

Chapter 4

Same-Sex Marriage in the United States

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Abstract This Chapter gives a brief analysis of the status of same-sex marriage in the United States prior to the US Supreme Court decisions of 2013 and the status of litigation and political reforms triggered in part by these court decisions. It shows that marriage is a central institution in the country's rationale of family law in ways that separate it from other western countries that have allowed same-sex marriage.

4.1 The Value of Marriage

The link between marriage and the family has historical roots. Since Aristotle, political science has linked family and nation building. In his *Politics* I, Aristotle referred to the family (*oikos*) as the first relationship to arise between man and woman. He thought that when several families unite aiming at fulfilling not only their daily needs, “the first society to be formed is the village.”¹ The *Politics* follows by saying that “the most natural form of the village appears to be that of a colony from the family . . .”² and then states that “When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes to existence . . .”³ they form a village and then a *polis*. Cicero also made the connection between marriage and government: “[T]he first bond of union is that between husband and wife; the next, that between parents and children;

¹Aristotle “The *Politics* of Aristotle, trans. into English with introduction, marginal analysis, essays, notes and indices by B. Jowett. Oxford, Clarendon Press, 1885. 2 vols, Book 1, 3.

²*Ibid.*

³*Ibid.*

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then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state.”⁴

The English historian Peter Laslett states that “the intellectual tradition of patriarchalism” that placed the family “at the centre of all social institutions” was widespread among sixteen and seventeen century European thinkers.⁵ For these thinkers the relationship between family and the political state was obvious and the analogies recurrent.⁶ The war against Mormon polygamy was partly based on a discourse of monogamy as essential to the construction of the United States.⁷ Nancy Cott argues that the founding fathers had “a political theory of marriage.”⁸ Influenced by Montesquieu, the founders would have “tied the institution of Christian-modeled monogamy to the kind of polity they envisioned.”⁹ This thinking propelled the analogy between the two forms of consensual union –marriage and government—into the republican nation’s self-understanding and identity.¹⁰

Marriage is linked to family as citizenship has been linked to the state. Cohabitation outside of marriage has been to family what illegal immigration has been to the state. In different periods, countries have been forced to redefine citizenship or include as citizens individuals that originally were not welcomed as such. The same has happened with families; countries have been forced by reality to recognize as family members individuals that were unwelcomed in the acceptable family structure. Recognition of family members outside the realm of marriage has been slow and within a limited scope. In the United States many social welfare benefits are attached to marriage.¹¹ Marriage is still today the equivalent to voting rights for citizenship. Married individuals have access to benefits and special treatment within family law, social welfare policy, immigration law, torts, tax law, among others. *Ceteris paribus*, unmarried individuals who function as families may not have access to those benefits and special treatment. Unmarried families are to married families what illegal aliens are to citizens. Sometimes states decide to grant limited benefits to illegal aliens or even grant them a window of opportunity to legalize their status, become legal residents and, eventually, citizens.¹² Sometimes

⁴Cicero, *De Officiis*, Book I, 57 (Walter Miller trans., 1913).

⁵Robert Filmer, *Patriarcha and Other Political Works*, Introduction by Peter Laslett 24 (2009).

⁶*Ibid.*, p. 27.

⁷Nancy Cott, *Public Vows: A History of Marriage and the Nation*, 10, (2002); Sara Barringer Gordon, *The Mormon question: polygamy and constitutional conflict in nineteenth-century America* 222 (2002).

⁸*Id.* at 9.

⁹*Id.* at 10.

¹⁰*Ibid.*

¹¹The Personal Responsibility and Work Opportunity Reform Act (PRWORA) Pub. L. No 104–193 includes several provisions to promote marriage.

¹²Undocumented immigration is a serious issue in the United States. “Estimates based on the March Supplement of the U.S. Census Bureau’s Current Population Survey (CPS) indicate that the unauthorized resident alien population rose from 3.2 million in 1986 to 12.4 million

states decide to grant certain benefits to unmarried couples, and in rare opportunities, grant a group of them full and equal access to marriage. Most of the time, however, states fall short of doing that and create differentiated status, just as citizens and foreign immigrants under a visa or permit may be able to reside in a country and enjoy limited benefits. By the beginning of the 21st century, several states granted same-sex couples limited rights and, in some cases a broad array of rights through registered partnership arrangements.¹³

The link between marriage and citizenship is not a metaphor. Marriage is treated as an essential gateway to citizenship. Thus, marriage can pave the way to citizenship in a manner that no other relationship between two individuals not connected by blood or adoption can. This may be the strongest signal of differentiation between families that start through marriage and families that start through cohabitation. In 2010, 82,449 individuals obtained legal permanent resident status as spouses of U.S. citizens coming from abroad.¹⁴ This is the largest category of new arrivals, followed by parents of U.S. citizens.¹⁵ Immigration policies can say a great deal

in 2007, before leveling off at 11.1 million in 2011.” Ruth Ellen Wasem, U.S. Immigration Policy: Chart Book of Key Trends, Congressional Research Service, Report for Congress R42988, March 7, 2013. Among the several problems that undocumented immigration creates, what to do with children who came to the U.S. at young age with undocumented parents and have lived most of their lives here is highly controversial. A possible solution has been the passing of the DREAM Act (acronym for Development, Relief, and Education for Alien Minors) but several forms of this bill have been in Congress since 2001. On June 15, 2012 President Barak Obama’s administration issued a memorandum known as the Deferred Action for Childhood Arrivals (DACA). “Individuals who demonstrate that they meet the guidelines below may request consideration of deferred action for childhood arrivals (DACA) for a period of 2 years, subject to renewal for a period of 2 years, and may be eligible for employment authorization.” U.S. Citizens and Immigration Services, Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions List at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#what> is DACA. For information on the DREAM Act see Mariela Olivares, *Renewing the Dream: Dream Act Redux and Immigration Reform*, 16 Harv. Latino L. Rev. 79, (2013).

