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# Dissenting From History: The False Narratives of the Obergefell Dissents

Christopher R. Leslie

*University of California - Irvine*, [cleslie@law.uci.edu](mailto:cleslie@law.uci.edu)

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# Dissenting from History: The False Narratives of the *Obergefell* Dissents\*

CHRISTOPHER R. LESLIE†

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According to a quote attributed to numerous philosophers and political leaders, “History is written by victors.”<sup>1</sup> In the legal battle over same-sex marriage, those opposed to marriage equality have attempted to disprove this age-old adage. In response to the majority opinion in *Obergefell v. Hodges*<sup>2</sup>—which held that state laws banning same-sex marriage violate the Fourteenth Amendment—each of the four dissenting Justices issued his own dissenting opinion. Every one of these dissents misrepresented the circumstances and precedent leading up to the *Obergefell* decision. Collectively, the *Obergefell* dissenters have valiantly tried to rewrite America’s legal, constitutional, and social history, all in an attempt to justify denying civil rights to same-sex couples.

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† Chancellor’s Professor of Law, University of California Irvine School of Law. The author thanks Erwin Chemerinsky, Catherine Fisk, Leah Litman, Doug NeJaime, and Tony Reese for comments on earlier drafts. Jiaxiao Zhang provided excellent research assistance.

1. This quote has been credited to George Orwell, Winston Churchill, and Napoleon, among others.

2. 135 S. Ct. 2584 (2015).

In *Obergefell*, the Supreme Court struck down the same-sex marriage bans of Michigan, Kentucky, Ohio, and Tennessee by holding that such marriage restrictions violated the Fourteenth Amendment. Writing for a 5-to-4 majority, Justice Kennedy began his substantive analysis by observing that “the Court has long held the right to marry is protected by the Constitution.”<sup>3</sup> Justice Kennedy discussed “four principles and traditions” that “demonstrate[d] that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”<sup>4</sup> These included individual autonomy, the support for an important two-person union for committed couples seeking companionship and mutual caring, the fact that marriage would help protect the children being raised by same-sex couples, and that denying same-sex couples the state-sanctioned benefits of marriage inflicted both material and stigmatic harm on gay Americans. Justice Kennedy concluded 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 Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.”<sup>5</sup> The decision meant that no state could deny same-sex couples the right to marry.<sup>6</sup>

Each of the four dissenting Justices in *Obergefell* authored his own written dissent, each joined by at least one of the other dissenters. A common theme running through the dissents was an appeal to history, including American history, world history, Blackstone, the Magna Carta, and Edward Coke’s 1797 commentary on English law.<sup>7</sup> History was important to many of the dissenters because of their professed commitment to originalism. Given their purported reverence for history, it is perhaps surprising that each of the dissenting opinions misrepresented fundamental features of the history leading to marriage equality for same-sex couples. In order to argue that the *Obergefell* majority overstepped its institutional bounds, the dissenting Justices distorted the history of marriage through the millennia, the history of marriage in America, constitutional history, gay history, and the history of the political debate over same-sex marriage. Through their collective revision of history, the dissenters sought to make the *Obergefell* decision appear both unnecessary and far more extraordinary than it actually is.

Methodically unpacking the content of the *Obergefell* dissents reveals a systematic and consistent distortion of American history both early and recent. This Article seeks to blunt the coordinated efforts by the losers to rewrite the history of same-sex marriage in America. Part One of this Article discusses the dissenters’ claim that throughout history across all civilizations, marriage has had only one unchanging definition: a union between one man and one woman. In addition to disregarding polygamous cultures, the dissenters’ claimed single historical definition of marriage is also abbreviated. Marriage was not simply a union between a man and a woman; for more than a century, marriage in America was officially defined as a union between a man and a woman of the same race in which the woman was legally subordinate to the man. The dissenters omitted or downplayed the racial restrictions and

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3. *Id.* at 2598.

4. *Id.* at 2599.

5. *Id.* at 2604.

