



# The Right to Marry

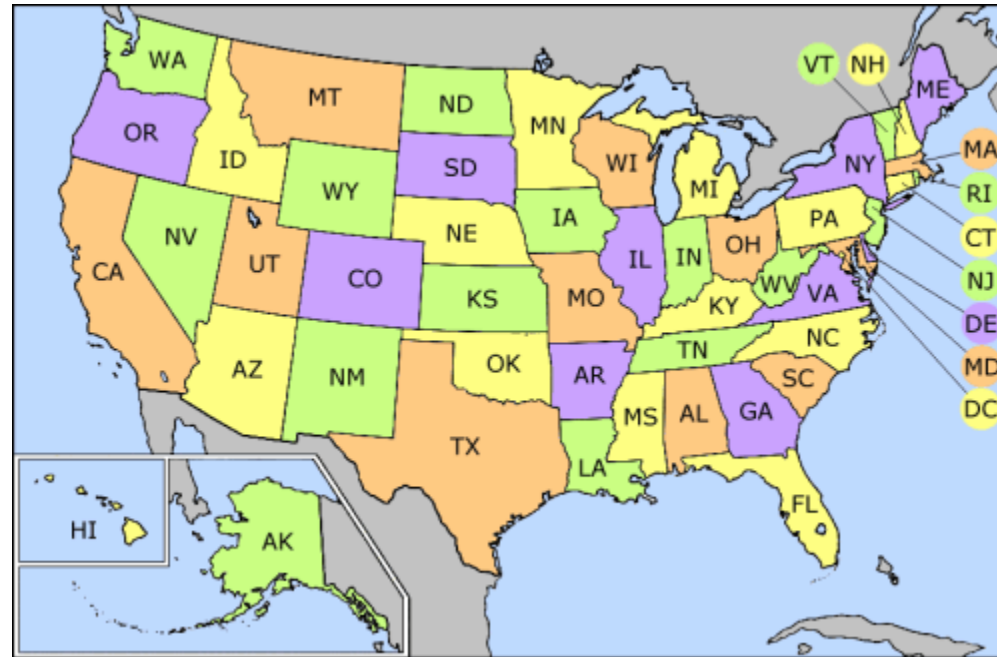
What does government have to do with love?

- Why would a couple living in California go to Reno or Los Vegas to get married?



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# Marriage laws set by states



