A *fundamental* right to marry for all

Barbara J. Cox *is vice dean of academic affairs and Clara Foltz Professor of Law at California Western School of Law and has chaired the board of directors of the national Freedom to Marry organization since its inception.*

Justice Anthony Kennedy ended his decision in *Obergefell v. Hodges* by saying: Same-sex couples "ask for equal dignity in the eyes of the law. The Constitution grants them that right." With these words, marriage equality became constitutionally protected across the United States. As we celebrate the 46th anniversary since the Stonewall riots against police harassment in June 1969, the movement for inclusion and acceptance of LGBTQ people in the United States has reached an important milestone. Only 11 years after the first same-sex couples married in Massachusetts, couples from Mississippi to Kentucky to North Dakota are now celebrating their freedom to marry.

This is the end of a personal journey. My spouse and I have been together for almost 25 years and were married in Canada in 2003. But we have had our marriage disrespected countless times and have often joked about going to Canada to "visit" our marriage. We lived through the "No on Knight/Proposition 22" and "No on Proposition 8" initiative battles and felt unsafe in our home state after Prop. 8 passed in 2008. When we visited family in Wisconsin and Kentucky, we knew our marital rights did not go with us.

What is most important about the Supreme Court's opinion was that it finally recognized that LGBTQ people share in the *fundamental right* to marry, long enjoyed by non-gay people. Those five justices understood what many have been saying for some time: Same-sex couples were not seeking the "right to same-sex marriage"; we were seeking the "right to marry." The Supreme Court has protected this fundamental right for decades without controversy. Its many decisions explain, in eloquent terms, why the freedom to marry the person of one's choice must not be limited by laws imposed by legislatures or by popular vote. In *Loving v. Virginia*, the Supreme Court noted that "patently no legitimate overriding purpose independent of invidious discrimination" supported the laws preventing interracial couples from marrying. When the California Supreme Court struck down this state's ban preventing interracial couples from marrying 19 years before the U.S. Supreme Court did so, the concurrence noted "only ignorance, prejudice and intolerance" denied interracial couples the right to marry.

Until the majority's decision last week, almost every court also rejected the possibility that same-sex couples had a fundamental right to marry, choosing instead to use equal protection to explain why it violated equality principles to allow opposite-sex couples to marry and prevent same-sex couples from doing so. True: Those laws did treat same-sex couples unequally. But the inequality went deeper. As the majority recognized, those laws denied us of a fundamental right. I would have thought this would be obvious; something that is defined as "of central importance," "primary" and "essential" should not be lost due to the sex of the person one chooses to marry.

In contrast, Chief Justice John Roberts spent most of his dissent arguing that there is no "fundamental right to same-sex marriage" and that legislators and voters are the ones who should decide the rights of LGBTQ people. But the political process should play no role in determining which individuals have essential rights and which do not. Roberts seems untroubled by the court's decision in the *Loving* case, arguing that it simply ended state bans against marriages that otherwise met the traditional requirement for one man and one woman to marry. But laws prohibiting interracial

Wednesday, July 1, 2015

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Law Practice
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Scorched earth ploys are not new in an era of cutthroat litigation, but a pair of Los Angeles and Irvine law firms went too far when they roused a state appellate panel's ire by suing opposing counsel and appealing the suit's dismissal.

Constitutional Law
The chains of doctrine
The majority's approach in a recent First Amendment case, doctrinally correct as it is, leads to quite absurd results. By **Ashutosh Bhagwat**

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Three former undergraduate students who claim they were sexually assaulted while attending UC Berkeley are suing the school and the Regents of the University of California, alleging gross mismanagement of their sexual assault claims.

Labor/Employment
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Law Practice
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Mitchell Silberberg & Knupp LLP, the 107-year-old law firm known for its work in digital media and entertainment, announced it would merge with corporate boutique Richardson & Patel LLP effective July 1.

Government

couples from marrying had existed for centuries, long before most of the laws that were adopted in the U.S. after 1994 when the Hawaii Supreme Court first recognized the possibility of marriage rights for same-sex couples. In fact, only five states actually had laws prohibiting same-sex couples from marrying before 1994. So if tradition and history are the watchwords for determining which rights are fundamental, then it would seem that Roberts should have been just as disparaging of the court's decision in *Loving* as he was of its decision in *Obergefell*.

And if Roberts is so concerned about the court not acting as a "super-legislature," then why did he join in decisions striking down campaign financing and voting rights laws, adopted by clear legislative majorities, as he did in *Citizens United* and *Shelby County v. Holder*? Either the Supreme Court has the obligation to determine the constitutionality of all laws, which precedent and the chief justice's prior opinions clearly support, or it does not.

One thing is clear: This is not simply a victory for same-sex couples; it is a victory for everyone. The LGBTQ movement suffered through heart-breaking losses as state-after-state banned same-sex marriages with their statutes, and then underscored their disapproval of same-sex relationships by enshrining it in their state constitutions. But no change in favor of LGBTQ rights could have happened so "quickly" without the support and growing understanding by the non-gay majority (though not soon enough for many like John Arthur, who died before his marriage with plaintiff James Obergefell would be recognized by Ohio).

The rainbow-hued postings on social media since last week did not come only from the LGBTQ community. They came from families and friends who have "evolved" in their understanding. We simply want to enjoy the same fundamental rights that they enjoy. But we had to fight for that right, one that most of them had always enjoyed and could take it for granted. Now children growing up in LGBTQ families or coming out themselves will know that the Constitution protects them as well.

The vast majority of people under 40 have easily recognized that allowing same-sex couples to marry is simply about fairness, love and commitment. All we can hope for is that future generations will simply wonder what the fuss was all about.

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Civil Rights
A *fundamental* right to marry for all
Until last week, almost every court chose to use equal protection to explain why it violated equality principles to prevent same-sex couples marrying. By **Barbara J. Cox**

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