6. *Id.* at 2607 (holding that “same-sex couples may exercise the fundamental right to marry in all States”).

7. *Id.* at 2632–37 (Thomas, J., dissenting).

gender ramifications of marriage—which courts played a major role in eliminating—in order to make *Obergefell*'s elimination of gender restrictions on marriage seem unprecedented.

Part Two explains how the *Obergefell* dissenters misrepresented the history of the substantive due process doctrine. While Justice Thomas essentially denied that the doctrine exists, Chief Justice Roberts's recitation of the history of substantive due process is particularly deceptive. Justice Roberts analogized *Obergefell* to *Lochner* and its progeny, claiming that *Lochner* provides the only substantive due process precedent for the *Obergefell* opinion. In an effort to make the entire doctrine seem indefensible, they disregarded all of the non-controversial cases that have relied upon substantive due process, including *Loving*, which provided a much closer analogy to the facts of *Obergefell* than did *Lochner*.

Part Three discusses how the *Obergefell* dissenters presented an overly optimistic portrait of the lives of same-sex couples who cannot legally marry. The dissenters asserted—without any evidence or citations—that unmarried same-sex couples can live together, raise children, travel, execute enforceable legal documents, and hold themselves out as married, all without repercussions or interference from the state. Part Three explains how these claims are facile and often untrue.

Part Four examines the national debate over same-sex marriage that culminated in the *Obergefell* opinion. The dissenters argued that the debate was respectful and not anti-gay. Part Four shows how the drive to ban same-sex marriage was largely driven by animus toward gay Americans. It illustrates how opponents of marriage equality routinely slurred gay Americans as immoral, as demeaning marriage, and as child molesters. The debate could hardly have been less respectful.

Finally, the Article concludes by speculating why the *Obergefell* dissenters misrepresented the histories of marriage, substantive due process, gay life in America, and the debate over same-sex marriage. It posits that the *Obergefell* dissenters sought to make constitutional protection of gay Americans seem unprecedented, to make gay Americans seem undeserving of equal rights, and to make opponents of gay rights seem noble. To create these illusions, the *Obergefell* dissenters had to distort the historical record. This Article seeks to set that record straight.

#### I. THE DISSENTS' REVISIONIST HISTORY OF MARRIAGE

Chief Justice Roberts began the first *Obergefell* dissent by asserting that always—and across all cultures—marriage has had one unchanging definition. In response to the majority's acknowledgement of the longevity and ubiquity of marriage across human societies, Roberts declared that “[f]or all those millennia, across all those civilizations, ‘marriage’ referred to only one relationship: the union of a man and a woman.”<sup>8</sup> Thus, “marriage as the union of a man and a woman,” according to Roberts, is a “universal definition of marriage.”<sup>9</sup> The other dissenters, too, treated this definition of marriage as constant across all societies.<sup>10</sup>

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8. *Id.* at 2612 (Roberts, J., dissenting).

9. *Id.* at 2613.

10. *Id.* at 2636 n.5 (Thomas, J., dissenting) (“Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history.”); *id.* at 2630

The dissenting Justices attempted to use history to set the stage for accusing the *Obergefell* majority of upending a definition of marriage that has remained in place—unaltered—since the dawn of recorded history. However, their brief history of the so-called “universal definition of marriage as the union of a man and a woman”<sup>11</sup> is simplistic and flawed. For example, this static vision of marriage ignores polygamy, which has been historically common in many cultures and practiced (at some point) in most societies.<sup>12</sup> Moreover this static definition overlooks those societies that have recognized same-sex relationships, including Roman, African, and Native American nations.<sup>13</sup>

