# Arkansas, State and Local Government

# POLS 353

# Spring 2016

Three types of Law:

# Constitutional

# State and Federal Constitutions

# Statutory

# Congressional Acts and Acts/Laws of the State Legislature

# and agency rules promulgated via delegated authority

# Judge made, Common Law

# Precedents, customs and judge made laws

# English Common Law

# Louisiana’s French Common Law

# Stare decisis – deference to previous judicial decisions

# Supreme Court Decisions With State Level Implications

**Role of Federal Government:**

*McCulloch v. Maryland-1819 -* supremacy of national law

*Gibbons v. Ogden-1824-* power of the federal government to regulate interstate commerce

***Education:***

*(Plessy v. Ferguson-1896-* separate but equal (railroad cars))

 *Brown v. Board of Education-1955-*  racial segregation in public schools

 Little Rock Nine

**Apportionment:**

*Baker v. Carr* -1962 -legislative apportionment was a judicable issue; into the thicket

*Reynolds v. Sims* -1964- “equal protection means equal”; one man, one vote

***Abortion:***

*(Griswold v. Connecticut –1965 – emanating penumbras create a right to privacy)*

*Roe v. Wade – 1973 -* State regulation only in 2nd and third trimester

*Webster v. Reproductive Health Services -1989 –* slightly more regulation

*Planned Parenthood v. Casey* – 1992- slightly more regulation

**Criminal Rights:**

*Gideon v. Wainwright-1963 - Fre*e counsel to indigent defendants

*Miranda v Arizona* – 1966- Must be advised of right to not self-incriminate

**Gay Marriage:**

<http://www.oyez.org/cases/case/?case=1792-1850/1819/1819_>

# McCulloch v. Maryland

## 17 U.S. 316 (1819)

### Docket Number:

### Abstract

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| Argued: | February 22, 1819 |  |  |  |  |  |  |  |  |
| Decided: | March 6, 1819 |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case In 1816, Congress chartered The Second Bank of the United States. In 1818, the state of Maryland passed legislation to impose taxes on the bank. James W. McCulloch, the cashier of the Baltimore branch of the bank, refused to pay the tax.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented The case presented two questions: Did Congress have the authority to establish the bank? Did the Maryland law unconstitutionally interfere with congressional powers?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion In a unanimous decision, the Court held that Congress had the power to incorporate the bank and that Maryland could not tax instruments of the national government employed in the execution of constitutional powers. Writing for the Court, Chief Justice Marshall noted that Congress possessed unenumerated powers not explicitly outlined in the Constitution. Marshall also held that while the states retained the power of taxation, "the constitution and the laws made in pursuance thereof are supreme. . .they control the constitution and laws of the respective states, and cannot be controlled by them."  |  |  |  |  |  |  |  |  |

# Gibbons v. Ogden

## 22 U.S. 1 (1824)

### Docket Number:

### Abstract

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|  |
| Decided: | March 2, 1824 |  |  |  |  |  |  |  |  |
| Argued: | February 4, 1824 |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case A New York state law gave two individuals the exclusive right to operate steamboats on waters within state jurisdiction. Laws like this one were duplicated elsewhere which led to friction as some states would require foreign (out-of-state) boats to pay substantial fees for navigation privileges. In this case a steamboat owner who did business between New York and New Jersey challenged the monopoly that New York had granted, which forced him to obtain a special operating permit from the state to navigate on its waters.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Did the State of New York exercise authority in a realm reserved exclusively to Congress, namely, the regulation of interstate commerce?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion The Court found that New York's licensing requirement for out-of-state operators was inconsistent with a congressional act regulating the coasting trade. The New York law was invalid by virtue of the Supremacy Clause. In his opinion, Chief Justice Marshall developed a clear definition of the word commerce, which included navigation on interstate waterways. He also gave meaning to the phrase "among the several states" in the Commerce Clause. Marshall's was one of the earliest and most influential opinions concerning this important clause. He concluded that regulation of navigation by steamboat operators and others for purposes of conducting interstate commerce was a power reserved to and exercised by the Congress.  |  |  |  |  |  |  |  |  |

