

# The Road to Marriage Equality: Routed through Utah & Built Upon the 14<sup>th</sup> Amendment

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In December 2013, the U.S. District Court for the District of Utah decided that the state's ban on same-sex marriage was unconstitutional. *Kitchen v. Herbert* successfully ended the state of Utah's constitutional amendment that prevented same-sex couples from getting legally married, and bolstered the United States Supreme Court's *Obergefell v. Hodges* decision in 2015 that made marriage equality part of America's legal system. Both cases relied on the 14<sup>th</sup> Amendment's protections guaranteed to all Americans. However, these decisions did not happen on their own. America did not always include gay and lesbian Americans as fully recognized citizens with the same rights as everyone else.

It was not until 1989 that some states legally recognized same-sex partners as such. New York became the first state to recognize a gay couple as a legally protected "family" in *Braschi v. Stahl Associates*. The Supreme Court of New York set a precedent for future cases by recognizing that a gay couple living together did constitute a legal family.

In 1990, the Supreme Court of Hawaii decided that banning same-sex marriage was discriminatory. This decision was met with such recoil by the state, that the State Constitution was amended to ban same-sex marriage. This act led to Congress' 1996 Defense of Marriage Act, which defined marriage, for federal purposes, as the union of one man and one woman, and allowed states to refuse to recognize same-sex marriages granted under the laws of other states.

However, 1996 was not all bad for equality as efforts to limit equality protections in other states were rejected by the courts. In Colorado, an amendment to the state constitution eliminated homosexuality as a protected class, effectively legalizing discrimination against lesbian and gay people. The amendment was

taken on in *Romer v. Evans*, and the Supreme Court of the United States found it in violation of the 14<sup>th</sup> Amendment's equal protection clause.

It was not until 2003 when another key case came before the Supreme Court. *Lawrence v. Texas* struck down a Texas sodomy law that made consensual same-sex

sexual activity illegal. The decision effectively legalized consensual homosexual sex, and invoked the 14<sup>th</sup> Amendment's due process and equal protection guarantees (because sodomy was not illegal between consenting heterosexual couples).



Genora Dancel, left, and Ninia Baehr were among plaintiffs in a case in Hawaii that challenged the state's anti-gay marriage policy. (Dennis Cook, AP)





Plaintiffs in suit against MA celebrated the one-year anniversary of *Goodridge v. Dept. of Public Health*. (Elise Amendola, AP)

protections afforded married heterosexual “spouses.” At the same time, *Hollingsworth v. Perry* overturned California’s Proposition 8, which had banned same-sex marriage. Unlike *Obergefell*, *Hollingsworth* did not result in a precedent setting decision by the Supreme Court. The decision left the original district court ruling that overturned Proposition 8, but had no discussion of the right to marry on a Federal level.

The road to marriage equality continued to be long and bumpy, even after *Kitchen v. Herbert*. In the opinion issued in late 2013, U.S. District Judge Robert Shelby found that the Utah State Constitution’s ban on same-sex marriage violated the protections guaranteed by the U.S. Constitution. The state of Utah neglected to request a temporary stay prior to the decision, and the Court’s order that the state cease enforcing its ban on same-sex marriage took effect immediately, allowing for Utah’s county clerks to begin issuing marriage licenses that afternoon.

“While it’s difficult to predict an alternate outcome, if the state had requested a temporary stay before Judge Shelby issued his decision, it is likely that it would have been granted,” said attorney Jane Marquardt, who was able to legally marry her partner, Tami, in December 2013. “And stays would probably have been granted through the appeals process, preserving the pre-decision status-quo. As it happened, a very different status-quo was established on December 20, 2013.” Marquardt continued, “It’s interesting that Judge Shelby was called an ‘activist judge’ for the *Kitchen* decision—some of the same critics said he should have stayed the decision without having been asked. That would have been an activist action.”

In 2004, Massachusetts became the first state to legalize same-sex marriage. The State Supreme Court found that the state’s ban on same-sex marriage violated the Massachusetts Constitution’s equal protection and due process guarantees. This decision was followed by several other state decisions and referendums in the years to follow.

Despite steps toward equality at the state level, few cases came before the U.S. Supreme Court until two decisions in 2013. Ten years after Massachusetts legalized same-sex marriage, *United States v. Windsor* challenged the Defense of Marriage Act section preventing married same-sex couples from being granted the federal



A large tax bill after her partner’s death led Edie Windsor, center, to challenge the Defense of Marriage Act. (Jewel Samad, Agence France-press via Getty Images)



Derek Kitchen (left) and Moudi Sbeity (right).  
(David Daniels Photography)

Utah appealed *Kitchen* to the United States Tenth Circuit Court of Appeals, which affirmed the District Court decision in June 2014. The Tenth Circuit recognized that Utah's reasoning matched that of Virginia in the 1967 *Loving v. Virginia* case, and was designed to "deprive a targeted minority of the full measure of human dignity and liberty." In October 2014, the U.S. Supreme Court rejected petitions for certiorari from five states where same-sex marriage bans had been struck down, including Utah and Oklahoma, because there was agreement among the Circuit Courts that same-sex marriage bans were unconstitutional.

The next month, a divided federal appeals court in Cincinnati upheld bans on same-sex marriage in four states. Dividing two to one, the U.S. Court of Appeals for the Sixth Circuit overturned lower-court rulings in cases from Kentucky, Michigan, Ohio, and Tennessee. In January 2015, the Supreme Court agreed to review the case.

In June 2015, *Obergefell v. Hodges* confirmed what many already believed. The right to marry is protected by the due process and equal protection clauses of the 14<sup>th</sup> Amendment. In his opinion, Supreme Court Justice Anthony M. Kennedy wrote:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were... It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.



Justice Anthony M. Kennedy