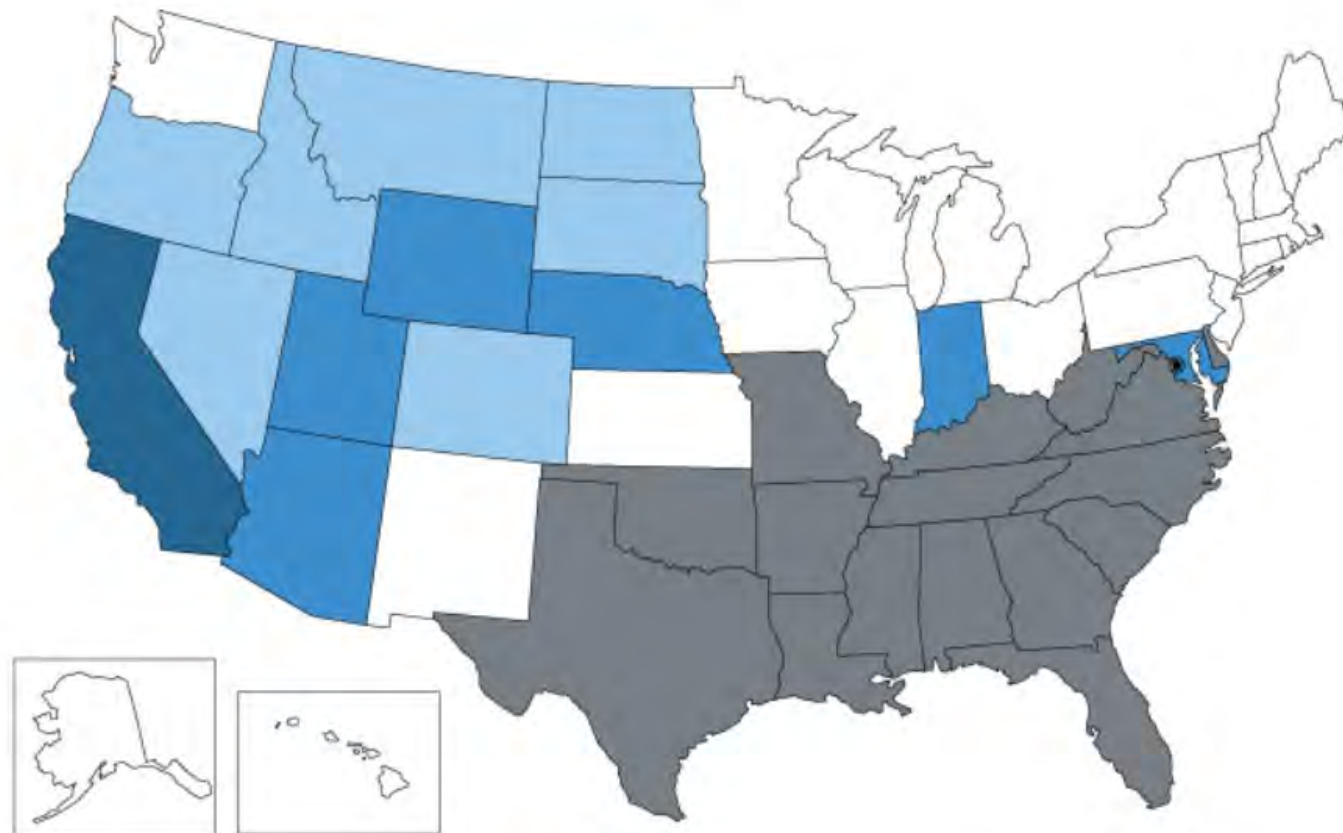
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# Marriage

- Marriage has governmental and religious components
  - Governments have regulated marriage: age, family relationship, procedure, who can get married, how many spouses
  - Marriage status affects: parental rights, women's rights, tax policy, health care, and more
- Who should decide what marriage is?
  - The national government? States? Individuals?
  - “Traditional definition of marriage”?

# Interracial Marriage



**Note:** Blank states did not have anti-miscegenation laws in the 20th century, though they may have had them earlier in history.

**KEY:**

- Repealed Anti-Miscegenation Laws in 1940's
- Repealed Anti-Miscegenation Laws in 1950's
- Repealed Anti-Miscegenation Laws in 1960's
- Anti-Miscegenation Laws Struck Down By *Loving v. Virginia*

**Related Issues:** [Racial Justice](#)



# Notes and Recent Decisions

## CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS: CALIFORNIA ANTI-MISCEGENATION LAWS DECLARED UNCONSTITUTIONAL.

The past two years have witnessed significant developments by the courts in checking discrimination against minority racial groups.<sup>1</sup> Perhaps the most important for California occurred on October 1, 1948, when the California Supreme Court in *Perez v. Lippold*<sup>2</sup> declared the California anti-miscegenation statutes<sup>3</sup> unconstitutional.

Petitioners, a white woman and a Negro man, sought a writ of mandamus to compel the County Clerk of Los Angeles County to issue them a certificate of registry<sup>4</sup> and a license to marry.<sup>5</sup> The respondent refused to issue the certificate and license, invoking Civil Code Section 69.<sup>6</sup> In an ably written opinion by Mr. Justice Traynor, the decision granting the writ was placed chiefly on the ground that the statutes were a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution.<sup>7</sup> Mr. Justice Edmonds in a concurring opinion declared the laws unconstitutional on the sole ground that the right to marry, being grounded in the fundamental principles of Christianity, is therefore protected by the constitutional guarantee of religious freedom.<sup>8</sup> Since three

In *Perez v. Lippold* in 1948, the California Supreme Court found that laws in California that prohibited marriage between two races were unconstitutional

The 14<sup>th</sup> Amendment played a key role in the decision.