(oyez)

# Plessy v. Ferguson

## 163 U.S. 537 (1896)

### Docket Number: 210

### Abstract

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|  |
| Decided: | May 18, 1896 |  |  |  |  |  |  |  |  |
| Argued: | April 13, 1896 |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case The state of Louisiana enacted a law that required separate railway cars for blacks and whites. In 1892, Homer Adolph Plessy--who was seven-eighths Caucasian--took a seat in a "whites only" car of a Louisiana train. He refused to move to the car reserved for blacks and was arrested.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Is Louisiana's law mandating racial segregation on its trains an unconstitutional infringement on both the privileges and immunities and the equal protection clauses of the Fourteenth Amendment?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion No, the state law is within constitutional boundaries. The majority, in an opinion authored by Justice Henry Billings Brown, upheld state-imposed racial segregation. The justices based their decision on the separate-but-equal doctrine, that separate facilities for blacks and whites satisfied the Fourteenth Amendment so long as they were equal. (The phrase, "separate but equal" was not part of the opinion.) Justice Brown conceded that the 14th amendment intended to establish absolute equality for the races before the law. But Brown noted that "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races unsatisfactory to either." In short, segregation does not in itself constitute unlawful discrimination. |  |  |  |  |  |  |  |  |

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| **Brown v. Board of Education (I)**

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| **Docket:** | 1 |
| **Citation:** | 347 U.S. 483 (1954)  |
| **Petitioner:** | Brown |
| **Respondent:** | Board of Education of Topeka |
| **Consolidated:** | Briggs v. Elliott, No. 2; Davis v. County School Board of Prince Edward County, Virginia, No. 4; Gebhart v. Belton, No. 10 |

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| Abstract

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| **Oral Argument:** | December 9, 1952 |
| **Oral Argument:** | December 10, 1952 |
| **Oral Argument:** | December 11, 1952 |
| **Oral Reargument:** | December 7, 1953 |
| **Oral Reargument:** | December 8, 1953 |
| **Oral Reargument:** | December 9, 1953 |
| **Decision:** | May 17, 1954 |
| **Subjects:** | Civil Rights, Desegregation, Schools |

 | Advocates

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Facts of the Case

Black children were denied admission to public schools attended by white children under laws requiring or permitting segregation according to the races. The white and black schools approached equality in terms of buildings, curricula, qualifications, and teacher salaries. This case was decided together with Briggs v. Elliott and Davis v. County School Board of Prince Edward County.

Question

Does the segregation of children in public schools solely on the basis of race deprive the minority children of the equal protection of the laws guaranteed by the 14th Amendment?

Conclusion

Yes. Despite the equalization of the schools by "objective" factors, intangible issues foster and maintain inequality. Racial segregation in public education has a detrimental effect on minority children because it is interpreted as a sign of inferiority. The long-held doctrine that separate facilities were permissible provided they were equal was rejected. Separate but equal is inherently unequal in the context of public education. The unanimous opinion sounded the death-knell for all forms of state-maintained racial separation.

# Baker v. Carr

## 369 U.S. 186 (1962)

### Docket Number: 6

### Abstract

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| Argued: | April 19, 1961 |  |  |  |  |  |  |  |  |
| Reargued: | October 9, 1961 |  |  |  |  |  |  |  |  |
| Decided: | March 26, 1962 |  |  |  |  |  |  |  |  |
|   |  |  |  |  |  |  |  |  |  |
| Subjects: | Judicial Power: Standing to Sue, Legal Injury |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case Charles W. Baker and other Tennessee citizens alleged that a 1901 law designed to apportion the seats for the state's General Assembly was virtually ignored. Baker's suit detailed how Tennessee's reapportionment efforts ignored significant economic growth and population shifts within the state.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Did the Supreme Court have jurisdiction over questions of legislative apportionment?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion In an opinion which explored the nature of "political questions" and the appropriateness of Court action in them, the Court held that there were no such questions to be answered in this case and that legislative apportionment was a justiciable issue. In his opinion, Justice Brennan provided past examples in which the Court had intervened to correct constitutional violations in matters pertaining to state administration and the officers through whom state affairs are conducted. Brennan concluded that the Fourteenth Amendment equal protection issues which Baker and others raised in this case merited judicial evaluation.  |  |  |  |  |  |  |  |  |

