

ARTICLE

MARRIAGE EQUALITY COMES TO AMERICA

*Carl Tobias**

Marriage equality is sweeping the nation. Four appeals courts recently affirmed district judges' opinions which invalidated numerous state laws proscribing same-sex marriage. Yet, the Sixth Circuit reversed a number of district jurists, prompting a circuit split that provoked Supreme Court resolution. Because marriage equality's status is unclear, this piece assesses disposition of the litigation and recommends how to clarify marriage equality.

I. RECENT LITIGATION

*United States v. Windsor*¹ prompted new challenges² in all states prohibiting same-sex marriage.³ The case held that the Defense of Marriage Act (DOMA) violated the Constitution⁴ by harming dignitary, economic, and numerous related interests of same-sex couples and their children.⁵ The majority praised

* Williams Chair in Law, University of Richmond. Thanks to John Pagan and Peggy Sanner for ideas and Leslee Stone for processing. Remaining errors are mine.

1. *United States v. Windsor*, 133 S.Ct. 2675 (2013).

2. Many cite it. For analyses of marriage equality, see MICHAEL KLARMAN, FROM THE CLOSET TO THE ALTAR (2013); MARK SOLOMON, WINNING MARRIAGE (2014).

3. See Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 870–71 (2014); Heather Gerken, *Windsor's Mad Genius*, 95 B. U. L. REV. 587 (2015). The ACLU has filed many of the challenges, but so have local attorneys. See Steve Friess, *For Lawyers, a Rocky Walk Down the Gay Marriage Aisle*, BLOOMBERG.COM (Jan. 28, 2015), <http://www.bloomberg.com/politics/features/2015-01-28/for-lawyers-a-rocky-walk-down-the-gay-marriage-aisle> (reporting on the differing strategies of national organizations like the ACLU and local attorneys with respect to challenging same-sex marriage bans).

4. *Windsor*, 133 S.Ct. at 2696; Michael Klarman, *Windsor and Brown*, 127 HARV. L. REV. 127, 127 (2013).

5. It apparently used elevated scrutiny. *Windsor*, 133 S.Ct. at 2693–96; see Franklin, *supra* note 3, at 872.

federalism without addressing state bans.⁶ In dissents, Chief Justice John Roberts asserted that the Court did not rule on the proscriptions’ constitutionality,⁷ while Justice Antonin Scalia claimed the arguments that invalidated DOMA could analogously govern them.⁸

Twenty-six district courts have found bans unconstitutional; two affirmed restrictions.⁹ Four circuits upheld invalidations; all determined that bans contravened the Fourteenth Amendment. The Seventh and Ninth Circuits mainly relied on the Equal Protection Clause’s “classification” thread, and a concurring jurist asserted that bans comprised sex discrimination; the Fourth and Tenth Circuits partly used this Clause’s “rights” strand¹⁰ but mostly employed the Due Process Clause’s fundamental right to marry.¹¹ In October, the Court denied Fourth, Seventh, and Tenth Circuit certiorari petitions.¹² However, last November, the Sixth Circuit found bans are constitutional, and this January, the Justices granted review.¹³

II. SIXTH CIRCUIT LITIGATION

In March 2014, Eastern District of Michigan Judge Bernard Friedman considered a ban violative of equal protection because Michigan articulated no “conceivable legitimate state interest.”¹⁴

6. *Windsor*, 133 S.Ct. at 2694–95; see Gerken, *supra* note 3.

7. *Windsor*, 133 S.Ct. at 2696 (Roberts, C. J., dissenting); see Klarman, *supra* note 4, at 158.

8. *Windsor*, 133 S.Ct. at 2697 (Scalia, J., dissenting); see Franklin, *supra* note 3, at 870.

9. ALLIANCE FOR JUSTICE, LOVE AND THE LAW: FEDERAL CHALLENGES TO STATE SAME-SEX MARRIAGE BANS (2015), available at <http://www.afj.org/wp-content/uploads/2015/04/Federal-Marriage-Equality-Report-4.22.15.pdf>.