¹³Benefits in these systems vary greatly. For example, in *Lewis v. Harris* the Supreme Court of New Jersey decided that same-sex couples had a right to enjoy the same rights and benefits of different-sex couples under civil marriage in New Jersey. See *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (2006). The New Jersey Legislature enacted the Civil Union Act creating a parallel system of civil unions for same-sex couples. Same-sex couples in civil unions were entitled to all of the rights, benefits, and responsibilities of marriage. See N.J.S.A. 37:1–33. A more limited system was enacted in Wisconsin, where in 2009 the Wisconsin legislature created a domestic partnership for same-sex couples that would allow them to access to limited benefits such as the right to make decisions on behalf of the ill partner, visit partners in hospitals, insurance benefits, among others. See, Wisconsin Legislative Reference Bureau, Domestic Partnership, Budget Brief 09–2, September 2009.

¹⁴Office Of Immigration Statistics, 2010 Yearbook Of Immigration Statistics 19 tbl. 6, (2011).

¹⁵*Ibid.*

about the types of families a country value and the associations it excludes. Through immigration law, countries can limit those associations that reject.¹⁶

The United States has traditionally protected marriage, and in the era of same-sex couples' recognition, it is still protecting the married family.¹⁷ What is changing is the composition of the married couple, but not the composition of the legal family. Despite uncontested statistics showing that marriage is on decline,¹⁸ U.S. courts still value the married family more than any other type of family association. This emphasis on marriage distances the United States from most countries where marriage equality has gained ground. Brazil, Portugal, Mexico, South Africa, Spain, and Canada are only a few of the countries that have accepted same-sex marriage while, at the same time, providing more rights to unmarried families or at least basing their decisions on arguments that reinforce the legal recognition of social constructions of the family.

In the United States, marriage is still treated as the main gateway to family formation, deserving constitutional protection.¹⁹ Before recognition of a right to family, comes the recognition of a right to marry. This right is presented to the community as an individual right, but one that makes a community function as such.²⁰ Statistics, however, show that an increasing number of families are formed outside the realm of marriage.²¹ Many of them repeat the pattern of a sexual family that has replaced the marriage certificate for an informal agreement that resembles marriage in all aspects of familial life, but in the formality of marriage itself. Proof of marriage is, however, simpler than proof of companionship. It only requires applicants to show the actual marriage certificate. Regardless of whether a married couple hates each other, actually supports each other, or does not speak to each

¹⁶For an account on the restrictions imposed by US immigration laws on interracial marriages between a white American citizen and a non-white foreigner until the 1960s, see Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation on Marriage*, 86 NYU L. Rev. 1361–1439 (2011).

¹⁷In the United States marriage is a fundamental right within the right to privacy protected by the 14th and 5th amendments of the U.S. Constitution. Although several decisions pointed into this direction, the 1978 U.S. Supreme Court decision *Zablocki v. Redhail* leaves no doubt that marriage is a fundamental right: “[I]t would make little sense to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society . . .” *Zablocki v. Redhail*, 434 U.S. 374 (1978).

¹⁸According to the Pew Research Center, in 2011 only 51 % of Americans 18 years and older were married, compared to 72 % in 1960. See Richard Fry, “No Reversal in Decline of Marriage,” *Pew Research Social & Demographic Trends*, November 20, 2012 at <http://www.pewsocialtrends.org/2012/11/20/no-reversal-in-decline-of-marriage/> and D’vera Cohn, Jeffrey S. Passel, Wendy Wang And Gretchen Livingston, “Barely Half of U.S. Adults Are Married – A Record Low,” *Pew Research Social & Demographic Trends*, December 14, 2011 at <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/>

¹⁹See *Zablocki*, *supra* note 17.

²⁰The U.S. Supreme Court has said that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. *Loving v. Virginia* 388 U.S. 1, 87 S.Ct. 1824 (1967).

²¹See *Pew Research Social & Demographic Trends*, *supra*, note 18.

other, a marriage certificate will be enough to treat that couple as a family. Despite its procedural benefits, focusing on the formality of marriage as the paramount evidence of family ties is problematic.

In the case of immigration, for example, using a marriage certificate as proof of family tie may allow the entrance of people who did not really have family ties with the sponsor,²² and it may leave out real families with individuals who support and care for each other.²³

4.2 A Dialogue Between Politics and Rights

The United States is experiencing a transitioning period on marriage regulation. Same-sex marriage has become a common topic for scholarly discussions,²⁴ a cause for litigation in many states,²⁵ and a source of legislation reform in many others.²⁶ On June 26, 2013 the Supreme Court issued its first two decisions on same-sex marriage. *Hollingsworth v. Perry (Perry)*²⁷ and *United States v. Windsor (Windsor)*.²⁸ In *Perry* the Supreme Court did not advance any substantive opinions on whether same-sex marriage was constitutionally protected, allowed or prohibited. It did, however, have the effect of allowing same-sex marriage in California.²⁹ The *Windsor* case was not about legalizing same-sex marriage but about challenging the restriction of marriage as a union between a man and a woman for federal purposes.