# Reynolds v. Sims

## 377 U.S. 533 (1964)

### Docket Number: 23

### Abstract

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|  |
| Decided: | June 15, 1964 |  |  |  |  |  |  |  |  |
| Argued: | November 13, 1963 |  |  |  |  |  |  |  |  |
|   |  |  |  |  |  |  |  |  |  |
| Subjects: | Judicial Power: Standing to Sue, Justiciable Question |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case In 1961, M.O. Sims, David J. Vann (Vann v. Baggett), John McConnell (McConnell v. Baggett), and other voters from Jefferson County, Alabama, challenged the apportionment of the state legislature. The Alabama Constitution prescribed that each county was entitled to at least one representative and that there were to be as many senatorial districts as there were senators. Population variance ratios of as great as 41-to-1 existed in the Senate.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Did Alabama's apportionment scheme violate the Fourteenth Amendment's Equal Protection Clause by mandating at least one representative per county and creating as many senatorial districts as there were senators, regardless of population variances?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion In an 8-to-1 decision, the Court upheld the challenge to the Alabama system, holding that Equal Protection Clause demanded "no less than substantially equal state legislative representation for all citizens...." Noting that the right to direct representation was "a bedrock of our political system," the Court held that both houses of bicameral state legislatures had to be apportioned on a population basis. States were required to "honest and good faith" efforts to construct districts as nearly of equal population as practicable.  |  |  |  |  |  |  |  |  |

# Griswold v. Connecticut

## 381 U.S. 479 (1965)

### Docket Number: 496

### Abstract

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| Argued: | March 29, 1965 |  |  |  |  |  |  |  |  |
| Decided: | June 7, 1965 |  |  |  |  |  |  |  |  |
|   |  |  |  |  |  |  |  |  |  |
| Subjects: | Judicial Power: Standing to Sue, Personal Injury |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case Griswold was the Executive Director of the Planned Parenthood League of Connecticut. Both she and the Medical Director for the League gave information, instruction, and other medical advice to married couples concerning birth control. Griswold and her colleague were convicted under a Connecticut law which criminalized the provision of counselling, and other medical treatment, to married persons for purposes of preventing conception.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Does the Constitution protect the right of marital privacy against state restrictions on a couple's ability to be counseled in the use of contraceptives?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion Though the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy. Together, the First, Third, Fourth, and Ninth Amendments, create a new constitutional right, the right to privacy in marital relations. The Connecticut statute conflicts with the exercise of this right and is therefore null and void.  |  |  |  |  |  |  |  |  |

# Roe v. Wade

## 410 U.S. 113 (1973)

### Docket Number: 70-18

### Abstract

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| Decided: | January 22, 1973 |  |  |  |  |  |  |  |  |
| Reargued: | October 11, 1972 |  |  |  |  |  |  |  |  |
| Argued: | December 13, 1971 |  |  |  |  |  |  |  |  |
|   |  |  |  |  |  |  |  |  |  |
| Subjects: | Privacy: Abortion, Including Contraceptives |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case Roe, a Texas resident, sought to terminate her pregnancy by abortion. Texas law prohibited abortions except to save the pregnant woman's life. After granting certiorari, the Court heard arguments twice. The first time, Roe's attorney -- Sarah Weddington -- could not locate the constitutional hook of her argument for Justice Potter Stewart. Her opponent -- Jay Floyd -- misfired from the start. Weddington sharpened her constitutional argument in the second round. Her new opponent -- Robert Flowers -- came under strong questioning from Justices Potter Stewart and Thurgood Marshall.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Does the Constitution embrace a woman's right to terminate her pregnancy by abortion?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion The Court held that a woman's right to an abortion fell within the right to privacy (recognized in Griswold v. Connecticut) protected by the Fourteenth Amendment. The decision gave a woman total autonomy over the pregnancy during the first trimester and defined different levels of state interest for the second and third trimesters. As a result, the laws of 46 states were affected by the Court's ruling. |  |  |  |  |  |  |  |  |

