

but also deprived them of the Bankruptcy Code's special protections for domestic-support obligations.⁸⁵ Additionally, same-sex couples had to adhere to a much more complicated procedure to file state and federal taxes jointly.⁸⁶ For same-sex couples that had a partner working for the Federal Government, DOMA robbed them of specific protections for crimes such as assault, kidnapping, and murder of "a member of the immediate family."⁸⁷ DOMA also negatively affected children of same-sex couples.⁸⁸ It increased healthcare costs for families by taxing health benefits provided by employers to their workers' same-sex spouses and it denied benefits allowed to families upon the loss of a spouse and parent.⁸⁹

Surprisingly, BLAG did not back down from this negative characterization of DOMA nor of its inherently discriminatory purpose in fighting to uphold the law.⁹⁰ In fact, the Court remarked that BLAG was "candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married."⁹¹ A plain reading of the law's title illustrates that its purpose was to discourage states from legalizing same-sex marriage and to further restrict same-sex couples' freedoms, if any state had the audacity to pass such a law.⁹² "The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, the union will be treated as second-class marriages for purposes of federal law."⁹³ For the Court, this was the clearest evidence of the unconstitutionality of the Act.⁹⁴

The Court concluded that Congress could not enact a law to further its personal views on what marriage should or should not be.⁹⁵ In doing so, the protections of Due Process were violated.⁹⁶ Because the purpose of DOMA was simply to "demean" same-sex couples.⁹⁷ The Court found no legitimate purpose that could overcome the blatant and unapologetic attempt to disparage and injure those whom New York wanted to protect by recognizing their union as married persons.⁹⁸

⁸⁵ *Id.*; see 11 U.S.C. § § 101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15).

⁸⁶ *Windsor*, 133 S. Ct. at 2694.

⁸⁷ *Id.* at 2694–2695.

⁸⁸ *Id.* at 2695.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2693.

⁹¹ *Id.* at 2693.

⁹² *Windsor*, 133 S. Ct. at 2693–2694.

⁹³ *Id.* at 2693–2694.

⁹⁴ *Id.* at 2694.

⁹⁵ See *id.* at 2694–95.

⁹⁶ *Id.* at 2694.

⁹⁷ *Id.*

⁹⁸ *Windsor*, 133 S. Ct. at 2694–95

The second to final line of the majority opinion is quite telling. Justice Kennedy wrote, “[t]his opinion and its holding are confined to those lawful marriages.”⁹⁹ By doing so, with one pen stroke, he left open the debate over same sex marriages. Yes, the Federal Government could not limit marriages between a man and a woman; but could states still choose to do so? Windsor and Spyer enjoyed the protections of the State of New York and willingly provided them by recognizing their marriage as legal.¹⁰⁰

THE DEBATE

It is with this backdrop that we frame the debate between opponents and proponents of same-sex marriage. Before we begin to take sides on this highly contentious issue, it is necessary to dispel a common myth held by most individuals. That myth requires a basic understanding of the Equal Protection Clause of the Fourteenth Amendment. Simply put, the Government, whether at the federal level or state level, can discriminate.¹⁰¹ The Fourteenth Amendment of the United States Constitution does not prevent discrimination.¹⁰² Rather, it simply sets the rules and standards that must be observed when the government chooses to discriminate.¹⁰³ The greatest importance of this debate is that states can prevent individuals from marrying.¹⁰⁴ For instance, many states prevent first cousins from wedding.¹⁰⁵ Therefore, the question is not if states can discriminate, but rather when they can discriminate when it comes to marriage.

As it applies to the same-sex marriage debate, the *Loving* case has taught us that the right to marry is a fundamental right guaranteed to citizens of all states by the Federal Constitution.¹⁰⁶ According to the Supreme Court in *Loving*, enumerated rights that are incorporated are so fundamental that any law restricting such a right must both serve a compelling state purpose and be narrowly tailored to that compelling purpose. As such, the same-sex marriage debate focuses squarely on one major question: what compelling government interest exists to prevent same-sex couples from marrying each other?

⁹⁹ *Id.* at 2696.

¹⁰⁰ *Id.* at 2683.

¹⁰¹ *See* *Nebbia v. People of New York*, 291 U.S. 502, 525 (1943).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Loving*, 388 U.S. at 7.

¹⁰⁵ *DeBoer v. Synder*, 772 F.3d 388, 413 (6th Cir. 2014); *see* Diane B. Paul & Hamish G. Spencer, “It’s Ok, We’re Not Cousins by Blood”: *The Cousin Marriage Controversy in Historical Perspective*, 6 PLOS BIOLOGY 2627, 2627 (2008).

¹⁰⁶ *Loving*, 388 U.S. at 12.