²²Linda Kelly, *Marriage for Sale: The Mail-Order Bride Industry and the Changing Value of Marriage*, 5 J. Gender Race & Just. 175 (2001).

²³Aubry Holland, *The Modern Family Unit: Toward A More Inclusive Vision of the Family in Immigration Law*, 96 Cal. L. Rev. 1049, 1059 (2008).

²⁴Scholarly literature on same-sex marriage was almost nonexistent until the 1980s. A limited search in the United States Library of Congress catalog showed 13 books with the word “same-sex marriage” in the title between 1900 and 1989, 42 between 1990 and 1999 and 450 since the year 2000. The Worldcat database showed 5 entries between 1900 and 1989 that contain “same-sex” in the title, and the word “marriage” as a subject when searching for books in English, excluding juvenile and fiction categories. The same search showed 160 hits from 1990 to 2000, and 974 from 2001 to 2013.

²⁵Prior to the decisions from the U.S. Supreme Court *Perry* and *Windsor*, same-sex marriage had been gained by court decisions in the states of Massachusetts, Connecticut, Iowa, California, New Mexico, and New Jersey.

²⁶New Hampshire, Vermont, New York, Maine, Maryland, Washington, Rhode Island, Delaware, Minnesota, Hawaii, Illinois, and the District of Columbia.

²⁷*Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (U.S. 2013).

²⁸*United States v. Windsor*, 133 S. Ct. 2675, 2682, 186 L. Ed. 2d 808 (2013).

²⁹The U.S. Supreme Court decided that the official sponsors of the California ballot initiative “Proposition 8” did not have standing to challenge the decision of the District Court that had declared Proposition 8 unconstitutional. Proposition 8 had limited marriage to the union of one man and one woman. *Perry* made the District Court decision final, allowing same-sex marriage in California.

In this decision the Supreme Court could have refrained from providing arguments in favor or against same-sex marriage. It chose, however, to advance arguments that, while working well in the narrow field of restricting the power of the federal government to define marriage for federal purposes, also paved the way for broader challenges to the constitutionality of same-sex marriage in general.

Perry and *Windsor* were not about making same-sex marriage available in each of the United States. Both decisions, however, have changed the landscape of same-sex marriage. For the first time in history same-sex marriage is perceived by many as an actual possibility in the foreseeable future of the United States. These decisions were the first but certainly will not be the last on same-sex marriage that the Supreme Court will issue.³⁰ On October 6, 2014, the Supreme Court denied review of five cases, which left as final decisions striking down bans to same-sex marriages in Indiana, Wisconsin, Utah, Oklahoma, and Virginia.³¹ This decision also opened the door for other states to open same-sex marriage as well.

An important component of the debate on same-sex marriage relates to the proper forum to address marriage and family. Whether same-sex marriage is a matter of rights or of politics defines the proper forum to address the issue. Some courts have denied same-sex marriage not because the institution would be bad for society but because the majorities should decide on this issue. In the United States we find decisions that gave the legislature the role of deciding on same-sex marriage, and courts that considered the issue a matter of rights that was outside the scope of the majorities.³²

Over the last century, western societies including the United States, have slowly accepted that citizens cannot use their political power to discriminate on the basis of race. Western societies have also accepted, albeit at an even slower pace, that political majorities cannot discriminate on the basis of gender. The same-sex marriage debate shows that sexual orientation is gradually becoming a protected category such as gender and race. As Justice Jackson stated more than 60 years ago:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.³³

³⁰The Supreme Court decided in January of 2015 to hear four new cases on same-sex marriage in 2015.

³¹*Baskin v. Bogan* (7th Cir. Sep. 4, 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 368 (4th Cir. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 988 (W.D. Wis. 2014), judgment entered (June 13, 2014), *aff'd sub nom. Baskin v. Bogan*, 14–2386, 2014 WL 4359059 (7th Cir. Sept. 4, 2014).

³²*Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003), *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 156–57, 957 A.2d 407, 420–21 (2008), *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009), and *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865.

³³*W.Va. State Bd. Of Educ. v. Barnette*, 319 US 624, 638.

Not all courts agree that same-sex marriage is one of those “certain subjects” that must be withdrawn from the “vicissitudes of political controversy.” The same-sex marriage debate, therefore, opens a broader debate about the role of courts in deciding issues related to same-sex marriage. If what is at stake is a modification of the concept of marriage, and marriage is an essential democratic concept, then it is a political issue subject to political definitions. The political branches of each nation shape immigration policies. Citizens vote for representatives who will enact statutes that will have an impact on who can be admitted into the country. Congress, as representing the desires of the majority, passes statutes on budget, housing, health, national security, among many other areas. This power, however, is limited by fundamental rights as set in the Constitution of a country/state and international conventions subscribed by a state. Constitutions and international law thus limit the political power of citizens. Once a particular issue is defined as protected or affecting fundamental rights, that issue no longer belongs to the political realm.