10. *Baskin v. Bogan*, 766 F.3d 648, 654–72 (7th Cir. 2014) (citing equal protection jurisprudence holding that classifications based on race and gender are subject to heightened scrutiny); *Latta v. Otter*, 771 F.3d 456, 467–68 (9th Cir. 2014); *id.* at 485–90 (Berzon, J., concurring); *Bostic v. Schaefer*, 760 F.3d 352, 375–78, 384 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1222–24 (10th Cir. 2014). The “rights” strand of the Equal Protection Clause applies strict scrutiny reviewing laws affecting suspect classifications.

11. *Bostic*, 760 F.3d at 375–78, 384; *Kitchen*, 755 F.3d at 1208–22.

12. Robert Barnes, *Supreme Court Declines to Review Same-Sex Marriage Cases, Allowing Unions in 5 States*, WASHINGTON POST (Oct. 6, 2014), http://www.washingtonpost.com/politics/courts_law/supreme-court-declines-to-review-same-sex-marriage-cases/2014/10/06/ee822848-4d5e-11e4-babe-e91da079cb8a_story.html 135 S. Ct. 134 (2014); Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES, Oct. 7, 2014, at A1.

13. *DeBoer v. Snyder*, 772 F.3d 388 (7th Cir. 2014), *cert. granted*, 135 S.Ct. 1040 (2015); Adam Liptak, *Justices to Decide Marriage Rights for Gay Couples*, N.Y. TIMES, Jan. 17, 2015, at A1.

14. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 768 (E.D. Mich. 2014). He found misplaced reliance on *Windsor*, which said marriage laws “must respect the constitutional rights of persons,” and its citation to *Loving v. Virginia*, 388 U.S. 1 (1967), was an enormous disclaimer. *Id.* at 770–72.

Last year, a Kentucky district jurist held a ban contravened equal protection,¹⁵ while Ohio¹⁶ and Tennessee¹⁷ courts invalidated limitations that prohibited recognizing out-of-state marriages.

Each defendant appealed,¹⁸ and the Sixth Circuit overturned rulings which struck down bans.¹⁹ Judge Jeffrey Sutton first pointedly invoked Supreme Court precedent and declared that *Baker v. Nelson* was binding until reversed explicitly or by outcome.²⁰ The jurist propounded several ways to conceptualize plaintiffs' appeals — "Originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning" — yet rejected the plaintiffs' theories for constitutionalizing marriage's definition and removing the issue from state voters where it has been "since the founding."²¹

He proclaimed that every Justice commences analysis of constitutional phraseology by assessing how ratifiers understood the wording.²² Doctrine yielded the same conclusion as history.²³ Judicial restraint and the idea of the sovereignty of "the people" dictate that courts uphold strictures evaluated under the rational basis test if jurists "conceive of [. . .] any plausible reason" for them.²⁴ "[S]ome rational basis" must justify the traditional definition; Sutton posited two bases that hurdled this low bar.²⁵ One was states' need for regulating "natural effects of male-female intercourse: children[.]" and the "encouragement to create and maintain stable relationships" in which they flourish.²⁶ Another was desire "to wait and see" before changing a norm accepted for centuries.²⁷ He asserted that the Justices have mainly invalidated

15. "No conceivable legitimate reason" justified it. *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014).

16. It violated equal protection and due process. *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014).

17. It contravened equal protection. *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014).

18. Erik Eckholm, *One Court, 3 Judges and 4 States' Gay Marriage Cases*, N.Y. TIMES, Aug. 7, 2014, at A15.

19. *DeBoer*, 772 F.3d 388; Erik Eckholm, *Court Upholds 4 State Marriage Bans*, N.Y. TIMES, Nov. 7, 2014, at A1.

20. *DeBoer*, 772 F.3d at 399, 402 (citing *Baker v. Nelson*, 469 U.S. 810 (1972), that summarily dismissed a marriage case).

21. *DeBoer*, 772 F.3d at 403.

22. The Constitution's government limits are an "unbending bulwark [until] the people" revise it with Article V, so the "Fourteenth Amendment permits [. . .] States to define marriage" traditionally. *Id.* at 403–04.