From *California Law Review* Volume 37, No. 1 (March 1949)

<sup>1</sup> Such developments have included the United States Supreme Court's declaring that state courts could not constitutionally enforce restrictive covenants, *Shelley v. Kraemer* (1948) 334 U.S. 1; holding the California Alien Land Law unconstitutional as applied, *Oyama v. California* (1947) 332 U.S. 633; holding that California could not constitutionally use the federally created racial ineligibility to citizenship as a basis for classification to bar Japanese fishermen from earning their living as commercial fishermen in the ocean waters off the California coast, *Takahashi v. Fish and Game Commission* (1948) 334 U.S. 410; reiterating in emphatic terms that the exclusion of Negroes from grand and petit juries by a state is a denial of equal protection, *Patton v. Mississippi* (1947) 332 U.S. 463; repeating the doctrine of *Missouri ex rel. Gaines v. Canada* (1938) 305 U.S. 337, that the state is bound to furnish a Negro facilities within its borders for legal education substantially equal to those there afforded white persons, whether or not other Negroes sought the same opportunity, *Sipuel v. Board of Regents* (1947) 332 U.S. 631, *Fisher v. Hurst* (1948) 333 U.S. 147.

<sup>2</sup> (1948) 32 A.C. 757, 198 P. (2d) 17.

<sup>3</sup> CAL. CIV. CODE §§ 60, 69.

<sup>4</sup> CAL. CIV. CODE § 69a.

<sup>5</sup> CAL. CIV. CODE § 69.

<sup>6</sup> "... no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian, or member of the Malay race."

Footnote 1 lists some of the other cases the found segregation and prohibitions to be unconstitutional

# Inter-racial marriage: to the Supreme Court

- *Loving v. Virginia* (1967)
  - Virginia law (from 1924) banned marriage between different races
  - The Lovings appealed their arrest and exclusion from Virginia
  - Supreme Court's decision:
    - States cannot prohibit people from marrying someone of a different race

Image from:

[http://www.encyclopediavirginia.org/loving\\_v\\_virginia\\_1967](http://www.encyclopediavirginia.org/loving_v_virginia_1967)





# *Loving v Virginia*

- To be heard by the Supreme Court, usually there has to be a real case
  - The Lovings were convicted of breaking a law
- Their lawyers appealed
- An example of the response by the state of Virginia:
  - The local judge in the Loving case, Leon Bazile, stated in his 1965 ruling that, “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”

# *Loving v. Virginia: a unanimous decision*

## Question

Did Virginia's antimiscegenation law violate the Equal Protection Clause of the Fourteenth Amendment?

## Conclusion

Sort: [by seniority](#) [by ideology](#)