In the United States, once the Supreme Court declared racial segregation unconstitutional, it shielded it from the majority’s views.³⁴ Once it decided that marriage was a fundamental right, it reduced the space for political intervention on such right. These decisions provoked political disagreement³⁵ but once claims of substantive due process or equal treatment were set, opposing groups had to accept that they would no longer decide to build a society where children would be divided by race in schools, or that marriage would be limited to people of the same race. These are no longer political decisions because they touch on fundamental rights.

4.2.1 From Courts to Political Processes and Vice Versa

Marriage equality activists have used different strategies to achieve same-sex marriage. For advocates, however, there is no question that marriage equality is a matter of rights. Challenges to marriage statutes, however, have not always triggered a positive outcome because of the position by some courts that same-sex marriage is a matter for legislatures to decide. For example, the New York Court of Appeals stated in 2006 that “the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.”³⁶ This decision triggered a political process that ended, after much back and forth between the

³⁴*Brown v. Board of Education*, 347 U.S. 483 (1954).

³⁵For an account of the immediate backlash of *Brown v. Board of Education* see Waldo E. Martin Jr., *Brown v. Board of Education: A Brief History with Documents 199–222* (1998); For examples of opposition to *Loving v. Virginia* see Peggy Pascoe, *What comes naturally: Miscegenation law and the making of race in America 287* (2009).

³⁶*Hernandez v. Robles*, 7 N.Y.3d 338, 356, 855 N.E.2d 1, 5 (2006).

New York State Assembly and the Senate, with the Marriage Equality Act that recognized same-sex marriage and became effective on July 24, 2011.³⁷

Courts, at other times, have recognized that marriage entails rights and benefits that non-married couples may also deserve. These courts have considered, however, that it is the role of legislatures to determine the specific institution or method of distribution of those rights. A decision by the Supreme Court of New Jersey illustrates this rationale:

To comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples. We will not presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles, so long as the rights and benefits of civil marriage are made equally available to same-sex couples. The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process.³⁸

The New Jersey court gave the legislature six months to enact legislation giving some sort of recognition to same-sex couples. The court did not mandate the legislature to recognize same-sex marriage. It gave the political branch the option of either expanding marriage or creating a different institution that would grant equal benefits and rights to same-sex couples outside the scope of marriage. The legislature took the second option enacting on December of 2006 a Civil Union Act.³⁹ The Bill stated:

It is the intent of the Legislature to comply with the constitutional mandate set forth by the New Jersey Supreme Court in the recent landmark decision of *Lewis v. Harris*, 188 N.J. 415, (October 25, 2006) wherein the Court held that the equal protection guarantee of Article I, paragraph 1 of the State Constitution was violated by denying rights and benefits to committed same-sex couples which were statutorily given to their heterosexual counterparts. The Court stated that the ‘State can fulfill that constitutional requirement in one of two ways. It can either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage.’ . . .

The Legislature has chosen to establish civil unions by amending the current marriage statute to include same-sex couples.⁴⁰

New Jersey provided same-sex couples the same rights and obligations afforded to married heterosexual couples but it refused to grant them access to the brand marriage. As shown below, New Jersey’s system did not last that long. After *Windsor* another decision declared New Jersey’s dual system unconstitutional.⁴¹

³⁷Assem. 8354, 2011 Leg., 234th Reg. Sess. (N.Y. 2011), in Bill Jacket, L. 2011 c. 95.

³⁸*Lewis v. Harris*, *supra* note 13, 200 (2006).

³⁹N.J. Stat. Ann. § 37:1–28 (West).

⁴⁰*Ibid.*

⁴¹Garden State Equality et al. v. Dow et al., 434 N.J.Super. 163 (2013). See below Sect. 4.2.2.

Hawaii was the first of these “dialogues” going wrong in the United States. In 1993 the Hawaii Supreme Court rejected the claim that the Hawaii constitution provided a fundamental right to same-sex marriage.⁴² It considered, however, that requiring marriage to be between a man and a woman constituted sex discrimination and remanded the case to a state court to determine whether the state could prove that it had a “compelling” state interest that would overcome such sex discrimination.⁴³ Later, a trial court ruled that the state marriage law was unconstitutional but before a final decision was issued on appeal, Hawaii citizens, through a referendum, amended Hawaii’s constitution, giving the legislature the power to reserve marriage to opposite-sex couples.⁴⁴ As this Chapter will show later, *Windsor* contributed—and it still does—to a shift towards same-sex marriage in several states, including Hawaii.

Same-sex marriage creates, therefore, a sort of “dialogue” between courts and legislatures. Outside the United States, the case of South Africa⁴⁵ and Colombia illustrate the connections and disconnections these dialogues can produce.⁴⁶

4.2.2 *California: From a Mayor’s Decision to a Court’s Decision*

The “dialogue” between courts and legislatures comes in part as a reaction of either a court or a legislature to what the other branch has stated. California’s process to same-sex marriage illustrates very well this action-reaction “dialogue” between courts and political processes because it involved not only courts and legislature, but also the citizens of California.