Opponents of Same Sex Marriage

Opponents of same-sex marriage assert two reasons to satisfy the requirement of a compelling government interest in the *Loving* case. The first is the argument that the primary purpose of marriage is procreation.¹⁰⁷ The second is that permitting same-sex marriage encourages violation of sodomy laws.¹⁰⁸ They believe it would be impossible for same-sex couples to express intimacy without violating criminal laws illegalizing sodomy.¹⁰⁹

Courts have long held that a connection exists between marriage and procreation.¹¹⁰ For instance, in 1888, the United States Supreme Court took the case of *Maynard v. Hill* where a question arose as to the intestate succession of a husband's estate and the ability of a legislature to enact laws dealing with divorce.¹¹¹ There, the Court took the opportunity to argue that marriage is much more than a mere contract between two consenting adults.¹¹² The court remarked that marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress."¹¹³ Less than 100 years later in the case of *Skinner v. State of Oklahoma ex rel. Williamson*, the Supreme Court again chose to speak on the connection of marriage and procreation when entertaining an appeal on Oklahoma's criminal sterilization law.¹¹⁴ In that case, Justice Douglas delivered the opinion of the Court writing, "[m]arriage and procreation are fundamental to the very existence and survival of the race."¹¹⁵ Language exists in the *Loving* case professing this connection when the Court signaled that marriage was "fundamental to our very existence and survival."¹¹⁶ Finally, as recently as 1978, the Supreme Court implied that marriage was "the foundation of the family and of society," through the case of *Zablocki v. Redhail*.¹¹⁷

Before 1962, every state classified sodomy as a felony punished by lengthy prison sentences.¹¹⁸ However, by 1986, when the United States

¹⁰⁷ See *Lawrence v. Texas* 539 U.S. 558, 605 (2003) (Scalia, J., Dissenting).

¹⁰⁸ See *Lawrence*, 539 U.S. at 596 (Scalia, J., Dissenting); *id.* at 605.

¹⁰⁹ See *Lawrence*, 539 U.S. at 563.

¹¹⁰ *Windsor*, 133 S. Ct. at 2718.

¹¹¹ *Maynard v. Hill*, 125 US 190, 193, 203 (1888).

¹¹² *Id.* at 205.

¹¹³ *Id.* at 211.

¹¹⁴ *Skinner v. State*, 316 US 535, 536 (1942).

¹¹⁵ *Id.* at 541.

¹¹⁶ *Loving*, 388 U.S. at 12.

¹¹⁷ *Zablocki v. Redhail*, 434 US 374, 384 (1978) (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

¹¹⁸ Don Gilleland, *Guest Column: 50 Years of Change, Shifts in Culture Not Always Predictable*, FLORIDA TODAY (Jan 2, 2013, 11:23 AM), available at

Supreme Court took up the constitutionality of sodomy laws in the case of *Bowers v. Hardwick*¹¹⁹, approximately twenty-five states had legalized the practice in some form.¹²⁰ Yet in the *Bowers* case, the Supreme Court chose to uphold the constitutionality of the law that made sodomy illegal.¹²¹ The case focused on a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults when applied to homosexuals.¹²²

In August 1982, an Atlanta police officer cited Hardwick for public drinking.¹²³ Hardwick failed to appear in court for the citation and in response the court issued an arrest warrant.¹²⁴ Officers went to Hardwick's apartment to serve the warrant and found him having consensual oral sex with another man.¹²⁵ Police arrested both men for sodomy, which was defined in Georgia law to include both oral sex and anal sex between members of the same or opposite sex.¹²⁶ Surprisingly, the local district attorney did not pursue the charges.¹²⁷ Therefore, Hardwick decided to sue Michael Bowers, the Attorney General for Georgia.¹²⁸ He sued in federal court to declare the State's sodomy law invalid.¹²⁹ In his pleadings, Hardwick claimed that as a "practicing homosexual" he would eventually be prosecuted for his activities.¹³⁰ Additionally, the American Civil Liberties Union ("ACLU") became involved in the case.¹³¹

Initially, Hardwick filed in the United States District Court for the Northern District of Georgia, where it was dismissed, with the Court ruling in favor of Attorney General Bowers.¹³² Hardwick then appealed that decision to the United States Court of Appeals for the Eleventh

<http://www.floridatoday.com/article/20130103/COLUMNISTS0205/301030003/Guest-column-50-years-change> (last visited September 20, 2015).

¹¹⁹ *Bowers v. Hardwick*, 478 US 186, 188 (1986).

¹²⁰ *Id.* at 196.

¹²¹ *Id.*

¹²² *Id.* at 187–88.

¹²³ Claude J. Summers & Craig Kazcorowski, *Bowers v. Hardwick / Lawrence v. Texas*, *GLBTQ: An Encyclopedia of Gay, Lesbian, Bisexual, Transgender, and Queer Culture* (Sept. 10, 2010), available at http://www.glbtq.com/socialsciences/bowers_v_hardwick.html.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Bowers*, 478 US at 187–88.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 188.

¹³¹ SUMMERS ET AL., *supra* note 123.

¹³² *Bowers*, 478 US at 186.