Roberts’s assertion of a historically unanimous, unchanging definition of marriage—between one man and one woman—is particularly perplexing because when it suited his needs he acknowledged the existence of polygamous cultures. Later in his dissent, Roberts raised the specter that *Obergefell* could create a slippery slope toward constitutionally-protected plural marriage when he menacingly suggested that “from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to *plural unions, which have deep roots in some cultures around the world.*”<sup>14</sup> This admission—in the form of a red herring<sup>15</sup>—disproves his opening gambit of presenting a solitary universal definition of marriage between one man and one woman. Roberts ignored polygamy when he incorrectly asserted an absolute singular historical definition of marriage, but he then invoked the “deep roots” of polygamous cultures when it was convenient to use polygamy as a scare tactic against marriage equality.<sup>16</sup>

#### A. The Statutory History of Marriage in America

In addition to incorrectly claiming a universal and timeless definition of marriage across all human civilizations, Roberts also asserted that the definition of marriage within the United States had remained unchanged since the founding of the Republic.

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(Scalia, J., dissenting) (“[W]hat was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.”).

11. *Id.* at 2613 (Roberts, J., dissenting).

12. See Michael G. Myers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1458–59 (2006) (“Of 1170 societies recorded in the punch-card version of Murdock’s *Ethnographic Atlas*, polygamy is practiced in 850. Indeed, polygamy is a common thread that has woven itself through almost all religions and cultures at one time or another.”).

13. See ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 344 (2004) (“In second-century Rome, marriage contracts between two men of the same age were permitted . . .”); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

14. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (emphasis added).

15. See Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down A Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 104 (2006) (explaining why allowing same-sex marriage will not lead to polygamy).

16. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (“[F]rom the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world.”).

The Chief Justice defined marriage as “the union of a man and a woman” and he claimed that “[t]his singular understanding of marriage has prevailed in the United States throughout our history.”<sup>17</sup> His singular definition, however, fails to account for the historic definition of marriage in American states that comprised of both racial restrictions and gender consequences that no longer exist. While Roberts is correct that the law defined marriage as between a man and a woman, he truncated the historical definition, which defined marriage as a union between a man and a woman *of the same race* in which *the woman is subordinate to the man*. The legal definition of marriage today is quite different from the institution of marriage that prevailed in eighteenth and nineteenth century America.

The *Obergefell* dissenters tried to create the illusion that the legal definition of marriage in America—and, indeed, all societies—has been static. That is untrue. In America, miscegenation laws and coverture regimes were once part of the definition of marriage. The legal definition of marriage has, however, changed dramatically, in part, because of the role of courts in forbidding states from imposing certain restrictions on marriage. The *Obergefell* dissenters attempted to obfuscate the evolution of marriage law in America in order to make *Obergefell* seem like the first redefinition of marriage in American history. Their attempt is misguided.

### 1. The Historic Racial Definition of Marriage

The Chief Justice argued that his universal definition of marriage prevailed even when a state’s statute did not explicitly define marriage to exclude same-sex couples. He asserted that “[t]he meaning of ‘marriage’ went without saying.”<sup>18</sup> His approach is essentially that “everybody knows” the definition of marriage, which happens to be *his* definition of marriage. Yet Roberts largely ignored the fact that for most of the nation’s history, the definition of marriage in most states depended on race. It “went without saying” that if a white man had a wife, she was white as well. Courts ultimately played a key role in redefining this aspect of marriage.

Until the twentieth century, most American states criminalized interracial marriage.<sup>19</sup> Although racist policies like miscegenation laws are generally associated with the South, states from coast to coast, and from the Mexican border to the Canadian border, prohibited interracial couples from marrying.<sup>20</sup> Those states that

17. *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting).

18. *Id.* at 2614.

