OUTWARD

What the Same-Sex Marriage Opinion Should Have Said (and Almost Did)

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If only it had been possible to whisper into Justice Kennedy's ear.

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The fireworks came early this year. When Justice Anthony Kennedy declared a constitutional right to same-sex marriage in *Obergefell v. Hodges* on June 26, each of the court's other four Republican appointees wrote a separate dissent taking a swipe at him (The court's four Democrats stayed mum, content to let Kennedy make the case and tak the heat.) Aiming all their firepower at Kennedy, the dissenters missed their real target: Constitution itself. While persuasively explaining why they could not join Kennedy's majority opinion, they failed to persuasively explain why they voted against the constitutional claims at issue—why they were dissenting ("Kennedy has reached the wr result") rather than concurring in the judgment ("Kennedy has reached the right result b for the wrong reasons"). Indeed, the four dissenters failed even to identify, much less engage, the best constitutional arguments for same-sex marriage—arguments that hav been repeatedly made over many years by many leading lawyers, scholars, and lower-co judges.

Justice Kennedy's majority opinion is not perfect, but it reached the right result, and for many of the right reasons. To be clear: Kennedy is not just right morally and not just righ politically. He is not only on the right side of history—duh!—but also on the right side of t law, based on the Constitution's letter and spirit and original meaning, as properly construed and implemented by the court in many previous cases.

Had I been whispering in Kennedy's ear, here is the opinion I would have urged him to wri

We begin, as is altogether fitting and proper, with the Constitution itself. The 14th Amendment opens with a promise of birth equality: "All persons born … in the United Sat … are citizens" and thus ***equal*** *citizens. As full and equal citizens, all persons born in Ame are entitled to full and equal protection of all fundamental civil liberties, as expressly*

guaranteed by the very next sentence of the 14th Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The 14th Amendment's opening words about birthright citizenship were a clear and conscious codification of Abraham Lincoln's vision at Gettysburg: America is dedicated t the proposition that all are created equal—"born" equal, in the language of the amendme Persons born black are equal in civil rights to those born white. Persons born male are eq in civil rights to those born female. Persons born out of wedlock are equal in civil rights to those born in wedlock. Those born into Irish American families are equal to Anglo Americans and Italian Americans. Those born into Jewish households are legally the san as those born into Catholic or Protestant households. Children born second or third or 10 in a family are in law no less than those born first—the amendment prohibits once-comm primogeniture and entail laws favoring first-born children as such. And today we make c that those born gay or lesbian are no less in civil rights than those born straight.

The 14th Amendment was surely about racial equality—the core case of birth equality—b it just as surely ranged beyond race. The text speaks more generally than race—in pointe and purposeful contrast to the race-specific language of the 15th Amendment that follov shortly thereafter. (That amendment, of course, was necessary, as was the later 19th Amendment, because the 14th Amendment's opening words applied only to "civil rights" and not to "political rights" such as voting, as this court correctly made clear early on in o 1875 ruling in Minor v. Happersett. *For more documentation and analysis, see Akhil Ama* The Law of the Land, *pp. 115-19; Akhil Amar,* America's Unwritten Constitution, *pp. 156-6 186-87, and sources cited therein.)*

The birth-equality principle was expressly and emphatically articulated in a landmark statute adopted alongside the 14th Amendment—by the very same Congress in the very same season and by virtually the same vote. This companion statute, the Civil Rights Act 1866, opened with language virtually identical to the first sentence of the 14th Amendme and then immediately glossed that language by proclaiming that all birthright citizens w entitled to "the full and equal" benefit of all fundamental civil rights. This birth-equality i was also expressly articulated by the first Justice Harlan—the great dissenter in Plessy–

our 1896 decision in Gibson v. Mississippi *where, happily, he spoke for the court as a who*
"All citizens are equal before the law."

This simple yet profound birth-equality principle powerfully organizes and unifies a vast amount of this court's case law in the modern era, which treats certain legal distinctions particularly problematic—laws discriminating on the basis of race, sex, ethnicity, or illegitimacy. By contrast, laws that distinguish along most other dimensions—treating w income differently than rental income; treating opticians differently than ophthalmologi treating small employers differently than large employers, and so on—are not viewed wi the same kind of skepticism.