On February 12 of 2004, the Mayor of San Francisco authorized officials of the city and county of San Francisco to issue marriage licenses. In a period of a month, around 4,000 marriage licenses were issued. The weddings stopped on March 11,

⁴²*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

⁴³*Ibid.*

⁴⁴“The legislature shall have the power to reserve marriage to opposite-sex couples.” Haw. Const. art. 1, § 23 (ratified Nov. 3, 1998).

⁴⁵In *Minister of Home Affairs and Another v. Fourie and another* the South African Constitutional Court mandated the legislature to provide a scheme of protection to same-sex couples similar to the one already afforded to opposite-sex couples. The result was the Civil Union Act of 2006, which allows same-sex marriage, as well as opposite sex marriage, with the same rights and protections afforded to individuals of opposite sex marrying under the Marriage Act of 1961. *Minister of Home Affairs and Another v. Fourie and another* [CC] [Constitutional Court] (CCT 60/04) [2005] ZACC 19; 2006 (3) BCRL 355(CC); 2006(1) SA524(CC) (1 December 2005) (S. Afr.). See Civil Union Act, 2006, Government Gazzette, Republic of South Africa, Vol. 497 Cape Town 17 November 2006.

⁴⁶For a thorough account of Colombia’s situation with same-sex marriage, see Chap. 5 of this book.

2004 when the California Supreme Court issued an interim stay directing officials to stop issuing marriage licenses.⁴⁷ On August of the same year, the Supreme Court stated that “local executive officials lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples.”⁴⁸ It also stated that “marriages conducted between same-sex couples in violation of the applicable statutes [were] void and of no legal effect.”⁴⁹

Parallel to the debates on same-sex marriage, California had afforded same-sex couples the same rights and benefits enjoyed by married opposite-sex couples, through a civil partnership regime. In other words, the debate on same-sex marriage was not about legal recognition of same-sex couples, or about accessing benefits or rights afforded to married couples. It was about accessing marriage and its branding:

Accordingly, the legal issue we must resolve is not whether it would be constitutionally permissible under the California Constitution for the state to limit marriage only to opposite-sex couples while denying same-sex couples any opportunity to enter into an official relationship with all or virtually all of the same substantive attributes, but rather whether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a ‘marriage’ whereas the union of a same-sex couple is officially designated a ‘domestic partnership.’⁵⁰

The Supreme Court concluded that California’s Constitution guaranteed “the same substantive constitutional rights as opposite-sex couples to choose one’s life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.”⁵¹

After this decision state voters passed a ballot initiative known as Proposition 8 (Prop 8), amending the State Constitution to define marriage as a union between a man and a woman. The proponents of the ballot were not only against same-sex marriage, but against courts being the right forum to decide on the issue. In the voter’s guide informing citizens on the ballot, proponents of Prop 8 stated that

CALIFORNIANS HAVE NEVER VOTED FOR SAME-SEX MARRIAGE. If gay activists want to legalize gay marriage, they should put it on the ballot. Instead, they have gone behind the backs of voters and convinced four activist judges in San Francisco to redefine marriage for the rest of society. That is the wrong approach.⁵²

⁴⁷*Lockyer v. City & Cnty. of San Francisco*, S122923, 2004 WL 473257 (Cal. Mar. 11, 2004).

⁴⁸*Lockyer v. City & Cnty. of San Francisco*, 33 Cal. 4th 1055, 1069, 95 P.3d 459, 464 (2004).

⁴⁹*Ibid.*

⁵⁰*In re Marriage Cases*, 43 Cal. 4th 757, 779–80, 183 P.3d 384, 398 (2008).

⁵¹*Ibid.*, pp. 433–434.

⁵²California, General Election, Tuesday November 8, 2008, Official Voter Information Guide. Arguments in Favor of Proposition 8. Available at <http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm>

Proposition 8 prevailed with the support of 52 % of the votes. Advocates of same-sex marriage challenged the constitutional amendment. The opinion of California's Attorney General was that the amendment was unconstitutional because it took away a fundamental right that had already been granted to a minority group.⁵³ The "dialogue" between courts and political processes continued with the Supreme Court of California deciding whether the amendment was constitutional or not. In *Strauss v. Horton* it decided that, precisely because same-sex couples already enjoyed similar rights and benefits afforded to married opposite-sex couples, the amendment was narrow enough to be constitutional.⁵⁴ The court, however, maintained as valid all marriages celebrated before its decision.⁵⁵

This back and forth between judicial and political processes, as it is well documented by now, did not end there. Two couples filed suit in federal court and started the litigation that ended in 2013 with the first of the two U.S. Supreme Court decisions issued the same day.⁵⁶ California's Attorney General decided not to defend Proposition 8. That left the challenge with plaintiffs and no official defendants. The official proponents of Prop 8 decided to act as defendants, which let the issue of legal standing open. At the end, the U.S. Supreme Court decided *Perry* on procedural grounds, declaring a lack of standing of a private party to defend the constitutionality of a statute when state officials had chosen not to defend it.⁵⁷ Defendants of Prop 8 before the U.S. Supreme Court repeated in their brief the argument they had used to justify Proposition 8 in the first place, regarding the right forum to decide issues on same-sex marriage:

Our Constitution does not mandate the traditional gendered definition of marriage, but neither does our Constitution condemn it. This Court, accordingly, should allow the public debate regarding marriage to continue through the democratic process, both in California and throughout the Nation.⁵⁸

Whether courts or political actors have the final word on same-sex marriage is not yet defined. It is, however, clear, that the practical effects of *Perry*, and the substantive reasons provided by the U.S. Supreme Court in *Windsor* have moved same-sex marriage closer to substantive due process or equal protection issues and further away from political processes subject to majoritarian decisions.