# Webster v. Reproductive Health Services

## 492 U.S. 490 (1989)

### Docket Number: 88-605

### Abstract

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|  |
| Argued: | April 26, 1989 |  |  |  |  |  |  |  |  |
| Decided: | July 3, 1989 |  |  |  |  |  |  |  |  |
|   |  |  |  |  |  |  |  |  |  |
| Subjects: | Privacy: Abortion, Including Contraceptives |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case In 1986, the state of Missouri enacted legislation that placed a number of restrictions on abortions. The statute's preamble indicated that "[t]he life of each human being begins at conception," and the law codified the following restrictions: public employees and public facilities were not to be used in performing or assisting abortions unnecessary to save the mother's life; encouragement and counseling to have abortions was prohibited; and physicians were to perform viability tests upon women in their twentieth (or more) week of pregnancy. Lower courts struck down the restrictions.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Did the Missouri restrictions unconstitutionally infringe upon the right to privacy or the Equal Protection Clause of the Fourteenth Amendment?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion In a controversial and highly fractured decision, the Court held that none of the challenged provisions of the Missouri legislation were unconstitutional. First, the Court held that the preamble had not been applied in any concrete manner for the purposes of restricting abortions, and thus did not present a constitutional question. Second, the Court held that the Due Process Clause did not require states to enter into the business of abortion, and did not create an affirmative right to governmental aid in the pursuit of constitutional rights. Third, the Court found that no case or controversy existed in relation to the counseling provisions of the law. Finally, the Court upheld the viability testing requirements, arguing that the State's interest in protecting potential life could come into existence before the point of viability. The Court emphasized that it was not revisiting the essential portions of the holding in Roe v. Wade.  |  |  |  |  |  |  |  |  |

(oyez)

# Planned Parenthood v. Casey

## 505 U.S. 833 (1992)

### Docket Number: 91-744

### Abstract

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|  |
| Argued: | April 22, 1992 |  |  |  |  |  |  |  |  |
| Decided: | June 29, 1992 |  |  |  |  |  |  |  |  |
|   |  |  |  |  |  |  |  |  |  |
| Subjects: | Privacy: Abortion, Including Contraceptives |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case The Pennsylvania legislature amended its abortion control law in 1988 and 1989. Among the new provisions, the law required informed consent and a 24 hour waiting period prior to the procedure. A minor seeking an abortion required the consent of one parent (the law allows for a judicial bypass procedure). A married woman seeking an abortion had to indicate that she notified her husband of her intention to abort the fetus. These provisions were challenged by several abortion clinics and physicians. A federal appeals court upheld all the provisions except for the husband notification requirement.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Can a state require women who want an abortion to obtain informed consent, wait 24 hours, and, if minors, obtain parental consent, without violating their right to abortions as guaranteed by Roe v. Wade?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion In a bitter, 5-to-4 decision, the Court again reaffirmed Roe, but it upheld most of the Pennsylvania provisions. For the first time, the justices imposed a new standard to determine the validity of laws restricting abortions. The new standard asks whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Under this standard, the only provision to fail the undue-burden test was the husband notification requirement. The opinion for the Court was unique: It was crafted and authored by three justices.  |  |  |  |  |  |  |  |  |

(OYEZ)

