TULSA WORLD

Elizabeth Wydra and Ilya Shapiro: The constitutional march down the aisle

By Elizabeth Wydra and Ilya Shapiro

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Our organizations regularly take opposite sides on big constitutional issues. Whether it's the Affordable Care Act, campaign finance, presidential power, or nearly anything else, the progressive Constitutional Accountability Center and the libertarian Cato Institute typically disagree. Yet we absolutely agree that the Constitution require states to extend marriage licenses to same-sex couples. That's why we've jointly filed a brief urging the U.S. Court of Appeals for the Tenth Circuit to affirm the district courts in Utah and Oklahoma that struck down those states' marriage restrictions.

Our reasoning begins with the Fourteenth Amendment, which, when ratified in 1868, wrote into the Constitution the ideal of equality so elegantly articulated in the Declaration of Independence. It did so through the sweeping text of the Equal Protection Clause, which guarantees "equal protection of the laws" to "any person." The 14th Amendment protects everyone-white or black, gay or straight, native or immigrant, man or woman-against hostile and arbitrary discrimination by state governments.

This intended breadth is clear from the drafting history. Drafted in the wake of the Civil War, the 14th Amendment had to protect groups like Asian immigrants in the West and white Unionists in the South —which is why its framers repeatedly rejected proposals that would have prohibited racial discrimination alone.

Beyond the issue of whom the Equal Protection Clause protects, the framers also recognized that the right to marry the person of one's choosing is a crucial component of liberty. After all, this was one of the fundamental rights denied by the institution of slavery. The Senate's leading sponsor of the 14th Amendment, Jacob Howard, explained that a slave "had not the right to become a husband or father in the eye of the law, he had no child, he was not a liberty to indulge the natural affections of the human heart for children, for wife, or even for friends."

This was a grievous wrong remedied by the 14th Amendment, and its requirement for equality under the law-the equality of basic rights for all —including the right to marry. Even if nobody

was specifically contemplating same-sex marriage in 1868, the 14th Amendment's text —its original meaning —logically requires striking down state laws that deny members of certain groups the right to marry the person of their choosing.

Both Utah and Oklahoma thus violate the Equal Protection Clause by forbidding same-sex couples from participating in what the Supreme Court recognizes as "the most important relation in life" and the "foundation of the family in our society." The discrimination written into these states' constitutions defies the Constitution's command of equality under the law. Gay men and lesbians in these states effectively wear class-based badges of inferiority that —regardless of the intent of those who voted on these provisions —injure their dignity and liberty.

It's clear that the Supreme Court is already following where the Constitution leads. The Court began down that path in Romer v. Evans, the first case in which it held that discrimination on the basis of sexual orientation violates the Equal Protection Clause. It continued its commitment to the law's neutrality in Lawrence v. Texas, which struck down the criminalization of homosexual sodomy. And just last year, in United States v. Windsor, the Court found unconstitutional the part of the Defense of Marriage Act that denied federal benefits to lawfully wedded same-sex couples.

When Justice Anthony Kennedy wrote his opinion in Romer, he invoked the majestic words of Justice John Marshall Harlan II that the Constitution "neither knows nor tolerates classes among citizens." Neither Utah's nor Oklahoma's constitutions should tolerate classes among their citizens, either.

Every individual has the right to choose the person they want to marry, and to have that decision respected equally by the state in which they live. Especially in the wake of Windsor, it is becoming clearer that laws that force same-sex unions into second-class status have no place in a free society.

Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, filed a brief in the Tenth Circuit supporting the constitutional challenge to the marriage laws of Utah and Oklahoma.