Some think that the 14th Amendment's framers were not clearly focused on sex discrimination or the related issue of women's civil rights. Wrong. In fact, much of the ke language of the amendment's first section tracked a proposal put forth earlier by none other than Elizabeth Cady Stanton. (For details see Akhil Amar, The Bill of Rights: Creati and Reconstruction *pp.260-61 and sources cited therein.) The 14th Amendment's framer thus knew exactly what they were doing in pitching its text at the proper level of general condemning not just racially discriminatory laws but all laws creating unequal civil rights the basis of birth status. This birth-equality principle resonated with Enlightenment ideology and the original Constitution's paired clauses banning both state and federal governments from creating titles of nobility (laws that privileged certain persons by din their birth).*

Not all laws that distinguish on the basis of birth status are unconstitutional. Some distinctions may be justifiable if genuinely and unavoidably necessary to prevent harm t others. For example, although some persons are born blind, the law may generally prohib blind persons from flying airplanes; persons born with the HIV virus may be legally prohibited from donating blood; and so on. But judges must carefully scrutinize all such l to ensure that they do not create an improper caste-like system in which some are legall demeaned and degraded while others or legally honored and exalted merely on the basis birth status.

Laws that allow straights to marry while denying this basic marriage privilege to gays ar

marry. So long, that is, as he marries a woman! Cf. Joseph Heller, Catch 22*. But "law reach past formalism."* Lee v. Weisman (1992) (Kennedy, J.)*. Sexual intimacy is part of the core marriage as a legal and social institution, and denial of same-sex marriage does indeed deprive gays and lesbians of the full and equal enjoyment of this intimacy—a full and equ opportunity for "the pursuit of happiness" that underlies the American project.*

We concede that some persons may experience some or all aspects of their sexual orientation as a matter of pure choice. Nevertheless, a vast number of our fellow citizens in fact understand themselves to be, quite simply, "born this way" in regard to their sexu orientation, and we are in no position to hold that these very widespread self-understandings are inauthentic or delusional. Even if it were conclusively proved at some future point that orientation is typically fixed not at birth but rather very early in childho the deep spirit of the birth-equality principle would still apply. Citizens should not be demeaned on the basis of harmless and morally irrelevant traits that they never chose a are not free to change with ease. That is the animating spirit—the underlying logic—of th birth-equality rule.

Religious equality principles are also indirectly relevant here. Even though religion is ofte chosen rather than fixed at birth, our Constitution allows persons to choose their religion freely and equally. Religion for many is central to identity and so is sexual orientation.

Why, then, did the framers of the 14th Amendment allow discriminatory marriage laws t continue on the books? In large part because they did not know all the facts, scientific an social, that we now know. They did not know that many persons experience sexual orientation as fixed, not chosen. They did not live in a world in which vast numbers of gay and lesbians openly challenged marriage exclusion as a fundamental badge of inequality and degradation.

Similarly, many of the 14th Amendment's framers thought racial segregation was acceptable because racial separation might genuinely be equal. If most blacks and most whites genuinely preferred segregation, then where was the improper demeaning of one race or the improper exaltation of another? Separate could truly be equal under certain factual assumptions in the 1860s (just as today, separate bathrooms and sports teams f males and females are generally seen as equal by both males and females). But once it

became clear, in the decades after the enactment of the 14th Amendment, that vast numbers of blacks did object to racial separation, this changed social fact itself was a pro basis for declaring racial segregation unconstitutional. See Plessy v. Ferguson (Harlan, J. dissenting)*;* Brown v. Board (Warren, C.J.).

A similar story may be told about sex discrimination—discrimination between men and women—within marriage laws. The Framers of the 14th Amendment quite clearly did believe in sex equality in civil rights: within this domain, these Framers believed that wor should not be demeaned nor men exalted because of their differential birth status. In the 1860s, marriage laws—and many other laws—created differentiated legal roles for men a women, but these differentiated legal roles were in that era not widely understood as ennobling men or degrading women. Both genders were highly esteemed, but they playe different legal roles. Separate roles, distinct roles, but not unequal roles. Women themselves were not en masse demanding an end to coverture laws in the 1860s. And so these laws were widely seen as permissible in the 1860s by the Framers of the 14th Amendment. But when later generations of women did en masse come to demand a cha —and to highlight that these laws now did indeed appear demeaning to them and improperly ennobling of men—judges in the mid-20th century rightly struck down these gendered marriage laws.

