



## High court ruling praised for labeling gay marriage 'fundamental right'

By [LYLE MORAN](#), The Daily Transcript  
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Barbara Cox had worked for more than 30 years in hopes of seeing same-sex couples granted the right to marry nationwide, dating back to her days helping draft one of the country's earliest domestic partnership ordinances in Wisconsin.

So the U.S. Supreme Court's ruling legalizing same-sex marriage quickly brought tears to her eyes Friday that kept flowing.

But Cox, a California Western School of Law professor, said what made the court's decision even more gratifying and powerful was its determination that for gays and lesbians marriage is a "fundamental right."

That phrase had been noticeably missing from most prior cases on the subject, she said, but was frequently mentioned in the majority opinion written by Justice Anthony Kennedy.

"The ability to marry and the recognition of the constitutionally protected right to do so for a minority that has been greatly despised is an amazing step forward," said Cox, who is also board chair of the pro-gay marriage group Freedom to Marry.

Other local legal experts also found the court's decree that marriage is a fundamental right under the Constitution for gay couples equally striking.

Miranda McGowan, a professor at University of San Diego School of Law, said the court and Justice Kennedy had previously taken a "minimalist" approach in their opinions expanding rights for gays and lesbians.

But Kennedy's opinion in Friday's 5-4 ruling betrayed none of that prior reticence to make broad statements and was sweeping in its conclusions, said McGowan, whose research has included a focus on sexual orientation, identity and equality.

"In casting the right in terms of a fundamental right to marry, Kennedy's opinion fully embraces gays and lesbians in the larger framework of the civil rights movement for blacks, other racial minorities and women," McGowan said. "I think that is really historically significant."

Kennedy's opinion was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan and Sonia Sotomayor.

Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito dissented and each wrote a separate opinion.

The majority determined that the right to marry is a "fundamental right inherent in the liberty of the person," and under the Due Process and Equal Protection clauses of the 14th Amendment, same-sex couples cannot be deprived of that right and that liberty.

Glenn Smith, a California Western School of Law professor, said “fundamental” is not a phrase the high court uses lightly.

“By repeatedly calling the right fundamental, the majority was saying that the marriage right deserves the highest echelon of constitutional protection,” said Smith, who teaches about constitutional law and Supreme Court decision making.

The dissenting justices rejected the argument that the right to marry is a fundamental right the court should extend to gay couples.

"Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not," wrote Roberts, whose dissent was joined by Scalia and Thomas. "The fundamental right to marry does not include a right to make a state change its definition of marriage."

The chief justice and other dissenters argued that the issue should be left up to the people through the electoral and legislative process.

The official proponents of Proposition 8, a ballot measure that banned gay marriage in California but was later overturned, agreed.

“Today’s decision does grave injury to the basic concept that the people — not the courts — make the law,” said Andy Pugno, general counsel for ProtectMarriage.com.

Local legal experts supportive of the court's decision also praised the majority for linking the right to marry to experiencing dignity and equality.

"They ask for equal dignity in the eyes of the law," Kennedy wrote of some of the petitioners in favor of same-sex marriage. "The Constitution grants them that right."

David Loy, legal director for the American Civil Liberties Union of San Diego & Imperial Counties, said such language further amplified the power of the landmark ruling.

"All couples, no matter their gender, have the same right to dignity and equality in their personal and sacred relationships," he said.

McGowan of USD was also struck by the focus Kennedy placed in his opinion on the individual plaintiffs in the cases before the court.

The most prominent plaintiff was Jim Obergefell, an Ohio man who unsuccessfully sought to place his name on his husband's death certificate because their marriage was not recognized in their home state.

"One of the things we often forget as lawyers is these cases ... are ultimately about living, breathing human beings who are asking for their rights to be declared, their personhood recognized and their problems to be addressed," McGowan said.

Cox said she is one person for whom the court's ruling had personal resonance.

She married her wife in 2003 in Canada, but their union could not be recognized in Kentucky, where Cox still has many family members and which was one of the states whose gay-marriage ban was before the court.

The high court ruled that prohibitions such as Kentucky's were illegal.

"I can now go home as a married woman," Cox said.