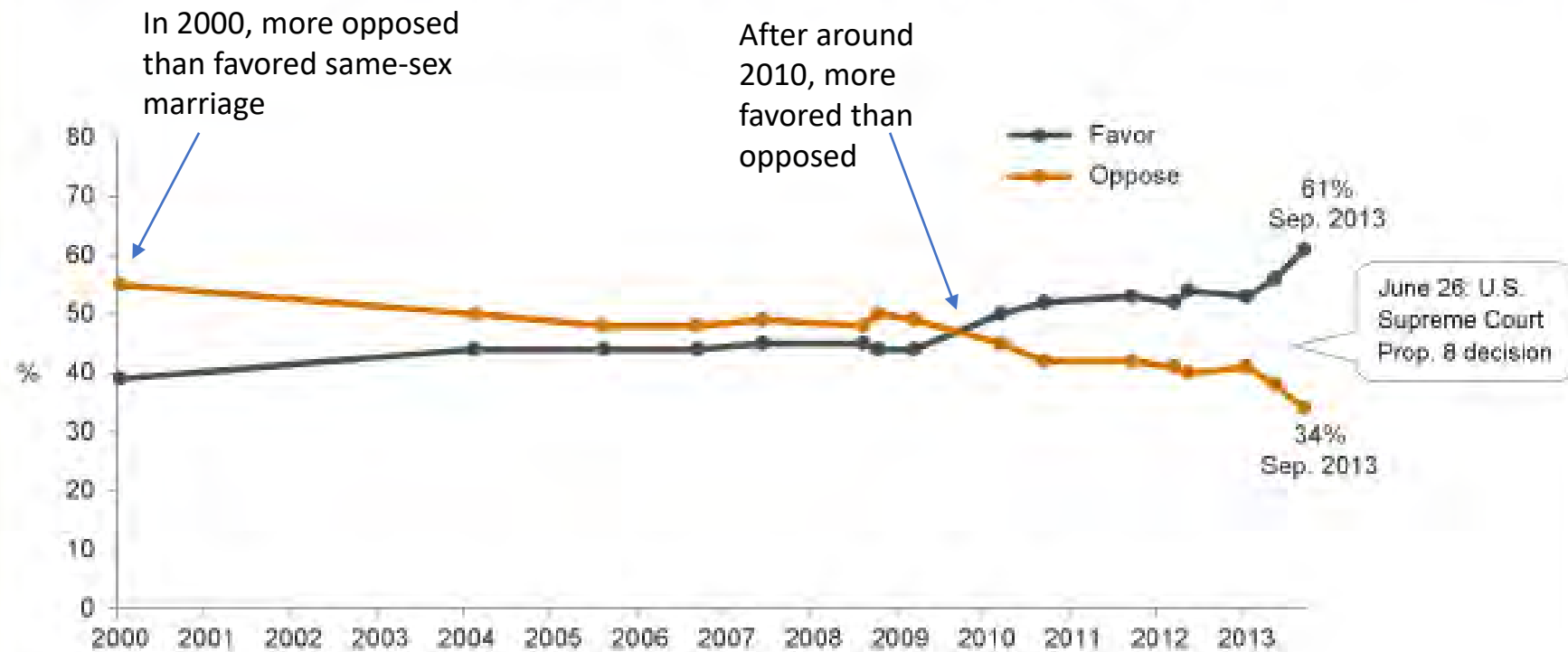
Yes. In a unanimous decision, the Court held that distinctions drawn according to race were generally "odious to a free people" and were subject to "the most rigid scrutiny" under the Equal Protection Clause. The Virginia law, the Court found, had no legitimate purpose "independent of invidious racial discrimination." The Court rejected the state's argument that the statute was legitimate because it applied equally to both blacks and whites and found that racial classifications were not