23. *Id.* But see William Eskridge, *Original Meaning and Marriage Equality*, SCOTUSBLOG (Jan. 17, 2015), <http://www.scotusblog.com/2015/01/symposium-original-meaning-public-deliberation-and-marriage-equality-2>.

24. *DeBoer*, 772 F.3d at 404 (citation omitted) (emphasis in original).

25. *Id.* But see *infra* text accompanying notes 38–39.

26. *DeBoer*, 772 F.3d at 404–05.

27. Federalism allows "laboratories of experimentation," permitting diverse state approaches. *Id.* at 406.

under rational basis scrutiny novel laws that target groups for disfavored treatment.²⁸ Bans could not evince the unthinking bias or malice that the Fourteenth Amendment proscribes, as 19 states constitutionalized a widely-held norm already in law.²⁹ Sutton lauded citizens for altering judicial decisions through constitutional revision.³⁰

Regarding the plaintiffs' argument, the jurist asked if individuals have a fundamental right to marry that is "deeply rooted in [U.S.] history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist," were they sacrificed, and contended the test is often met by locating the "right in the Constitution," which has no general or gay marriage right.³¹ He said equal protection demanded heightened review of laws which single out groups of persons for unequal treatment, but the Justices and the Sixth Circuit have never held that sexual preference classifications mandate elevated scrutiny.³² To determine whether a particular classification is suspect and presumptively unconstitutional, courts apply four "rough" criteria.³³ Sutton could not deny the "lamentable reality that gay" individuals have experienced discrimination yet also claimed the "marital institution arose independently" of the record compiled, spanning millennia and nearly all societies.³⁴ He observed plaintiffs wielded political power that 11 years of success and the promising future witnessed.³⁵

28. *Id.* at 408 (citations omitted).

29. *Id.*; Linda Greenhouse, *It's Too Late to 'Wait-and-See' at the Supreme Court*, N.Y. TIMES (Apr. 29, 2015), <http://www.nytimes.com/2015/04/30/opinion/on-same-sex-marriage-it-to-too-late-to-wait-and-see-at-the-supreme-court.html>.

30. "Debate on sensitive issues [. . .] may shade into rancor[,] but that does not justify removing [them] from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate." He found "real" persons on both sides of each initiative, while gay people and states should not be considered abstractions. *DeBoer*, 772 F.3d at 409–10 (citing *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1638 (2014)).

31. *DeBoer*, 772 F.3d at 411 (citation omitted). *Loving* found a "fundamental right to marry" but used no new definition to allow interracial marriage. *Id.*; *DeBoer*, 973 F. Supp. 2d at 768. *But see* Franklin, *supra* note 3, at 887; *infra* note 64.

32. *DeBoer*, 772 F.3d at 413; Klarman, *supra* note 4, at 141. *But see supra* text accompanying note 10.

33. Whether government discrimination historically victimized the group and it has a defining characteristic legitimately bearing on the classification; exhibits unchanging characteristics defining it as a discrete group; and is politically powerless. *DeBoer*, 772 F.3d at 413 (citation omitted).

34. "Laws targeting same-sex couples" are recent. This sequence prevented inferring "prejudice against gays" prompted marriage's traditional definition. *Id.* at 413 (citation omitted); see Peter Baker, *Millenia of Marriage Between Man and Woman Weigh on Court*, N.Y. TIMES, Apr. 29, 2015 at A16.

35. States need not recognize marriages others conduct. The 14th Amendment demands laws only be rationally related to legitimate ends; insisting on states' own

Judge Martha Craig Daughtrey, writing in dissent, criticized Sutton's notion that the Fourteenth Amendment's "original meaning" left marriage untouched, contending it was also not originally meant to end public school segregation or anti-miscegenation laws.³⁶ Daughtrey also criticized Sutton's view of marriage as an institution meant for male-female relationships, claiming there was never a universally accepted definition.³⁷ The jurist characterized the argument that prohibitions satisfy rational basis review because same-sex couples produce no unintended children as so weak it "could not be taken seriously."³⁸ To the majority's "let the people decide" assertion, Daughtrey countered with the difficulty of amending state constitutions and contended the U.S. Constitution requires courts to determine "individual rights under the Fourteenth Amendment," despite public opinion.³⁹ Regarding the majority's admonition that the states should be allowed to "wait and see" marriage equality's impacts elsewhere before changing the definition, Daughtrey replied that, with no clear evidence of problems, the "states as 'laboratories of democracy' metaphor and its [restraint pitch do not have] resonance in the fast-changing" marriage debate.⁴⁰