We do the same today and for the same reason. Indeed, the laws at issue today do, forma discriminate on the basis of sex. Under these laws, Pat can marry Jane only if Pat is male (Patrick) and not female (Patricia). This is sex-discrimination pure and simple, and under our longstanding sex-discrimination case law—case law deeply rooted in the text and spi of the 14th Amendment, as we have just explained—this sex discrimination regime must survive the most exacting judicial scrutiny. We hold today that this regime fails this scrutiny. These sex-discriminatory laws are an improper attempt to enforce a rigid and unequal gender code, telling men that they must not act in effeminate ("sissy") ways and women that must not behave in a masculine ("butch") manner. Such laws are a violation genuine sex equality and also of liberty—the liberty of each person, male or female (or neither or both), to be free to be true to himself/herself//oneself.

To put this point about the deep connection between equality and freedom a different w —and to explain from yet another angle why we now must vindicate the enacted letter a

spirit of the 14th Amendment without being hamstrung by every specific nontextual and unratified factual or normative assumption that its Framers may have held—we today ta judicial notice of the following basic and widespread facts of our modern world. Sexual intimacy and human procreation have been profoundly decoupled in the last half-centur Persons can have babies without having sex (IVF) and can have sex without having babi (contraception). Marriage law itself has become gender-neutral, undercutting several of basic premises of earlier regimes that structured marriage in deeply gendered ways. Gender itself has been scientifically transformed. Legally and factually, men can now become women and women can now become men. If Patrick, who is married to Jane, undergoes medical and/or legal gender reassignment and becomes Patricia, Pat is the sa human being on both sides of this medical and/or legal procedure. And after the gender transition occurs, Pat and Jane remain married. This is already a same-sex marriage, in virtually every state! No jurisdiction has been brought to our attention that treats Pat's medical transformation as ipso facto dissolving the marriage—as does, for example, dea Pat is Pat regardless of what is between Pat's legs or what was once between them on t day that Pat was born, and regardless of what gender designation appears on Pat's birth certificate or driver's license or passport. Our fundamental nature is not male or female, black or white, but human, pure and simple. Our most basic law must recognize these ba facts of modern life, modern law, and modern science.

There are obvious similarities between Justice Kennedy's actual majority opinion and m alternative. My opinion and his both rely squarely on the 14th Amendment's vision. We b invoke liberty and equality and try to highlight ways in which these principles at times intertwine. We both treat sexual orientation as analogous to race in certain ways. (Kenn does this by appealing at every turn to the 1967 case of *Loving v. Virginia*, involving interracial marriage, and by twice explicitly suggesting that sexual orientation is "immutable." I do so by stressing the 14th Amendment idea of birth equality.) We both candidly confront the fact that the 14th Amendment's Framers did not understand that i words would doom bans of same-sex marriage. In doing so, we both point to the significance of changed gender rules within marriage—for example, the demise of coverl laws that once gave husbands more power than wives in certain key respects.

But I like my version better. I root my opinion in the solid text of the 14th Amendment's promises of birthright citizenship and the privileges and immunities of citizenship, whic

include both substantive rights and equality rights. Also, I make a number of knockdown historical points about the Framers of the amendment and the companion Civil Rights A of 1866. Kennedy does not play these or any other persuasive originalist notes and puts most of his weight on the textually inapt Due Process Clause. That clause speaks plainly procedural rights (fair trials, unbiased judges, and the like) as distinct from substantive rights (such as the right to marry). Kennedy, a libertarian, stresses the word *liberty* in the Due Process Clause, but this liberty has historically been closely linked to negative rights (freedom from government) rather than affirmative rights (freedom to insist on government-recognized benefits such as marriage laws). Kennedy does not make crysta clear the distinction between applying the 14th Amendment's Framers' actual and enact principles to new scientific and social and legal facts, on the one hand, and simply substituting newfangled principles of his own creation, on the other. Kennedy does not treat same-sex marriage bans as simple sex-discrimination laws, nor does he discuss the reality of gender-reassignment in modern America. He offers no overarching way of bringing unity to the court's treatment of certain kinds of discriminations as particularly invidious. My parsimonious account not only makes sense of the cases as a whole, but powerfully connects them to core principles of constitutional text, history, and structure

At several points in his opinion, Kennedy takes pains to limit the right to marry to two-person marriages, but he offers no real reason why. My argument cleanly distinguishes same-sex marriage from polygamy. Anti-polygamy laws do not discriminate on the basis birth status. They do not treat Patrick differently than Patricia, nor do they treat those b gay differently than those born straight. No strong evidence has yet been presented to suggest that a vast number of persons are in fact born polygamous or become polygamo in early childhood and without conscious choice. No broad social movement has arisen in America to insist, authentically, that polygamists were "born this way" and have no real choice in the matter. The distinction between a legally sanctioned two-person institutio and a legally unsanctioned three-person arrangement is just like many other generally unproblematic distinctions throughout our law. Tax laws allow different sorts of commuting cost deductions, depending on whether a person has one employer or two or more employers; discrimination laws treat firms with 14 employees differently from tho with 15; and so on.