19. Christopher R. Leslie, *Justice Alito’s Dissent in Loving v. Virginia*, 55 B.C. L. REV. 1563, 1564 (2014).

20. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 43 (2000) (“Community sentiment against whites marrying African Americans was not limited to the south in the antebellum decades. Intermarriage bans and penalties echoed each other from state to state, north and south, east and west, together composing an American system.”); PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 6 (2009) (“Miscegenation law reached well beyond the South. When the term ‘miscegenation’ was invented, laws prohibiting interracial marriage were in effect not only there but also in Maine and Rhode Island; in Michigan, Illinois, and Ohio; in California, Nebraska, and Washington. By the end of the nineteenth century, the laws had spread to cover nearly all the states of the U.S. West . . .”).

did not enact miscegenation laws had relatively small populations of African-Americans.<sup>21</sup> Every state with a black population of five percent or more legislated against interracial marriages.<sup>22</sup> Having a small number of African-American residents did not, however, necessarily deter states from prohibiting these citizens from marrying white partners. North Dakota, for example, forbade interracial marriages even though the entire state was at that time home to but 201 black residents.<sup>23</sup>

More importantly, in those states that did ban interracial marriage—which represented the vast majority of states—the racial restrictions were considered fundamental.<sup>24</sup> Miscegenation laws were at the core of the definition of marriage.<sup>25</sup> These attitudes remained dominant well into the twentieth century. Reporting on the views of Caucasian Americans in 1944, social scientist Gunnar Myrdal concluded that “the ban on intermarriage and other sex relations involving white women and colored men takes precedence before everything else.”<sup>26</sup> As late as the 1950s, the overwhelming majority of white Americans—over 92 percent nationwide and over 99 percent in the South—opposed interracial marriage.<sup>27</sup> In the early twentieth century, a significant faction of African-Americans also opposed interracial marriage and supported miscegenation laws.<sup>28</sup>

American courts saw racial restrictions as inherent in the definition of marriage. For example, the Supreme Court of Virginia argued that miscegenation laws were examples of positive law appropriately reflecting both natural law and God’s law because the “two distinct races . . . should be kept distinct and separate, and . . . connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.”<sup>29</sup> Similarly, the Indiana Supreme Court upheld that state’s miscegenation law because “natural law

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21. *See Sharp v. Perez*, 32 Cal. 2d 711, 747 (1948) (Shenk, J., dissenting) (“The infrequency of such [interracial] unions is perhaps the chief reason why prohibitive [miscegenation] laws are not found in the remaining states.”).

22. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 219 (2003).

23. Edward T. Wright, Comment, *Interracial Marriage: A Survey of Statutes and Their Interpretations*, 1 MERCER L. REV. 83, 88 (1949).

24. PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE AND LAW—AN AMERICAN HISTORY* 120 (2002) (“Racial segregation in marriage and the family became just as central a part of American apartheid as did segregation in trains or in schools.”).

25. As with same-sex marriage bans, many states amended their constitutions to prohibit interracial marriages. *See* FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE & AMERICAN LAW* 52–53 (2009).

26. PASCOE, *supra* note 20, at 192 (quoting GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 60, 587 (1944)).

27. Leslie, *supra* note 19, at 1574 (citing RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 85, 88 (2003)); PASCOE, *supra* note 20, at 206–07; Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1181 (2009).

28. PASCOE, *supra* note 20, at 183 (discussing the positions and influence of Marcus Garvey). Many African-Americans held complicated opinions, opposing both interracial marriage and miscegenation laws. CHARLES FRANK ROBINSON II, *DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH* 115 (2003).

29. *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878).

which forbids [racial] intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.”<sup>30</sup> This nineteenth-century reasoning lasted well into the twentieth, as the trial judge in *Loving v. Virginia* again upheld the Virginia miscegenation law, asserting 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.”<sup>31</sup> Even those who did not view miscegenation laws as required by religious doctrine relied on natural law to justify prohibiting interracial marriages.<sup>32</sup>

Just as the *Obergefell* dissenters claimed that all societies and civilizations prohibited same-sex couples from marrying,<sup>33</sup> supporters of miscegenation laws similarly claimed a universality to racial restrictions on marriage. For example, the Supreme Court of Indiana asserted that marriage “is a public institution established by God himself, is recognized in all Christian and civilized nations,” and implied that no “civilized nation” would allow interracial marriage.<sup>34</sup> In upholding miscegenation laws, state courts also thought that such laws were universal across the country. The Tennessee Supreme Court upheld that state’s miscegenation law in 1871, by incorrectly observing that also prohibiting interracial marriage “were the laws of the British Colonies in this country, reenacted after the separation by the thirteen States. . . . And such, indeed, we believe was the law of every State.”<sup>35</sup> Though widespread, miscegenation laws did not taint the penal codes of every state.<sup>36</sup> Nevertheless, the overwhelming majority of states defined marriage as a function of race and precluded interracial marriage. At the time, this race-based definition of marriage was not considered controversial.