Circuit.¹³³ that the District Court's ruling was reversed and Georgia's sodomy statute was deemed unconstitutional.¹³⁴ The State of Georgia then appealed to the Supreme Court of the United States.¹³⁵ The United States Supreme Court ruled in favor of the State of Georgia.¹³⁶ In reaching their decision, the Court did not question the wisdom or legality of the act of sodomy; rather the focus was on a state's ability to pass laws criminalizing the activity.¹³⁷ More specifically, "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."¹³⁸ The Court found no right existed.¹³⁹

Proponents of Same Sex Marriage

Proponents are quick to point out flaws with the conservative view in support of the ban on same sex marriage.¹⁴⁰ In their minds, the purpose of marriage being procreation lacks merit.¹⁴¹ For these individuals, couples become married for a large variety of reasons that have nothing to do with children.¹⁴² Some of these reasons include health insurance, federal benefits, economic forces, and the simple notion of wanting to spend your life with the person you love.¹⁴³

Proponents also point out that if the entire purpose of marriage is to procreate, then infertile individuals should equally be denied the ability to marry.¹⁴⁴ Having children should be a requirement for obtaining a marriage license similar to a blood test.¹⁴⁵ If a couple indicated that they were unwilling to conceive a child, then they should be denied a marriage license on par with a same-sex couple.¹⁴⁶

As to the sodomy debate, the metaphoric wind has been taken out of the sails of this argument through the case of *Lawrence v. Texas*.¹⁴⁷

¹³³ *Id.* at 186, 189.

¹³⁴ *Id.* at 189.

¹³⁵ *Id.*

¹³⁶ *Id.* at 196.

¹³⁷ *Id.* at 190.

¹³⁸ *Bowers*, 478 US at 190.

¹³⁹ *Id.* at 190–91.

¹⁴⁰ John G. Culhane, *Uprooting The Arguments Against Same-Sex*, 20 CARDOZO L. REV. 1119, 11195–96 (1999).

¹⁴¹ *Id.*

¹⁴² Nancy C. Polikoff, *For The Sake Of All Children: Opponents And Supporters Of Same-Sex Marriage Both Miss The Mark*, 8 N.Y. CITY L. REV. 573, 589 (2005).

¹⁴³ *Id.*

¹⁴⁴ Monica H. Wallace & Christopher G. Otten, *Marriage Equality: The "States" Of The Law Post Windsor And Perry*, 16 LOY. J. PUB. INT. L 239, 261 (2014).

¹⁴⁵ *See* Kitchen v. Herbert, 755 F.3d 1193, 1220 (10th Cir. 2014).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1217; *see Lawrence*, 539 U.S. at 574.

Rarely does the United States Supreme Court completely overturn its own precedent.¹⁴⁸ Yet, even more unusual is the relatively short amount of time between the *Bowers* decision and the *Lawrence* decision.¹⁴⁹ *Bowers* was decided in 1986.¹⁵⁰ The Court overturned the *Bowers* decision in the *Lawrence* case in 2003, less than twenty years later.¹⁵¹

In *Lawrence*, John Lawrence entertained two gay acquaintances in his home near Houston, Texas in September 1998.¹⁵² The two acquaintances had been in a romantic relationship with each other prior to that evening but had broken-off the relationship.¹⁵³ This enabled Lawrence and one of the individuals to engage in sexual relations that evening.¹⁵⁴ This infuriated the other man.¹⁵⁵ Seeking revenge, he called the police and reported “a black male going crazy with a gun” at Lawrence’s apartment.¹⁵⁶ Four deputies arrived at the scene; however, instead of finding a crazy, gun wielding black man, they found Lawrence having anal sex in his bedroom with the other man.¹⁵⁷ A second officer reported seeing them engaged in oral sex, and two others did not report seeing the pair having sexual intercourse.¹⁵⁸ Upset, Lawrence argued with the police for entering his home.¹⁵⁹

At the time, Texas’s anti-sodomy statute read that “homosexual conduct” was a misdemeanor and consisted of someone who “engages in deviant sexual intercourse with another individual of the same sex.”¹⁶⁰ As such, law enforcement arrested Lawrence for “deviate sex.”¹⁶¹

At the trial level, Lawrence pled no contest to the charges and was fined.¹⁶² He then appealed his conviction to a three-judge panel of the Texas Fourteenth Court of Appeals.¹⁶³ The Court heard the case on

¹⁴⁸ See *Kitchen*, 755 F.3d at 1217.

¹⁴⁹ *Id.*; *Bowers*, 478 U.S. at 186.

¹⁵⁰ See *Kitchen*, 755 F.3d at 1217.

¹⁵¹ See *Lawrence*, 539 U.S. at 558.

¹⁵² *Id.* at 562.

¹⁵³ See David Oshinsky, *Book Review, Strange Justice, The Story of Lawrence v. Texas*, by Dale Carpenter, N.Y. TIMES, March 16, 2016, § BR1 available at <http://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See generally *id.*

¹⁵⁷ *Lawrence*, 539 U.S. at 562.

¹⁵⁸ *Id.* at 563.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See *Lawrence*, 539 U.S. at 563; *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. App. 2001).