<https://www.oyez.org/cases/1966/395>

Same-sex marriage



## A record share of Californians support same-sex marriage



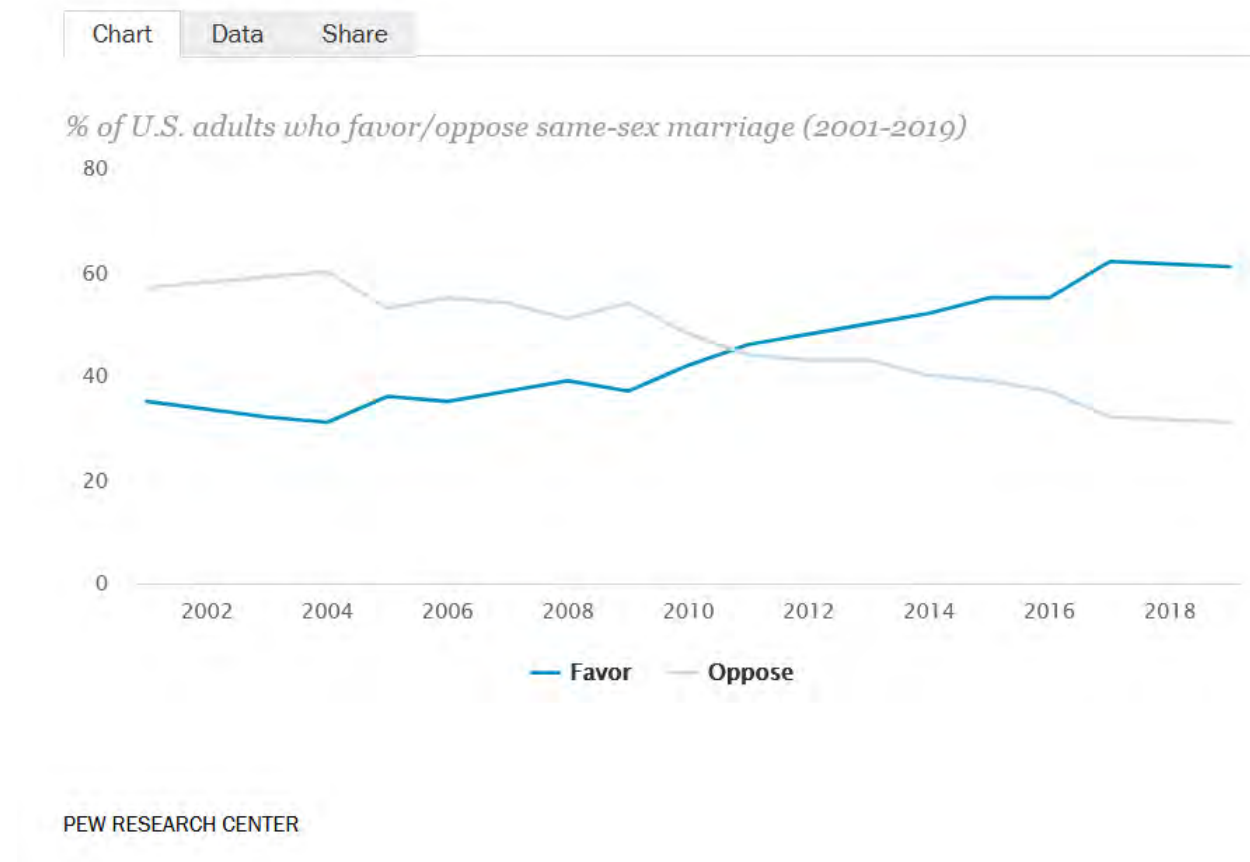
**Source:** PPIC Statewide Surveys, January 2000–September 2013.

**Note:** Dots indicate dates on which the question was asked in PPIC Statewide Surveys.

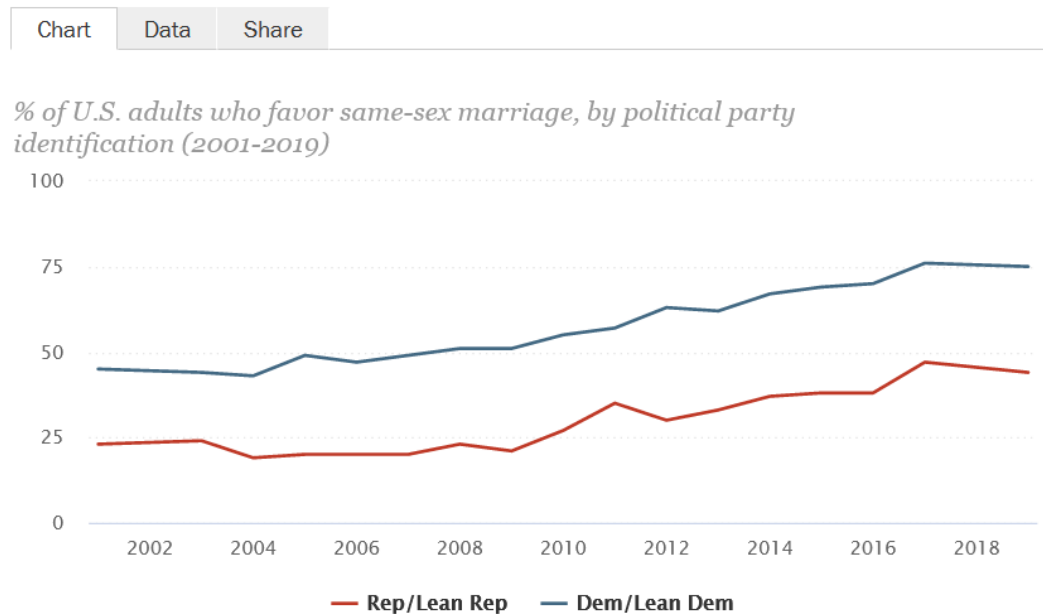
**From:** Just the Facts: Californians' Attitudes Towards Same-Sex Marriage, PPIC, 2013.