Each plaintiff quickly appealed, with every jurisdiction save Tennessee filing before the deadline to facilitate review and supporting certiorari.⁴¹ That enabled the Justices to first discuss the petitions on January 9, grant them a week later, and resolve the question this Term.⁴²

marriage definitions is rational. *DeBoer*, 772 F.3d at 415, 417–18; Greenhouse, *supra* note 29 (success idea).

36. Racial discrimination remained following a civil war, slavery's termination, and 14th Amendment ratification, so many cases and court decrees were required to achieve any protection. *DeBoer*, 772 F.3d at 431 (Daughtrey, J., dissenting).

37. His admiration for strikingly unequal traditional marriage was "naive, if not misplaced." *Id.* at 432; see Douglas NeJaime, *Will the Supreme Court Recognize Modern Marriage?*, L.A. TIMES, Jan. 22, 2015, available at <http://www.latimes.com/opinion/op-ed/la-oe-nejaime-same-sex-marriage-20150123-story.html>.

38. *DeBoer*, 772 F.3d at 434 (citing *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014)).

39. The Supreme Court said the people cannot order states to violate equal protection. *DeBoer*, 772 F.3d at 435.

40. The states with marriage equality equal those with interracial marriage when *Loving* issued. *Id.* at 435–36.

41. *E.g.*, *DeBoer v. Snyder*, Petition for a Writ of Certiorari, 2014 WL 6449712 (2014); *Henry v. Hodges*, Petition for a Writ of Certiorari, 2014 WL 5907570 (2014); see Lyle Denniston, *Momentum Builds for Review of Same-Sex Marriage*, SCOTUSBLOG (Dec. 2, 2014), <http://www.scotusblog.com/2014/12/momentum-builds-for-review-of-same-sex-marriage>. Reversal and appeal unsettled marriage equality.

42. Lyle Denniston, *Same-Sex Marriage: A Simple Appeal*, SCOTUSBLOG (Nov. 17, 2014), <http://www.scotusblog.com/2014/11/same-sex-marriage-a-simple-appeal>; see *supra* note 13.

III. SUGGESTIONS FOR THE FUTURE

The October certiorari denials suggested the Court would only accept cases upholding bans like the Sixth Circuit issued.⁴³ Marriage equality's unsettled status and other appellate courts' persuasive analyses of relevant questions demonstrate the Justices correctly afforded certiorari and need to reverse the Sixth Circuit opinion. Most important, the Court action will probably end the circuit split⁴⁴ that imposed diverse legal regimes and uncertainty on 21 million Sixth Circuit residents and even more across the increasingly peripatetic country.⁴⁵ This stark nationwide patchwork, having marriages valid for numerous states and illegal within quite a few, greatly affects the daily lives of "real" persons for whom Sutton voiced deep respect.⁴⁶ The 300 same-sex couples who exchanged vows between the time Judge Friedman decided and when his opinion was stayed comprise trenchant illustrations, as the Sixth Circuit reversal leaves their marital status ambiguous.⁴⁷ Denial of the Fourth, Seventh and Tenth Circuit certiorari petitions and stays for jurisdictions — especially Alaska, Florida and Kansas — also propel into "legal limbo" untold numbers of same-sex partners.⁴⁸

Additional rationales for granting certiorari directly address arguments for rejecting Supreme Court review. For example, the Justices might have preferred that state legislatures and the people decide the issue jurisdiction-by-jurisdiction, thus honoring federalism, as *Windsor* and Sutton urged;⁴⁹ deferring to each, like Sutton's *Schuette* allusion proposed;⁵⁰ or minimizing the controversy which putatively attends the Court's nationwide resolution of divisive social policy matters, namely abortion.⁵¹

43. See sources cited *supra* notes 12, 42.

44. *Id.*; see David Herzig, *A Taxing Decision*, SLATE, Jan. 22, 2015.