November 3, 1999, and found the statute unconstitutional.¹⁶⁴ A majority of judges ruled that the law violated the Equal Rights Amendment to the Texas Constitution, which bars discrimination based on sex, race, color, creed, or national origin.¹⁶⁵ The Court of Appeals decided to review the case en banc and on March 15, 2001, the appellate court reversed the three-judge panel's decision.¹⁶⁶ Lawrence's attorneys sought review by the Texas Court of Criminal Appeals, the highest appellate court in Texas.¹⁶⁷ After a year's delay, on April 17, 2002, the request was denied.¹⁶⁸

On July 16, 2002, a Petition for Writ of Certiorari was filed with the United States Supreme Court.¹⁶⁹ The Court accepted jurisdiction.¹⁷⁰ Presented to the Justices were three questions of great importance:

1. Whether the petitioners' criminal convictions under the Texas 'Homosexual Conduct' law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws?
2. Whether the petitioners' criminal convictions for adult consensual sexual intimacy in their home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?
3. Whether *Bowers v. Hardwick* should be overruled?¹⁷¹

Justice Kennedy wrote the opinion overturning *Bowers*.¹⁷² Kennedy and the concurring Justices specifically found that homosexuals had a protected liberty interest to engage in private, sexual activity.¹⁷³ Furthermore, the sexual and moral choices of homosexuals enjoyed constitutional protection.¹⁷⁴ The majority's moral disapproval of an activity did not provide a legitimate justification for the criminalization of sodomy.¹⁷⁵

“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making

¹⁶⁴ *Id.*

¹⁶⁵ *See generally Lawrence*, 41 S.W.3d at 359.

¹⁶⁶ *See Lawrence*, 539 U.S. at 558.

¹⁶⁷ *Id.* at 563.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 564.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See Lawrence*, 539 U.S. at 562.

¹⁷³ *Id.*

¹⁷⁴ *See id.* at 560.

¹⁷⁵ *Id.*; *see generally Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (discussing rights protected from government interference).

their private sexual conduct a crime[.]”¹⁷⁶ Kennedy wrote. In reaching the decision, the Court reviewed many of the arguments made by the court in *Bowers*.¹⁷⁷ The Court stated the belief that “[c]ondemnation of [homosexual practices] is firmly rooted in Judeo-Christian moral and ethical standards.”¹⁷⁸ It also examined the legislative history that criminalized certain sexual practices, and cited the Model Penal Code’s recommendations since 1955, the Wolfenden Report of 1963, and a 1981 decision of the European Court of Human Rights.¹⁷⁹

However, the majority concluded that intimate, adult, consensual conduct whether sexual or not, constituted a liberty protected by the Fourteenth Amendment’s Due Process protections.¹⁸⁰ Kennedy stated the Constitution protects “personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing” and that homosexuals “may seek autonomy for these purposes.”¹⁸¹

What is a marriage?

A third issue that has arisen from the same-sex marriage debate is the definition of a marriage to begin with.¹⁸² In a sense, opponents of same-sex marriage believe the protection and integrity of the traditional definition of marriage should be a compelling government interest.¹⁸³ Such an argument is so novel, yet, so important to the concept of equal protection jurisprudence that it deserves special attention.

While several jurisdictions have implied protecting the “traditional” definition of marriage is of the utmost importance, none have been as straight forward as the State of Utah in the case of *Kitchen v. Herbert*.¹⁸⁴ The case focused on the same-sex couple of Derek Kitchen and Moudi Sbeity.¹⁸⁵ The two had been in a monogamous, committed relationship for several years while living in Salt Lake City, Utah.¹⁸⁶ Despite applying for and being denied a marriage license, the two sought recognition of their relationship from one of the most conservative states in the Country.¹⁸⁷

¹⁷⁶ See *Lawrence*, 539 U.S. at 571.

¹⁷⁷ *Id.* at 578.

¹⁷⁸ *Id.* at 577.

¹⁷⁹ *Id.* at 571.

¹⁸⁰ *Id.* at 573.

¹⁸¹ *Id.* at 574.

¹⁸² See *Kitchen*, 755 F.3d at 1216.

¹⁸³ *Id.* at 1216, 1219.

¹⁸⁴ *Id.* at 1216.

¹⁸⁵ *Id.* at 1199.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

In March 2013, Kitchen, along with other same-sex couple plaintiffs sued the Governor and Attorney General of Utah, as well as the clerk of Salt Lake County, in their official capacities.¹⁸⁸ Their suit challenged three provisions of Utah law relating to same-sex marriage.¹⁸⁹ First, Utah Code section 30–1–2(5) reads marriages that are “prohibited and declared void” are those “between persons of the same sex.”¹⁹⁰ Second, in 2004, the Utah Legislature passed section 30–1–4.1, which read:

(1)(a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.

(b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.

(2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section.¹⁹¹

Finally, the State Legislature provided a proposed constitutional amendment to its electorate, known as Amendment Three.¹⁹² It states: “(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”¹⁹³ Amendment Three passed with approximately sixty-six percent (66%) of the vote and became section twenty-nine of Article I of the Utah Constitution.¹⁹⁴

After dealing with some preliminary questions, the Tenth Circuit espoused on the definition of marriage over the years. It started its examination with the 1972 United States Supreme Court case of *Baker v. Nelson*.¹⁹⁵ There, the Court upheld a ban on same-sex marriage and defined the concept as “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children

¹⁸⁸ *Kitchen*, 755 F.3d at 1200.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (quoting UTAH CODE § 30–1–2(5) (2014)).

¹⁹¹ *Id.* (quoting UTAH CODE § 30–1–4.1 (2014)).