# Gideon v. Wainwright

## 372 U.S. 335 (1963)

### Docket Number: 155

### Abstract

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|  |
| Argued: | January 15, 1963 |  |  |  |  |  |  |  |  |
| Decided: | March 18, 1963 |  |  |  |  |  |  |  |  |
|   |  |  |  |  |  |  |  |  |  |
| Subjects: | Criminal Procedure: Right to Counsel |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case Gideon was charged in a Florida state court with a felony for breaking and entering. He lacked funds and was unable to hire a lawyer to prepare his defense. When he requested the court to appoint an attorney for him, the court refused, stating that it was only obligated to appoint counsel to indigent defendants in capital cases. Gideon defended himself in the trial; he was convicted by a jury and the court sentenced him to five years in a state prison.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Did the state court's failure to appoint counsel for Gideon violate his right to a fair trial and due process of law as protected by the Sixth and Fourteenth Amendments?  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Conclusion In a unanimous opinion, the Court held that Gideon had a right to be represented by a court-appointed attorney and, in doing so, overruled its 1942 decision of Betts v. Brady. In this case the Court found that the Sixth Amendment's guarantee of counsel was a fundamental right, essential to a fair trial, which should be made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Justice Black called it an "obvious truth" that a fair trial for a poor defendant could not be guaranteed without the assistance of counsel. Those familiar with the American system of justice, commented Black, recognized that "lawyers in criminal courts are necessities, not luxuries."  |  |  |  |  |  |  |  |  |

# Miranda v. Arizona

## 384 U.S. 436 (1966)

### Docket Number: 759

### Abstract

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|  |
| Decided: | June 13, 1966 |  |  |  |  |  |  |  |  |
| Argued: | February 28, 1966 |  |  |  |  |  |  |  |  |
|   |  |  |  |  |  |  |  |  |  |
| Subjects: | Criminal Procedure: Miranda Warnings |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Facts of the Case The Court was called upon to consider the constitutionality of a number of instances, ruled on jointly, in which defendants were questioned "while in custody or otherwise deprived of [their] freedom in any significant way." In Vignera v. New York, the petitioner was questioned by police, made oral admissions, and signed an inculpatory statement all without being notified of his right to counsel. Similarly, in Westover v. United States, the petitioner was arrested by the FBI, interrogated, and made to sign statements without being notified of his right to counsel. Lastly, in California v. Stewart, local police held and interrogated the defendant for five days without notification of his right to counsel. In all these cases, suspects were questioned by police officers, detectives, or prosecuting attorneys in rooms that cut them off from the outside world. In none of the cases were suspects given warnings of their rights at the outset of their interrogation.  |  |  |  |  |  |  |  |  |
| clear |  |  |  |  |  |  |  |  |
| Question Presented Does the police practice of interrogating individuals without notifying them of their right to counsel and their protection against self-incrimination violate the Fifth Amendment?  |  |  |  |  |  |  |  |  |
|  |  |  |  |  |  |  |  |  |
| Conclusion The Court held that prosecutors could not use statements stemming from custodial interrogation of defendants unless they demonstrated the use of procedural safeguards "effective to secure the privilege against self-incrimination." The Court noted that "the modern practice of in-custody interrogation is psychologically rather than physically oriented" and that "the blood of the accused is not the only hallmark of an unconstitutional inquisition." The Court specifically outlined the necessary aspects of police warnings to suspects, including warnings of the right to remain silent and the right to have counsel present during interrogations.  |  |  |  |  |  |  |  |  |

# Obergefell *v.*Hodges

### DOCKET NO.

## 14-556

## Facts of the case

Groups of same-sex couples sued their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states' bans on same-sex marriage or refusal to recognize legal same-sex marriages that occurred in jurisdictions that provided for such marriages. The plaintiffs in each case argued that the states' statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and one group of plaintiffs also brought claims under the Civil Rights Act. In all the cases, the trial court found in favor of the plaintiffs. The U.S. Court of Appeals for the Sixth Circuit reversed and held that the states' bans on same-sex marriage and refusal to recognize marriages performed in other states did not violate the couples' Fourteenth Amendment rights to equal protection and due process.

## Question

(1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

(2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state?

## Conclusion

### 5–4 DECISION FOR OBERGEFELL MAJORITY OPINION BY ANTHONY M. KENNEDY

The Fourteenth Amendment requires both marriage licensing and recognition for same-sex couples.