⁵³Attorney General's Response to Amicus Curiae Briefs, January 21, 2009, p. 4.

⁵⁴*Strauss v. Horton*, 46 Cal. 4th 364, 411, 207 P.3d 48, 77 (2009).

⁵⁵*Ibid.*

⁵⁶For a thorough account on the legal strategies behind California's same-sex marriage litigation see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. Rev. 1235, 1330 (2010).

⁵⁷*Perry supra* note 27 at 2668.

⁵⁸Brief for Petitioners at 8, *Hollingsworth et al. v. Perry* 570 US—(2013) (No. 12–144).

4.3 Windsor: The Game Changer

In 1996 the U.S. Congress passed the Defense of Marriage Act (DOMA). Section 3 of the DOMA stated that for federal purposes:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.⁵⁹

Since 2008 the State of New York recognized same-sex marriages legally performed outside the State. Edith Windsor and Thea Spyer lived in New York and married in Ontario, Canada, in 2007. Thea Spyer died in 2009 leaving her entire estate to Edith Windsor. Although her marriage was recognized by the State of New York, Section 3 of DOMA barred her from claiming the federal estate tax exemption for surviving spouses. Edith Windsor brought a refund suit arguing that DOMA violated her equal protection rights. Similarly to the Attorney General of California in the *Perry* case, the United States Attorney General notified the Speaker of the House of Representatives that the Department of Justice would no longer defend Section 3’s constitutionality.⁶⁰ A Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the case defending the constitutionality of Section 3 of DOMA. The District Court permitted the intervention and found Section 3 unconstitutional, ordering the Treasury to refund Ms. Windsor’s tax payments. The Court of Appeal for the Second Circuit affirmed the decision but the United States still did not enforce the judgment. The U.S. Supreme Court granted *certiorari*.

The decision in *Windsor* changed the landscape of same-sex marriage litigation because it provided reasons based on dignity and on equality to affirm the lower courts decisions. The Court had other options that would have kept the outcome intact but would have provided less fuel for future litigation. One of the main issues with Section 3 of DOMA was whether it interfered with the states’ power to regulate family law matters: “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”⁶¹ The court further argued that “[c]onsistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law

⁵⁹Defense of Marriage Act, Section 3.

⁶⁰For an analysis of the Supreme Court reasoning on both *Perry* and *Windsor* cases on the issue of standing see Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 Ind. L.J. 67 (2014).

⁶¹*Windsor supra*, note 28, p. 2691.

policy decisions with respect to domestic relations.”⁶² Despite this recognition of state power, the Court decided that the issue at hand on substantive grounds beyond federalism:

Despite these considerations, it is unnecessary to decide whether this 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.⁶³

4.3.1 *Windsor and Dignity: A Lost Opportunity*

Many courts around the world have based their decisions for granting same-sex marriage on the value of dignity. South Africa’s Constitutional Court is famous for its use of dignity as a pillar of constitutional review.⁶⁴ It was not a surprise, therefore, that in *Minister of Home Affairs and Another v. Fourie* the South African Constitutional Court justified the constitutionality of same-sex marriage on dignity as linked to equality.⁶⁵ Other countries have also heavily relied on dignity to justify their shifts from opposite-sex marriage to marriage equality. Mexico, for example, has issued several decisions on same-sex marriage. The first one is worth noticing for its use of dignity as autonomy. For the Mexican Supreme Court, dignity was the basis for which each individual had the right to choose her own family.⁶⁶ The rationale of the Court was that marriage between individuals of the same sex was constitutional not because *marriage* was important, but because dignity led to the free development of one’s personality. What was important, therefore, was that every individual had to be respected in her choices about family formation.⁶⁷

Of all uses of dignity, when it comes to same-sex marriage courts have used it to reinforce concepts of equality and autonomy. Dignity is not a foreign concept to U.S. courts.⁶⁸ It has not, however, used it consistently. A few courts did use dignity as autonomy in their state decisions on same sex marriage. In *Goodridge v. Department of Public Health* Justice Marshall used dignity as equality, stating that

⁶²*Ibid.*

⁶³*Ibid.*, p. 2692.

⁶⁴Stu Woolman, *The Architecture of Dignity*, in *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* 76 (Drucilla Cornell et al. eds., 2013).

⁶⁵*Fourie*, *supra* note 45.

⁶⁶Acción de inconstitucionalidad 2/2010, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Novena Época, 10 de Agosto de 2010, Par. 275 (Mex.)

⁶⁷*Ibid.*

⁶⁸Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 Colum. J. Eur. L. 238 (2008); Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of A Right*, 37 Ohio N.U. L. Rev. 381 (2011).