¹⁹² *Id.*

¹⁹³ *Id.* (quoting UTAH CONT. ART. I, § 29 (2014)).

¹⁹⁴ *Kitchen*, 755 F.3d at 1200.

¹⁹⁵ *Id.* at 1204 (citing *Baker v. Nelson*, 409 U.S. 810 (1971)).

within a family, is as old as the book of Genesis” and that “[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [the institution of marriage] by judicial legislation.”¹⁹⁶ In regards to the Equal Protection argument, the Court wrote “[t]here is no irrational or invidious discrimination” because “in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”¹⁹⁷

This analysis honed in on the State of Utah’s main argument.¹⁹⁸ In rejecting requests to approve same-sex marriages, the State believed it was preserving the traditional definition of the term.¹⁹⁹ The State argued that the term “marriage” by its nature prevented same-sex couples from marrying.²⁰⁰ Citing the *Glucksberg*²⁰¹ decision, Utah believed that the court’s opinion depended upon the development of a “careful description of the asserted fundamental liberty interest,” relying on “[o]ur Nation’s history, legal traditions, and practices [to] provide the crucial guideposts for responsible decision making.”²⁰²

The Tenth Circuit rejected this claim, reasoning that if the Court was restricted to defining marriage based upon its historical application, not only would same-sex couples be denied the right to marry, but so would interracial couples.²⁰³

To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so. One might just as easily have argued that interracial couples are by definition excluded from the institution of marriage. But “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”²⁰⁴

The Court also referred to the *Lawrence* decision,²⁰⁵ reminding the State of Utah that the moral majority is not how the law is defined but rather a starting point for an equal protection analysis.²⁰⁶ With this in

¹⁹⁶ *Id.* at 1200 (quoting *Baker*, 191 W.2d at 186).

¹⁹⁷ *Id.* at 1204–05 (citing *Baker*, 191 W.2d at 187).

¹⁹⁸ See generally *id.* at 1202, 1216.

¹⁹⁹ *Id.*

²⁰⁰ *Kitchen*, 755 F.3d at 1200

²⁰¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²⁰² *Kitchen*, 755 F.3d at 1205 (citing *Glucksberg*, 521 U.S. at 721).

²⁰³ *Id.*

²⁰⁴ *Id.* at 1216–17.

²⁰⁵ *Kitchen* court quoting *Lawrence*, 539 U.S. at 577–78.

²⁰⁶ *Kitchen*, 755 F.3d at 1217.

mind, the Tenth Circuit found Utah's ban unconstitutional.²⁰⁷ This decision clearly stands for the proposition that defending tradition is not a compelling government interest.²⁰⁸ This is especially true when that tradition stands for centuries of discrimination and bigotry.

BRENNER V. SCOTT, 999 F. SUPP. 2D 1278 (N.D. FLA. 2014).

The *Brenner* case consisted of twenty-two different plaintiffs from two consolidated cases, which included nine same sex couples.²⁰⁹ Many of these couples were legally married in various jurisdictions such as New York, the District of Columbia, Iowa, Massachusetts, and Canada.²¹⁰ There was also a surviving spouse of a New York same-sex marriage and two individuals who had been in a same-sex relationship for fifteen years wishing to marry in Florida.²¹¹ Judge Robert Lewis Hinkle heard the case.²¹²

The namesake of the case was James D. Brenner ("Mr. Brenner") who wanted to marry his partner Charles D. Jones ("Mr. Jones").²¹³ Mr. Brenner had been an employee of the State of Florida since 1981 and Mr. Jones worked for the Florida Department of Education since 2003.²¹⁴ The parties married in Canada in 2009, however, the State of Florida refused to recognize the marriage.²¹⁵ By doing this, the State would be denying retirement benefits to Mr. Jones after Mr. Brenner's death.²¹⁶

The defendants consisted of five different entities and individuals.²¹⁷ Brenner sued the Governor, the Attorney General, the Surgeon General, the Secretary of the Department of Management Services, and the Clerk of Court of Washington County, Florida.²¹⁸ All defendants were sued in their official capacities.²¹⁹ In Brenner's view, they all played a part in denying him the ability to marry in Florida.²²⁰

Brenner argued that Florida's ban on same-sex marriage violated the Fourteenth Amendment's Due Process and Equal Protection

²⁰⁷ *Id.* at 1199.

²⁰⁸ *See id.*

²⁰⁹ *Brenner*, 999 F. Supp. 2d at 1282.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 1280.

²¹³ *Id.* at 1282.

²¹⁴ *Id.*

²¹⁵ *Brenner*, 999 F. Supp. 2d at 1282.

²¹⁶ *Id.*

²¹⁷ *See id.* at 1278, 1283–84.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 1284.

Clauses.²²¹ More specifically, Brenner's challenge, as to the Equal Protection claim, argued that the ban discriminated based on sexual orientation.²²² He also argued that his First Amendment right of association had been infringed upon.²²³

Brenner challenged Article I, section twenty-seven, of the Florida Constitution, and Florida Statutes section 741.212 and section 741.04(1).²²⁴ Article I, section twenty-seven provides: "Marriage defined—Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."²²⁵ Florida Statutes section 741.212 provides:

(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.

(2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.