Still, Kennedy got the right answer. The dissenters did not, and they did not even ask the

right questions. Chief Justice John Roberts himself asked a version of the Patrick/Patric question at oral argument but then proceeded to utterly ignore this issue in his opinion—did all the other dissenters in their separate opinions. But the dissenters cannot properly this if they wish to rule against same-sex marriage. Even if Kennedy didn't squarely rely this approach, the litigants and amici did make this argument, and so have many other thoughtful scholars and judges. America is entitled to know why this argument is not a proper alternative basis for Kennedy's judgment. And although Kennedy himself did not magic words such as "strict scrutiny," his repeated emphasis on the immutability of sexu orientation and the long history of anti-gay discrimination surely required that a persuas dissent confront the claim that laws discriminating on the basis of sexual orientation demand heightened judicial scrutiny. Once again, this was an issue at the very heart of th case at hand and any justice ruling against the gay and lesbian litigants at hand owed America a careful explanation why heightened scrutiny was inappropriate under the unifying logic of a very long line of landmark precedents involving race and sex discrimination and discrimination against illegitimate children. But Chief Justice Roberts dissent never explained why heightened scrutiny was unwarranted.

So, too, America is entitled to know how a proper federal system will work if a marriage t is fully valid in the state where it was held fades in and out, legally, as persons cross state lines—perhaps as part of their federal responsibilities, if, for example, they are in the military and sent to a different base or are travelling to the national capital to petition Congress. Kennedy did not need to address these arguments because he was giving the plaintiffs everything they asked for without having to reach the interstate issues. But th issues were squarely before the court, and the dissenters simply ignored them, proceedi to vote against the actual citizens before the court in the case at hand without answerin their plausible legal claims. This is judicial minimalism with a vengeance.

The chief justice repeatedly invoked principles of judicial deference but failed to explain clearly why these principles did not apply with equal or greater force in previous landmar cases in which he voted to invalidate an iconic Voting Rights Act and voted to undo congressional limits on campaign contributions (which are decisively different from pure expressive independent activities such as running political ads on one's own).

Justice Antonin Scalia's dissent insisted that the fact that the Framers of the 14th

Amendment accepted bans on same-sex marriage was utterly dispositive. He claimed th this fact alone "resolves these cases." But why then are coverture laws, which these sam amenders also found proper, unconstitutional? What about the fact that many amender found segregation and anti-miscegenation laws acceptable? Should this fact alone have resolved *Brown v. Board* and *Loving v. Virginia* in favor of segregationists and anti-miscegnationists? No answer from the good justice.

Justice Clarence Thomas persuasively argued that it was a stretch to say that the Due Process Clause was violated. There was not a clear violation of negative liberty, nor was there any obvious procedural lapse in the laws at issue. But what about the 14th Amendment's birthright citizenship clause and its companion guarantee of full and equa privileges and immunities of citizenship—clauses that Thomas himself has powerfully highlighted and championed in other cases? Once again, silence.

Finally, Justice Samuel Alito was highly persuasive in reminding us that the anti-same-s marriage laws at issue were hardly irrational. Following tradition is often quite rational, a every reform is likely to have unintended consequences. Not all of these consequences m be apparent immediately. Same-sex marriage is an experiment, and the jury is still out. F enough. But once again, the same could have been said about coverture laws in 1970, and Alito's arguments merely explain why the laws at hand are rational. What he failed to explain is why mere rationality was enough—why these discriminatory laws should not b treated with special judicial skepticism as are many other traditional gender laws. Laws that discriminated against illegitimate children were not irrational; they arguably incentivized the biological parents to marry; and some of these laws had deep historical roots. Yet the court rightly invalidated these laws as violative of the birth-equality princi Jim Crow was a pretty strong tradition in 1954. But *Brown* was nevertheless clearly right and so is *Obergefell*.

Read more of Slate's coverage of same-sex marriage at the Supreme Court.

This is the second of two ***Slate*** *articles on* Obergefell*. In his* earlier piece*, Professor Amar drew connections between Anthony Kennedy and Earl Warren. For more on the 14th Amendment's birth-equality principle, interested readers may wish to consult Chapter 5 ("Living in the Shadow of Brown v. Board") of Amar's latest book,* The Law of the Land: A

Grand Tour of our Constitutional Republic.

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