45. See *supra* note 41; Ginnie Graham, *3200 Same-Sex Couples Marry*, TULSA WORLD (Jan. 18, 2015), http://www.tulsaworld.com/news/ginniegraham/more-than-same-sex-couples-marry-in-oklahoma-in-less/article_dd39267c-093f-5d13-a675-734b11637659.html.

46. See *DeBoer*, 772 F.3d at 409–10; see also *supra* note 30 (Sutton's respect).

47. They and 1000 Utah couples won recognition cases. *Caspar v. Snyder*, 2015 WL 224741 (E.D. Mich. 2015); *Evans v. Utah*, 21 F. Supp. 3d 1192 (D. Utah 2014).

48. See sources cited *supra* notes 9, 12, 45. They will be in limbo until the Court rules. Even if it upholds bans, judges will probably recognize their marriages. See *supra* note 47. Alabama Supreme Court resistance to federal court rulings invalidating its ban is unique. Ronald Krotoszynski, *Alabama's Dangerous Defiance*, N.Y. TIMES, Mar. 6, 2015, at A29.

49. *Bostic v. Schaefer*, 760 F.3d 352, 398 (4th Cir. 2014) (Niemeyer, J., dissenting); *Kitchen v. Herbert*, 755 F.3d 1193, 1231 (10th Cir. 2014) (Kelly, J., dissenting); *supra* text accompanying notes 5, 24, 27, 29, 31, 36.

50. See *supra* note 30; see also Baker, *supra* note 34 (discussing the idea of deference).

51. Klarman, *supra* note 4, at 146–48; see Adam Liptak, *Taking Up Gay Marriage, But on Their Own Terms*, N.Y. TIMES, Jan. 18, 2015, at A4. Insofar as this reflects concern about resolution before the U.S. reaches consensus, states that have marriage equality equal those with interracial marriage when *Loving* issued. See *supra* note 40.

However, *Windsor* intimates that civil rights' vindication eclipses federalism;⁵² *Schuette* merits nominal deference because the case implicates affirmative action, an unrelated facet of Equal Protection Clause jurisprudence;⁵³ and the Fourteenth Amendment contemplates that federal judges will ascertain whether bans contravene the provision.⁵⁴ In short, the Justices appropriately granted review, as myriad persons now need clarification of their marital status, and protracted disposition will continue harming same-sex couples and their children and prolong uncertainty.⁵⁵

Numerous paths sustain marriage equality, although confining the appeals to a pair of questions and the Court's phrasing left unclear whether a majority would adopt one. For instance, some commentators expected the Justices would ask if the bans deny claimants equal protection or due process, rather than (1) "does the Fourteenth Amendment require a state to license a marriage between two people of the same sex" or (2) does that proviso compel a jurisdiction to recognize such a marriage when "lawfully licensed and performed out-of-state?"⁵⁶

The Court may employ reasoning similar to *Windsor*'s, as Scalia predicted,⁵⁷ because no convincing argument distinguishes the circumstances. Moreover, *Windsor* said that individual rights trump federalism even with respect to marriage, which the states traditionally regulated.⁵⁸ For example, the Justices can invoke elevated scrutiny and conclude that the dignitary, financial, and other injuries that same-sex marriage bans exact violate the Fourteenth Amendment.⁵⁹ A related circumscribed approach, derived from *Windsor* and the second question, is having jurisdictions recognize same-sex marriages which are valid in numbers of states permitting these unions.⁶⁰ The Court might also

52. *Bostic*, 760 F.3d at 379; *Kitchen*, 755 F.3d at 1228; *supra* text accompanying note 14; *see supra* notes 5, 8, 45, 47. *But see supra* text accompanying notes 6, 30.

53. *Bostic*, 760 F.3d at 379; *supra* text accompanying notes 14, 39, *infra* note 52. *But see supra* note 30.

54. *See supra* notes 14, 39 and accompanying text.

55. Chaos in Alabama, Michigan and Utah resembles concern about political chaos invoked to support deciding *Bush v. Gore*, 531 U.S. 98 (2000); *see supra* text accompanying notes 45–48.