(3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.²²⁶

Florida Statutes section 741.04(1) provides, "[n]o county court judge or clerk of the circuit court in this state shall issue a license for the

²²¹ *Brenner*, 999 F. Supp. 2d at 1284.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

marriage of any person . . . unless one party is male and the other party is female.”²²⁷

Initially, the State countered by filing a motion to dismiss.²²⁸ It argued that Mr. Brenner lacked standing to bring forth the suit and that the defendant’s names were improper.²²⁹ The Court agreed in part with this motion, dismissing the complaint against the Governor and the Attorney General.²³⁰ Yet, the court remarked, “[i]f it turns out later that complete relief cannot be afforded against the Secretary and Surgeon General, any necessary and proper additional defendant can be added.”²³¹

With this resolved, the court turned to the merits of Mr. Brenner’s argument.²³² First, the court focused on a state’s rights concern.²³³ In part, Governor Scott asserted that the decision to deny or permit same sex-marriage was solely in the preveue of the state government.²³⁴ The federal government could not interfere with such a decision.²³⁵ The court quickly pointed to the *Loving* case as a prime example where the federal government could and had interfered with the state’s right to police marriage.²³⁶ The Court remarked that the Fourteenth Amendment had been created after the Civil War:

for the express purpose of protecting rights against encroachment by state governments. By that time it was well established that a federal court had the authority—indeed, the duty—to strike down an unconstitutional statute when necessary to the decision in a case or controversy properly before the court. The State of Florida has itself asked federal courts to do so. So the suggestion that this is just a federalism case—that the state’s laws are beyond review in federal court—is a nonstarter.²³⁷

Next, the Court reverted to a traditional examination of discrimination under the Equal Protection Clause.²³⁸ The first step was to determine the proper test in deciding if discrimination by the state was proper.²³⁹ This focused on the issue of whether the right to marry was a

²²⁷ *Brenner*, 999 F. Supp. 2d at 1284.

²²⁸ *See id.*

²²⁹ *See id.* at 1284–85.

²³⁰ *See id.* at 1286.

²³¹ *Id.*

²³² *See id.* at 1286.

²³³ *Brenner*, 999 F. Supp. 2d at 1287.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 1286–87.

²³⁷ *Id.* at 1286.

²³⁸ *Id.* at 1287.

²³⁹ *Brenner*, 999 F. Supp. 2d at 1287.

fundamental right under the Constitution.²⁴⁰ Citing the *Loving* case, the Court found clearly it was.²⁴¹ In fact, since the *Loving* case courts, in several jurisdictions repeatedly found that the right to marry was fundamental.²⁴² “Indeed, the Court has sometimes listed marriage as the very paradigm of a fundamental right.”²⁴³

With this established, the next step was to determine if the State of Florida’s ban would pass strict scrutiny.²⁴⁴ Under equal protection jurisprudence, the government can discriminate against a fundamental right through means that are narrowly tailored to serve a compelling state interest.²⁴⁵ As to what compelling state interest Florida had in continuing with its same sex marriage ban, the state resorted to the procreation argument used by most other jurisdictions.²⁴⁶ The Court rejected this argument.²⁴⁷ It found no historical precedent where Florida required procreation as a condition of marriage.²⁴⁸ The evidence as to this issue was clear as individuals who are medically unable to procreate, who are beyond child-bearing age, and individuals who voluntarily or involuntarily become medically unable to procreate, are allowed to marry and remain married.²⁴⁹ “In short, the notion that procreation is an essential element of a Florida marriage blinks reality.”²⁵⁰

The Court went so far as to imply that the procreation argument was a “pretext” and the true argument against same-sex marriage focused on a moral disapproval of the practice.²⁵¹ “The undeniable truth is that the Florida ban on same-sex marriage stems entirely, or almost entirely, from moral disapproval of the practice.”²⁵² Falling back on the *Lawrence* decision, the court reminded the State that the moral majority does not

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *See id.* at 1288.

²⁴³ *Id.*; *see, e.g., Glucksberg*, 521 U.S. at 720 (refusing to recognize assisted suicide as a fundamental right, listing rights that do qualify as fundamental, and placing the right to marry first on the list); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (including the right to marry in the fundamental right to privacy); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, (1942) (labeling marriage “one of the basic civil rights of man”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (saying that “[w]ithout doubt” the right “to marry” is within the liberty protected by the Due Process Clause); *Maynard v. Hill*, 125 U.S. 190, 205, (1888) (labeling marriage “the most important relation in life”).

²⁴⁴ *Id.*

²⁴⁵ *Brenner*, 999 F. Supp. 2d at 1288.

²⁴⁶ *Id.*

²⁴⁷ *See id.* at 1289.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1289.

²⁵¹ *See Brenner*, 999 F. Supp. 2d at 1289.