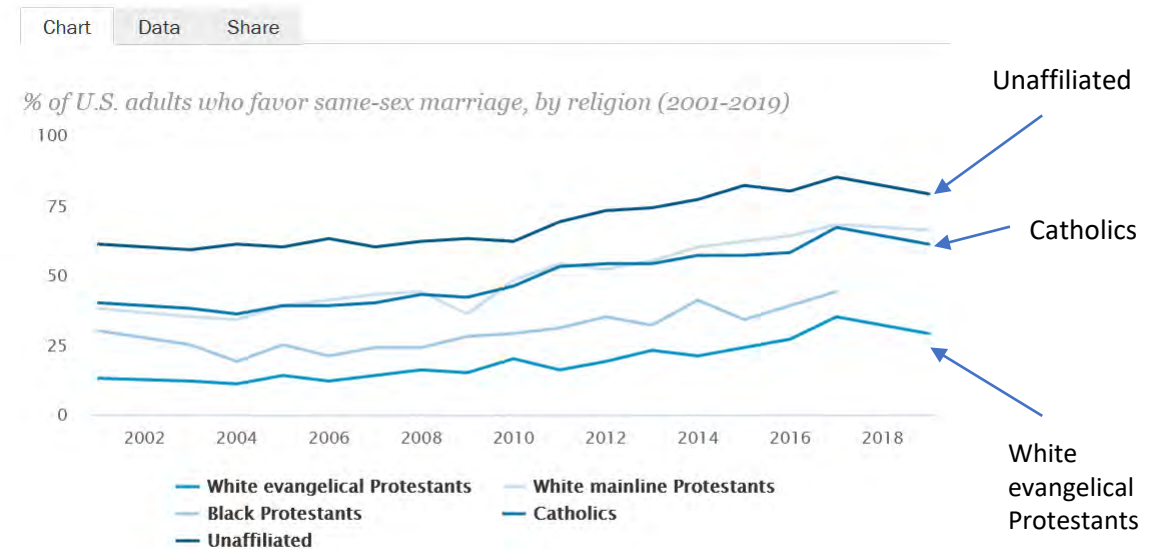
# Changing US Opinion about Same-Sex Marriage



# Opinions about Same-Sex Marriage and Political Party and Religious Affiliation



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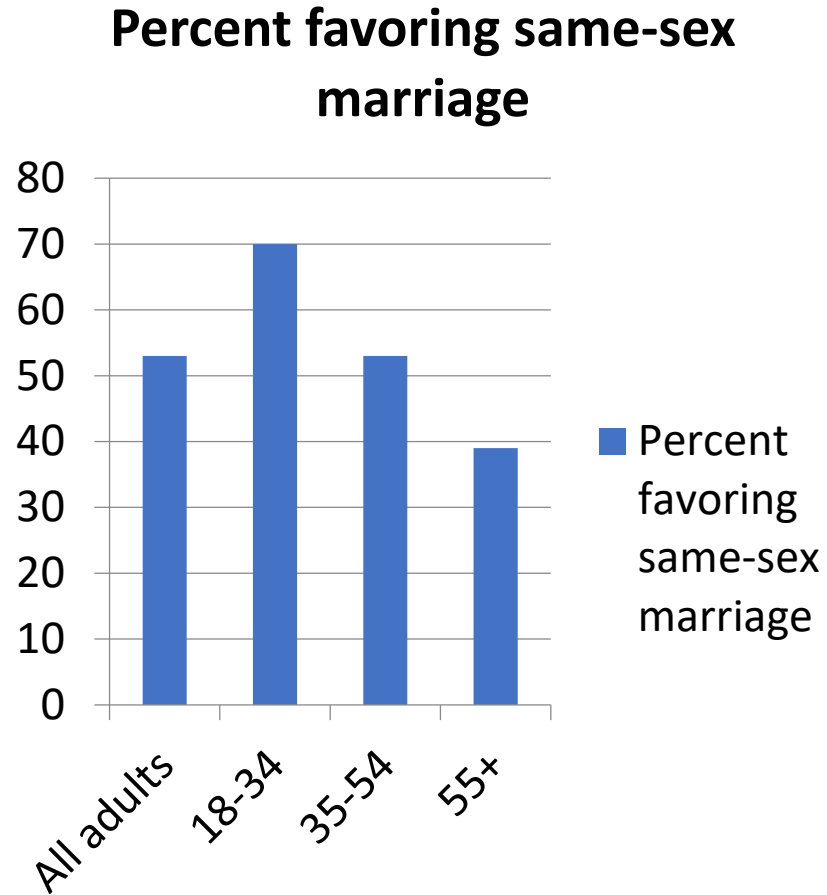