56. 135 S.Ct. 1040 (2015). It may mean little. Robert Barnes, *A Question on the Gay Marriage Question*, WASH. POST, Jan. 17, 2015; Liptak, *supra* note 51. *But see* *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

57. *See supra* text accompanying note 8.

58. *Bostic*, 760 F.3d at 379; *Kitchen*, 755 F.3d at 1228; *supra* text accompanying note 52; *see* Franklin, *supra* note 3, at 871 n.248; *supra* notes 5, 8, 39, 51, 54. *But see supra* notes 6, 21–22, 30.

59. Klarman, *supra* note 4, at 158; *supra* text accompanying notes 4–5. *But see supra* text accompanying notes 32–35.

60. *See supra* note 56. *Windsor* required the federal government, not states, to recognize the marriages.

use Equal Protection Clause assessment that considers bans to be sexual orientation discrimination, triggering heightened review.⁶¹ For instance, the Justices could decide limitations fail to meet elevated scrutiny because the “responsible procreation” and “wait-and-see” rationales are not sufficiently important government interests or the heterosexual-only classification lacks a substantial relationship to their achievement.⁶²

Should a Court majority believe those avenues unpersuasive or require excessive doctrinal change, it may prefer relatively different, ostensibly narrower, routes. The Justices might treat bans as sex discrimination vis-à-vis equal protection, which receives intermediate scrutiny, because the proscriptions facially classify according to sex and are premised on gender stereotypes.⁶³ For example, the Court may find prohibitions do not survive that evaluation, as the reasons proffered are insufficiently important state interests or the pertinent classification bears no substantial relationship to attaining them. Moreover, the Justices can apply Due Process Clause examination by acknowledging same-sex couples’ fundamental right to marry, which demands strict review.⁶⁴ For instance, the Court might determine bans fail this test, because the rationales are not compelling or the classification lacks narrow tailoring to their realization. The Justices may concomitantly hold that bans infringe liberty which due process encompasses, as *Windsor* and *Lawrence v. Texas* suggested.⁶⁵ In the end, numerous paths support marriage equality.⁶⁶

61. See *supra* text accompanying note 10 (7th & 9th Circuits mostly used equal protection). But see *supra* note 32.

62. They may even hold bans lack a rational basis. See 4th, 7th, 9th, 10th Circuit majority opinions, *supra* note 10. But see 4th, 10th Circuit dissents, *supra* note 10; *supra* text accompanying notes 24–29, 32–33.

63. *Latta*, 771 F.3d at 485–90 (Berzon, J., concurring); see Suzanne Goldberg, *Risky Arguments in Social Justice Litigation*, 114 COLUM. L. REV. 2087, 2109 (2014); Adam Liptak, *Gender Bias Issue Could Sway Chief Justice*, N.Y. TIMES, Apr. 30, 2015, at A14; *Baskin*, 766 F.3d at 654–72; *Latta*, 771 F.3d at 467–68; *id.* at 485–90 (Berzon, J., concurring); *Bostic*, 760 F.3d at 375–78, 384; *Kitchen*, 755 F.3d at 1222–24.

64. See *supra* text accompanying note 11 (recounting the 4th and 10th Circuits’ use of due process review). But see *Bostic*, 760 F.3d at 385 (Niemeyer, J., dissenting); *Kitchen*, 755 F.3d at 1230 (Kelly, J., dissenting); *DeBoer*, 772 F.3d at 411.

65. *Windsor*, 133 S.Ct. at 2689, 2692–93; *Lawrence v. Texas*, 539 U.S. 558, 566–67, 578–79 (2003); see Franklin, *supra* note 3, at 881–89; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

66. Most doctrinal tests seem met. David Cruz, *Unveiling Marriage Equality?*, SCOTUSBLOG (Jan. 17, 2015), <http://www.scotusblog.com/2015/01/symposium-unveiling-marriage-equality>; Eskridge, *supra* note 23. Gay rights cases may eschew them. Franklin, *supra* note 3, at 871–72, 881; see Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

IV. CONCLUSION

Marriage equality has come to 37 jurisdictions, but not yet all. When the Supreme Court addresses this question, it should clarify marital status by ruling that bans violate the Fourteenth Amendment.