²⁵² *Id.*

constitute a compelling state interest.²⁵³ As such, the court found Florida's ban unconstitutional.²⁵⁴

FLORIDA'S FUTURE

On August 21, 2014, the court issued a preliminary injunction forbidding the State of Florida from banning same-sex marriage.²⁵⁵ Yet in the same breath, the Court temporarily stayed the injunction until it was decided if the three same-sex marriage cases that at that time had petitioned for the United States Supreme Court to hear them would be heard (*Bostic*, *Bishop*, and *Kitchen*) and for ninety-one days thereafter.²⁵⁶ In the meantime, the State appealed to the Eleventh Circuit.²⁵⁷

However, on October 7, 2014, the United States Supreme Court rejected the request to hear *Bostic*, *Bishop*, and *Kitchen*.²⁵⁸ Soon after, Mr. Brenner filed a motion requesting Judge Hinkle to lift his stay before the ninety-one-day period under the original order.²⁵⁹ The State objected and Judge Hinkle rejected Mr. Brenner's request on November 5, 2014.²⁶⁰

On November 19, 2014, the State asked the Eleventh Circuit Court of Appeals to extend Judge Hinkle's stay pending appeal.²⁶¹ On December 3, 2014, the Eleventh Circuit refused that request.²⁶² On December 15, 2014, the State renewed its request to the Eleventh Circuit, to stay Judge Hinkle's preliminary injunction.²⁶³ Florida's Attorney General, Pam Bondi, made her request based upon the need for uniformity within the state.²⁶⁴ Specifically, she argued that Judge

²⁵³ *See id.* at 1289–90.

²⁵⁴ *Id.* at 1290.

²⁵⁵ *Id.* at 1294.

²⁵⁶ *Id.* at 1294 (referring to *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

²⁵⁷ *Brenner*, 999 F. Supp. 2d at 1292.

²⁵⁸ *Schaefer v. Bostic*, 2014 U.S. LEXIS 6405 (U.S. 2014); *Herbert v. Kitchen*, 2014 U.S. LEXIS 6637 (U.S. 2014); *Smith v. Bishop*, 2014 U.S. LEXIS 6054 (U.S. 2014).

²⁵⁹ *Brenner*, 999 F. Supp. 2d at 1289 (Plaintiff's Motion to Dissolve Stay *Brenner*, 999 F. Supp. 2d at 1278 (No. 14-12061-AA).

²⁶⁰ Motion to Stay Pending Appeal Denied, *Brenner*, 999 F. Supp. 2d at 1278 (No. 14-12061-AA).

²⁶¹ Appellants' Motion to Extend Stay of Preliminary Injunctions Pending Appeal, And For Expedited Treatment Of This Motion, *Brenner*, 999 F. Supp. 2d at 1278 (No. 14-12061-AA).

²⁶² Order Denying Stay, *Brenner*, 999 F. Supp. 2d at 1278 (No. 14-12061-AA).

²⁶³ Chris Johnson, *Florida Seeks Hold On Same-Sex Marriages From Supreme Court*, WASHINGTON BLADE, Dec. 15 2014, available at <http://www.washingtonblade.com/2014/12/15/florida-seeks-hold-sex-marriages-supreme-court/>.

²⁶⁴ Attorney General Pam Bondi News Release, Memo: Attorney General's Office Files Application To Stay Preliminary Injunctions in Same Sex Marriage Case, Whitney

Hinkle's ruling only applied to Washington County, the named defendant in the suit, and not the sixty-six other clerks throughout the state.²⁶⁵ On December 19, 2014 this request was denied.²⁶⁶

On December 23, 2014, the Washington County Clerk of Court filed an emergency motion asking for clarification of Hinkle's order.²⁶⁷ Did the clerk need to issue a marriage license only to Brenner plaintiffs or to all same-sex marriage couples?²⁶⁸ On December 24, 2014, Judge Hinkle issued an order, which stated his injunction applied to "the Secretary of the Department of Management Services, the Surgeon General, and their officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them."²⁶⁹ A deadline of December 29, 2014 was provided for the Secretary to argue the effect of the original injunction.²⁷⁰ On January 1, 2015, Judge Hinkle explained the scope of his injunction, writing that the Florida Constitution requires all Florida clerks to issue licenses to same-sex couples, and that while clerks are free to interpret his ruling differently, they should anticipate lawsuits if they fail to issue such licenses.²⁷¹

The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, *the Constitution* requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction.²⁷²

On January 6, 2015, Judge Hinkle's stay ended and same-sex marriages began throughout Florida.²⁷³ While all clerks issued licenses to

Ray, FLORIDA OFFICE OF THE ATTORNEY GENERAL, Dec. 15, 2014, available at <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/9EB7EDE54F4C979285257DAF0078A7BF>.

²⁶⁵ *Id.*

²⁶⁶ Justin Snow, *Supreme Court Allows Florida Same-Sex Marriages to Proceed*, METRO WEEKLY, Dec. 19, 2014, available at <http://www.metroweekly.com/2014/12/supreme-court-allows-florida-same-sex-marriages-to-proceed/>.

²⁶⁷ Emergency Motion for Clarification and Memorandum of Law, *Brenner*, 999 F. Supp. 2d at 1278 (No. 14-12061-AA).

²⁶⁸ *Id.*

²⁶⁹ Order Setting Procedures on the Emergency Motion to Clarify, *Brenner*, 999 F. Supp. 2d at 1278 (No. 14-12061-AA).

²⁷⁰ *Id.* (emphasis added).