“The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.”⁶⁹ This approach was also used by the 9th Circuit in *Perry v. Brown*.⁷⁰

The U.S. Supreme Court used the term dignity several times in *Lawrence v. Texas*⁷¹ and it again went back to dignity in *Windsor*. Although in *Lawrence* dignity was rightly linked to autonomy, *Windsor* gave another use of dignity that narrows its ability to be used outside the scope of marriage. Instead of reinforcing the idea of dignity as autonomy, it used dignity as status: marriage became the focus of dignity rather than individuals and their families. The decision referred 22 times to the idea of dignity. The most important references to dignity as status derived from marriage are illustrated below:

- “Here the State’s decision to give this class of persons the right to marry conferred upon them a *dignity* and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.”⁷²
- “It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and *dignity* as that of a man and woman in lawful marriage.”⁷³
- “By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and *dignity* to that bond.”⁷⁴

Windsor sought a protection to same-sex couples based on their recognition as worth of marriage. It was, undoubtedly, a statement on equality. This equality, however, is not for all families and all individuals. It is only for same-sex couples worth of being granted the dignity of marriage. The decision argued that the federal definition of marriage as the union between a man and a woman “places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, . . . and whose relationship the State has sought to dignify. *And it humiliates tens of thousands of children now being raised by same-sex couples.*”⁷⁵

⁶⁹See *Goodridge v. Dep’t of Pub. Health*, *supra* note 32, at 312, 313, 337,392, and 395.

⁷⁰“The designation of ‘marriage’ is the status that we recognize. It is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it.” *Perry v. Brown*, 671 F.3d 1052, 1079 (9th Cir. 2012) vacated and remanded sub nom. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (U.S. 2013).

⁷¹*Lawrence v. Texas* 539 U.S. 571 (2003).

⁷²*Windsor*, *supra* note 28, p. 2692. Emphasis added.

⁷³*Ibid.*, p. 2689. Emphasis added.

⁷⁴*Ibid.*, p. 2692. Emphasis added.

⁷⁵*Ibid.*, p. 2694. Emphasis added.

The reference to children makes it clear that the Supreme Court had no intention of recognizing the same dignity to families of married and unmarried parents. The issue, for this court, was marriage and not equality and even less, autonomy to choose one's family. It may be precisely the narrative on institutional dignity, along with the image of children being humiliated by their parents' impossibility to be married what ignited so many decisions favorable to same-sex marriage. *Windsor* provided same-sex couples with the best assimilation argument: they were worth of marrying and not having access to marriage was an affront to their dignity. This insult affected innocent children. The couples the *Windsor* decision seemed to speak about do not resemble at all the individuals that gathered outside the Stonewall Inn in 1969.⁷⁶ They did not resemble the individuals that brought constitutional challenges to the sodomy statutes in the past.⁷⁷

The decision showed the plaintiff as selfless as possible. *Windsor* was a case of a tax credit and yet the decision barely talked about money and tangible benefits. It referred to the institution of marriage as something bigger than its benefits and obligations. This was also the narrative chosen by the plaintiff and its legal team. The ACLU produced several videos showing the love story of Ms. Windsor and Mr. Spyer. They got engaged in 1967 and were together until 2009, when Ms. Spyer passed away. In one of the videos Ms. Windsor reflects on the day after their marriage in Canada in 2007. She talks about how marriage is special. She can't point out to what it is but she thinks that marriage is different.⁷⁸

Ms. Windsor and Ms. Spyer's story is beautiful and marriage should have been available to them in 1967. Their decision to marry, however, could have been protected by the Supreme Court on the basis of their right to have the family of their choice. Treating individuals with dignity, as it was the idea developed by the Supreme Court in *Lawrence v. Texas* requires allowing individuals to make the most intimate decisions without government interference. *Windsor*, instead, is not a decision on autonomy, but on marriage and the dignity that comes from it.

⁷⁶For an account of the role of the Stonewall riots in the rise of the LGBT movement see David Carter, *Stonewall: The Riots that Sparked the Gay Revolution*, New York, 2010.

⁷⁷The plaintiff in *Bowers v. Hardwick*, the case in which the Supreme Court upheld the constitutionality of anti sodomy statutes, was a gay man who was arrested by a police officer who entered into Hardwick's apartment and found him engaged in consensual oral sex with another male. *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Lawrence v. Texas* the Supreme Court overturned *Bowers*. The plaintiff was also a gay man who had been arrested by a police officer who entered Lawrence's bedroom and saw him engaged in consensual oral sex with another man. *Lawrence v. Texas*, *supra* note 71 at 558.

⁷⁸Time, *Edith and Thea: A Love Story*, December 20, 2013.

4.3.2 *After Windsor: The Dialogue Between Rights and Politics Revisited*

The *Windsor* decision made more than ordering the federal government to reimburse Ms. Windsor the estate taxes she had paid. Although the decision was limited to declaring Section 3 of DOMA unconstitutional, the impact it has had on state decisions is unmistakable. Less than 2 years after *Windsor* more than 80 cases were being litigated in state courts and more than 40 decisions were issued.⁷⁹ Likewise, most circuit courts had issued at least one decision on same-sex marriage.⁸⁰ Between November of 2013 and June of 2014 same-sex marriage became legal through court decisions in several States.⁸¹

In Michigan, a District Court decided on March 2014 that the Michigan Marriage Amendment violated equal protection under Michigan's Constitution.⁸² The U.S. Court of Appeal for the 6th Circuit issued a halt on same-sex marriage decisions until an appeal was decided. The decision by the District Court, however, cited *Windsor* several times. Defendants claimed that the ban on same-sex marriage was justified because the best environment to raise children was a married father and mother.⁸³ The District Court, following *Windsor*, harshly criticized this argument:

In attempting to define this case as a challenge to “the will of the people,” state defendants lost sight of what this case is truly about: people. No court record of this proceeding could ever fully convey the personal sacrifice of these two plaintiffs who seek to ensure that the state may no longer impair the rights of their children and the thousands of others now being raised by same-sex couples. It is the Court’s fervent hope that these children will grow up “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Windsor*, 133 S. Ct. at 2694.⁸⁴

Some of the states in which same-sex marriage statutes are being challenged are the most conservative of the United States. Virginia, for example, until recently not only did not recognize same-sex marriage but a 2006 constitutional amendment denied the recognition of any type of same-sex association.⁸⁵ *Bostic v. Rainey*,

⁷⁹For an accurate account of same-sex marriage litigation in the United States, see Freedom to Marry’s website at www.freedomtomarry.org/litigation

⁸⁰*Id.*

⁸¹In New Jersey, *Garden State Equality et al. v. Dow et al.*, *supra* note 41; in New Mexico, *Griego v. Oliver*, *supra* note 32, 865; in Oregon, *Geiger v. Kitzhaber*, 6:13-CV-01834-MC, 2014 WL 2054264 (D. Or. 2014); in Pennsylvania, *Whitewood v. Wolf*, 1:13-CV-1861, 2014 WL 2058105 (M.D. Pa. 2014); in Illinois the legislature had already passed a marriage equality statute that had deferred its implementation to June 2014. A court decision ordered the immediate implementation of the statute. *Lee v. Orr*, Dist. Court, ND, Illinois 2014.

⁸²*DeBoer v. Snyder*, Civil Action No. 12-CV-10285.

⁸³*DeBoer, Id.*

⁸⁴*Ibid.*

⁸⁵Chris Jenkins, *Ban on Same-sex Unions Added to Virginia Constitution*, The Washington Post, Nov. 8, 2006.

however, changed family law for gays and lesbians in Virginia. In a 41 page decision, the District Court rejected the rationale of protecting heterosexual marriage as the best framework for raising children. Using arguments from *Windsor*, as well as other U.S. Supreme Court decisions, it declared the ban on same-sex marriage in Virginia a violation of the U.S. Constitution.⁸⁶

In addition to a flow of cases pending all around the United States, several legislatures have also amended their state constitutions, also citing *Windsor* as one of the reasons for the change. In Hawaii, it was the legislature itself that revised its former stance on marriage. On October of 2013, Hawaii's Attorney General issued Formal Opinion 13–1 stating that “the plain language of article I section 23 [of the Hawaii Constitution] does not compel the legislature to limit marriages to one man and one woman; it gives the legislature the option to do so.”⁸⁷ On November of 2013 the Hawaii State Legislature passed the Hawaii Marriage Equality Act of 2013. The Bill stated in its first paragraphs the link between this new legislation and the Supreme Court's decision in *Windsor*:

The legislature acknowledges the recent decision of the United States Supreme Court in *United States v. Windsor*, 133 S.Ct. 2675 (2013), which held that Section 3 of the Defense of Marriage Act, Public Law 104–199, unlawfully discriminated against married same-sex couples by prohibiting the federal government from recognizing those marriages and by denying federal rights, benefits, protections, and responsibilities to those couples.⁸⁸

4.4 Before and After *Windsor*: A Narrow Concept of the Family

The value of marriage in the U.S. seems to trump the value of equality and autonomy combined. *Windsor* is, no doubt, a game changer because it is triggering marriage equality at a speed that would have not been predicted ten years ago. What *Windsor* has not, however, done, is to shift the focus from marriage to equality. Married and unmarried couples will still be treated differently in most states. The Massachusetts decision on same-sex marriage of 2003 illustrates this commitment to marriage:

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and

⁸⁶*Bostic v. Rainey*, Case 2:13-cv-00395-AWA-LRL.

⁸⁷State of Hawaii, Office of the Attorney General, October 14, 2013, Op. No 13–1.

⁸⁸Hawaii State Legislature, Senate Bill 1 (SB1).

Available at http://www.capitol.hawaii.gov/splsession2013b/SB1_HD1_.pdf

communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.⁸⁹

The California decision of 2008 is also centered on an idea of the married family:

The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage.⁹⁰

Recognizing same-sex marriage is a positive outcome, but it could have been a real “game changer” if the Supreme Court, and the decisions that have followed, would have focused on dignity as autonomy and the role of family law to afford protection to families regardless of their marital status.

The Supreme Court will have more opportunities to define the scope of marriage as a fundamental right. It is still possible that the Supreme Court will use new cases to strengthen the protection of the family, and will focus on the right of same-sex couples to enjoy the benefits of marriage because they chose to do so. There is, however, a real possibility that the Supreme Court will continue focusing on the right to enter into a marriage and lose the opportunity to talk about the family as a reality beyond marriage. It may focus on the dignity that marriage, according to their prior opinions, gives individuals, rather than the dignity of each individual regardless of their marital status. This would be unfortunate. It is through the respect of autonomy that the dignity of each individual is recognized.

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⁸⁹*Goodridge*, *supra* note 7, 965.

⁹⁰*Ibid*; *In re Marriage Cases* *supra* note 50, 813.

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