Yes, yes. Justice Anthony M. Kennedy delivered the opinion for the 5-4 majority. The Court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples in the same manner as it does to opposite-sex couples. Judicial precedent has held that the right to marry is a fundamental liberty because it is inherent to the concept of individual autonomy, it protects the most intimate association between two people, it safeguards children and families by according legal recognition to building a home and raising children, and it has historically been recognized as the keystone of social order. Because there are no differences between a same-sex union and an opposite-sex union with respect to these principles, the exclusion of same-sex couples from the right to marry violates the Due Process Clause of the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment also guarantees the right of same-sex couples to marry as the denial of that right would deny same-sex couples equal protection under the law. Marriage rights have traditionally been addressed through both parts of the Fourteenth Amendment, and the same interrelated principles of liberty and equality apply with equal force to these cases; therefore, the Constitution protects the fundamental right of same-sex couples to marry. The Court also held that the First Amendment protects the rights of religious organizations to adhere to their principles, but it does not allow states to deny same-sex couples the right to marry on the same terms as those for opposite-sex couples.

Chief Justice John G. Roberts, Jr. wrote a dissent in which he argued that, while same-sex marriage might be good and fair policy, the Constitution does not address it, and therefore it is beyond the purview of the Court to decide whether states have to recognize or license such unions. Instead, this issue should be decided by individual state legislatures based on the will of their electorates. The Constitution and judicial precedent clearly protect a right to marry and require states to apply laws regarding marriage equally, but the Court cannot overstep its bounds and engage in judicial policymaking. The precedents regarding the right to marry only strike down unconstitutional limitations on marriage as it has been traditionally defined and government intrusions, and therefore there is no precedential support for making a state alter its definition of marriage. Chief Justice Roberts also argued that the majority opinion relied on an overly expansive reading of the Due Process and Equal Protection Clauses of the Fourteenth Amendment without engaging with the judicial analysis traditionally applied to such claims and while disregarding the proper role of the courts in the democratic process. Justice Antonin Scalia and Justice Clarence Thomas joined in the dissent. In his separate dissent, Justice Scalia wrote that the majority opinion overstepped the bounds of the Court’s authority both by exercising the legislative, rather than judicial, power and by doing so in a realm that the Constitution reserves for the states. Justice Scalia argued that the question of whether same-sex marriage should be recognized is one for the state legislatures, and that for the issue to be decided by unelected judges goes against one of the most basic precepts of the Constitution: that political change should occur through the votes of elected representatives. In taking on this policymaking role, the majority opinion departed from established Fourteenth Amendment jurisprudence to create a right where none exists in the Constitution. Justice Thomas joined in the dissent. Justice Thomas also wrote a separate dissent in which he argued that the majority opinion stretched the doctrine of substantive due process rights found in the Fourteenth Amendment too far and in doing so distorted the democratic process by taking power from the legislature and putting it in the hands of the judiciary. Additionally, the legislative history of the Due Process Clause in both the Fifth and Fourteenth Amendments indicates that they were meant to protect people from physical restraint and from government intervention, but they do not grant them rights to government entitlements. Justice Thomas also argued that the majority opinion impermissibly infringed on religious freedom by legislating from the bench rather than allowing the state legislature to determine how best to address the competing rights and interests at stake. Justice Scalia joined in the dissent. In his separate dissent, Justice Samuel A. Alito, Jr. wrote that the Constitution does not address the right of same-sex couples to marry, and therefore the issue is reserved to the states to decide whether to depart from the traditional definition of marriage. By allowing a majority of the Court to create a new right, the majority opinion dangerously strayed from the democratic process and greatly expanded the power of the judiciary beyond what the Constitution allows. Justice Scalia and Justice Thomas joined in the dissent.

<https://www.oyez.org/cases/2014/14-556>

**Same Sex Marriage**

**Why Do I Care About Massachusetts and California Judges?**

**What Do Voting Patterns in ME, MD, and WA have to Do With Me?**

**What are The Supremes Up To?**

* Two Federalism Concepts:
	+ Federal Defense of Marriage Act of 1996 defined marriage for federal purposes
	+ But states are in charge of marriage laws and locals issue marriage licenses, so…
	+ State by state responses:
		- “Mini” DOMA’s in the states –
		- Some by Constitutional Amendment
		- Some by Statute
	+ Some allow marriage because of Judicial Decisions
	+ Some allow marriage because of Citizen’s Initiative
	+ Some allow Civil Unions or Domestic Partnerships
	+ In other words, Laboratories of Democracy, or ‘all over the map’

Which leads us to…

* Three Constitutional Concepts:
	+ Full Faith and Credit (Article 4)