²⁷¹ Order on the Scope of the Preliminary Injunction, *Brenner*, 999 F. Supp. 2d at 1278 (No. 14-12061-AA).

²⁷² *Id.* at 3.

²⁷³ David Smiley, *South Florida Gay Couples Marry in Early Morning Ceremonies*, MIAMI HERALD, available at <http://www.miamiherald.com/news/local/community/gay-south-florida/article5479842.html>.

same-sex couples on this date, clerks in thirteen counties—Baker, Calhoun, Clay, Duval, Franklin, Holmes, Jackson, Liberty, Okaloosa, Pasco, Santa Rosa, Wakulla, and Washington—indicated that they would no longer provide courthouse wedding services to avoid having to officiate at the wedding of same-sex couples.²⁷⁴ Officially, this was done to spare the awkwardness for clerk personnel.²⁷⁵

WHAT THE FUTURE HOLDS?

At the time of writing this article, the *Brenner* case sits before the Eleventh Circuit awaiting further argument.²⁷⁶ However, on January 16, 2015, the United States Supreme Court announced it would hear cases involving same-sex marriage from four other circuits.²⁷⁷ Two questions will be decided by the Court.²⁷⁸ The first is whether same-sex marriage is or is not legal—more specifically, does the Equal Protection Clause invalidate same-sex marriage bans?²⁷⁹ The second question focuses on the Full Faith and Credit Clause.²⁸⁰ Here, the Court will decide whether a state has to honor same-sex marriages from other states?²⁸¹ Both questions will strike at the very heart of the same sex marriage debate.

Many legal scholars believe the decision will rest on the shoulders of Justice Anthony Kennedy.²⁸² At seventy-six years old, no one knows exactly how Justice Kennedy will vote; yet, many believe that based on his prior record, it is likely he will fall in favor of same-sex marriages.²⁸³ However, no one can know for sure. Justice Kennedy has spoken often of

²⁷⁴ Anna M. Phillips, *As Gay Marriage Approaches, Several Counties' Clerks Opt Out of Wedding Ceremonies*, TAMPA PAY TIMES, Jan. 2, 2015, available at <http://www.tampabay.com/news/courts/in-north-florida-a-views-collide-over-gay-weddings-as-many-clerks-opt-out/2212297>.

²⁷⁵ *Id.*

²⁷⁶ *Armstrong v. Brenner*, 135 S. Ct. 890 (2014).

²⁷⁷ Scott Simon, *Supreme Court Will Rule on Gay Marriage Nationwide*, Jan. 17, 2015, available at <http://www.npr.org/2015/01/17/377925064/supreme-court-will-rule-on-gay-marriage-nationwide>.

²⁷⁸ *Id.*

²⁷⁹ Scott Simon, *Supreme Court Will Rule on Gay Marriage Nationwide*, Jan. 17, 2015, available at <http://www.npr.org/2015/01/17/377925064/supreme-court-will-rule-on-gay-marriage-nationwide>.

²⁸⁰ Steve Sanders, *Marriage Equality is a National Issue, And So the Time Has Come for Our National Court to Address It*, THE HUFFINGTON POST, Jan. 3, 2015, available at http://www.huffingtonpost.com/steve-sanders/marriage-equality-is-a-national-issue_b_6409852.html.

²⁸¹ Simon, *supra* note 277.

²⁸² Joan Biskupic, *Justice Anthony Kennedy Key Figure As Supreme Court Weighs Gay Marriage*, THE HUFFINGTON POST, Jan. 16, 2015, available at http://www.huffingtonpost.com/2015/01/16/kennedy-supreme-court-gay-marriage_n_6489434.html.

²⁸³ *Id.*

his belief that government should have “dignity” for gay individuals.²⁸⁴ While at the same time, as a President Reagan appointee, he is a staunch supporter of state’s rights over the federal government.²⁸⁵ Only time will tell if this one swing vote will alter the course of history for approximately nine million Americans who identify themselves as gay or lesbian.²⁸⁶

CONCLUSION

It is quite possible that by the time this article is published, the debate will be over and gay marriage will fade into the history books as the Twenty-First Century’s First Civil Rights Movement. But whether gays and lesbians marry, whether the “traditional” definition of marriage survives, the depth and breadth of equal protection jurisprudence has been changed forever. Courts in all states, and at all levels, now have more guidance than ever in defining fundamental rights. No longer are we limited to a strict reading of the Constitution, the Bill of Rights, or individual state mandates to define this concept. We now have precedent from several courts expanding the traditional idea of liberty.

Maybe, fundamental rights are so innate, so truly basic, that it is impossible to list all of them in the volumes of American legal jurisprudence. Like legal scholars say of the United States’ Constitution; it is a living, breathing document, which is constantly changing.²⁸⁷ But perhaps the life breathed into the document comes from those strong enough to stand up for themselves against the majority. Perhaps the change is not in what the document says, but in what we as “the people” are willing to ask from it.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Ramon Johnson, *Gay Population Statistics*, ABOUT.COM, <http://gaylife.about.com/od/comingout/a/population.htm> (last accessed Apr. 20, 2015).

²⁸⁷ *See, e.g.*, U.S. CONST. amend. XV–XXVI (amendments ratified 1870–1971).