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# Same Sex Marriage Opinions and Age

- *Generational differences in opinions about same-sex marriage*



# Same Sex Marriage

- Hawaii Supreme Court prohibited discrimination with regard to same-sex marriage (1993)
- Defense of Marriage Act (1996):
  - National law allowing states not to recognize same-sex marriages from other states
- First state to legalize civil unions:
  - Vermont (2000)
- First state to legalize marriage:
  - Massachusetts (2004)
- California
  - Proposition 8 (2008):
    - banned same-sex marriage in California
  - *Hollingsworth v. Perry* (2013):
    - Supreme Court case upheld unconstitutionality of Proposition 8
    - <https://www.oyez.org/cases/2012/12-144>

# Same Sex Marriage

- *United States v. Windsor* (2013)
  - *Defense of Marriage Act of 1996 (DOMA) is unconstitutional*
- *Obergefell v. Hodges*, June 2015
  - <https://www.oyez.org/cases/2014/14-556>
- [Map of U.S. States and Same Sex Marriage](#)
  - *Website kept track of states that allowed same-sex marriage before Obergefell v. Hodges made it national, and the interactive map is linked to individual state histories*

# Obergefell v. Hodges decision

Sort: [by seniority](#) [by ideology](#)

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

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

Portraits of the Supreme Court Justices (ordered by seniority):

- Sotomayor
- Ginsburg
- Kagan
- Breyer
- Kennedy
- Roberts
- Scalia
- Alito
- Thomas

Annotations:


- Died September 2020 (points to Ginsburg)
- Retired July 2018 (points to Kennedy)
- Died February 2016 (points to Scalia)

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Annotations:

- Pointing to Ginsburg: Died September 2020  
Replaced by Amy Coney Barrett
- Pointing to Kennedy: Retired July 2018  
Replaced by Brett Kavanaugh
- Pointing to Scalia: Died February 2016  
Replaced by Neil Gorsuch

## Justices Thomas and Alito Question Same-Sex Marriage Precedent

The justices, who dissented from the 2015 decision establishing a right to same-sex marriage, said it had cast “people of good will as bigots.”



People celebrating a ruling establishing a constitutional right to same-sex marriage in front of the Supreme Court in 2015. James Obergefell, the lead plaintiff in the case, said Monday's opinion was “deeply disturbing and upsetting.” Doug Mills/The New York Times



By Adam Liptak

Oct. 5, 2020



WASHINGTON — Justices Clarence Thomas and Samuel A. Alito Jr., who dissented from the Supreme Court's [2015 decision](#) establishing a constitutional right to same-sex marriage, appeared to urge the court on Monday [to reconsider the ruling](#), which they said had invented a right with no basis in the text of the Constitution.

“By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the court has created a problem that only it can fix,” Justice Thomas wrote, in an opinion joined by Justice Alito.

GEFELL

Y M. KENNEDY

ix couples.

Roberts

Alito



Scalia

Thomas