**Section 1.**  Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.  **Section 2.** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* + Reserved Powers (10th Amendment)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* + Equal Protection (14th Amendment)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* Four Supreme Questions:
	+ Q: Is the 1996 Federal DOMA constitutional? (And who will defend it?)
		- A: Unconstitutional. The House Republicans stepped in to defend it.
	+ Q: Is California’s Proposition 8 (a citizen initiated Constitutional mini-DOMA) constitutional? (And who will defend it?)
		- A: The court did not answer because California failed to defend.
	+ Q: Do gay people/couples deserve *strict scrutiny? Intermediate scrutiny?*
		- A: In other words: So you won your court case. Do I have to bake you a cake?
	+ Q: What does “Circuit Split” mean?
		- A: Differing opinions from Circuit Courts of Appeals, often a reason to grant cert.
		- Which is exactly what happened. That’s how Obergeffel got to the Supremes.

Same Sex Marriage Info From the National Conference of State Legislatures as of 2/9/15:

## <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>

**Latest Development:** Alabama is the latest state to allow same-sex marriage. A U.S. district judge ruled the state's ban unconstitutional in January, but put the decision on hold to allow the state to prepare. The state requested the hold be extended, but the U.S. Supreme Court refused to do so.

State legislatures, voters and more recently the courts have made sweeping changes over the past two decades in laws defining whether marriage is limited to relationships between a man and a woman or is extended to same-sex couples. Before the U.S. Supreme Court ruling on Oct. 6, 2014, declining to hear cases on same-sex marriage, 31 states had either constitutional or statutory provisions that explicitly defined marriage as between a man and a woman and just 19 states and the District of Columbia allowed same-sex marriage. Now, at least 36 states and D.C. recognize same-sex marriage.

The status of same-sex marriage remains in flux. All states have some court case pending on the topic. Five of those states’ cases were pending before the U.S. Supreme Court. The Supreme Court decided not to hear the cases, thereby allowing the decisions from the 4th, 7th and 10th U.S. Circuit Courts of Appeal to stand. That meant same-sex couples could marry in five more states—Indiana, Oklahoma, Utah, Virginia and Wisconsin. The following day, the 9th U.S. Circuit Court of Appeals struck down same-sex marriage bans in Nevada and Idaho.

Two days later, West Virginia’s attorney general stopped his defense of that state’s ban. Colorado’s attorney general said the 10th U.S. Circuit Court of Appeals decision invalidates that state’s ban. In North Carolina, a federal judge ruled that state’s ban unconstitutional, applying the 4th U.S. Circuit Court of Appeals ruling. Alaska's appeal was refused by the Supreme Court and a federal district judge ruled Arizona's ban unconstitutional and the attorney general said he would not appeal the decision. Wyoming is the latest state where the attorney general has decided not to appeal a federal district court judge ruling the state’s ban unconstitutional. The U.S. Supreme Court on Nov. 12, 2014, lifted its hold on issuing same-sex marriage licenses in Kansas. A South Carolina state Supreme Court and federal judge in Montana are the latest to rule overturning same-sex marriage bans. On Jan. 6, 2015, the state of Florida will begin allowing same-sex marriage after a district judge ruled the ban unconstitutional and the U.S. Supreme Court refused to grant the state’s attorney general a stay on the decision. On February 9, 2015 Alabama began issuing same-sex marriage licenses after a U.S. district judge ruled the state's ban unconstitutional. The judge put the January decision on hold to allow the state to prepare. The state requested the hold be extended, but the U.S. Supreme Court refused to do so. With these changes, at least 37 states and D.C. recognize same-sex marriage.

There is also a federal appeals court ruling to uphold states' ban on same-sex marriage. On Nov. 6, 2014, a federal appeals court judge in the 6th U.S. Circuit upheld four states' bans on same-sex marriage. The opinion upholds bans in Kentucky, Michigan, Ohio, and Tennessee. The decision is the first by a federal appeals court to uphold the bans. The U.S. Supreme Court has agreed to hear the four cases. The court is expected to hear arguments in April and make a decision in June.