In some ways, America’s history of criminalizing interracial relationships has been lost. Although miscegenation laws are well known to historians, “most [w]hite Americans somehow managed to forget how fundamental they had once believed these bans to be and, moreover, managed to persuade themselves that they, and their government, had always been firmly committed to civil rights and racial equality.”<sup>37</sup> The *Obergefell* dissenters seem to fall into this category of Americans, unaware of the critical importance of miscegenation laws in defining the legality of marriage for much of American history.

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30. *State v. Gibson*, 36 Ind. 389, 404 (1871).

31. *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial judge).

32. PASCOE, *supra* note 20, at 1 (“Between the 1860s and the 1960s, Americans saw their opposition to interracial marriage as a product of nature rather than a product of politics.”).

33. *See supra* notes 8–16.

34. *Gibson*, 36 Ind. at 402–03.

35. *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 311 (1871).

36. BOTHAM, *supra* note 25, at 52–53 (“In the history of the American colonies and states, only eight never restricted or banned interracial relations: Alaska, Connecticut, Hawaii, Minnesota, New Hampshire, New Jersey, Vermont, and Wisconsin.”).

37. PASCOE, *supra* note 20, at 291–92.



## 2. The Gendered Consequences of Marriage

Traditionally, the definition of marriage included not only which couples were allowed to marry, but also the legal consequences of marriage. In defending the constitutionality of California's miscegenation law, the dissent in *Sharp v. Perez*<sup>38</sup> articulated the then-prevailing wisdom that "[t]here can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, . . . and what shall be the legal consequences of their marrying. . . ."<sup>39</sup> These legal consequences were wildly different for the husband and the wife in a marriage.

American states historically defined the institution of marriage in a manner that legally subordinated wives to their husbands.<sup>40</sup> Such relegation was by design, not happenstance.<sup>41</sup> States employed coverture laws as the primary mechanism of this subordination. Coverture laws provided that "[t]he legal existence of a woman was suspended by marriage"<sup>42</sup> because the wife's "legal and economic identity was subsumed by her husband's upon marriage under the doctrine of coverture."<sup>43</sup> As historian Norma Basch explained, marriage "law created an equation in which one plus one equaled one by erasing the female one."<sup>44</sup>

Coverture laws put wives under the legal control of their husbands.<sup>45</sup> A married woman could not enter a contract without her husband's consent.<sup>46</sup> Although an unmarried woman could own personal property, if she married, her property became her husband's, and he had sole authority to control its use and transfer.<sup>47</sup> Additionally, all of the wife's future earnings and labor were automatically her husband's

38. In *Sharp v. Perez*, the California Supreme Court became the first state high court of the post-Reconstruction era to hold miscegenation laws unconstitutional. 198 P.2d 17 (Cal. 1948).

39. *Id.* at 37 (Shenk, J., dissenting).

40. Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1118 (2014) ("First, the one man-one woman model of marriage has historically assumed and perpetuated the subordination of women to men.").

41. *Id.*; see COTT, *supra* note 20, at 3.

42. *Baker v. State*, 744 A.2d 864, 908 (Vt. 1999); NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 17 (1982) ("The doctrine of marital unity not only mandated the wife's subservience to her husband, but it also held the distinction of obliterating her legal identity.").

43. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 958, 992 (N.D. Cal. 2010); COTT, *supra* note 20, at 52–53; HENDRIK HARTOG, MAN AND WIFE IN AMERICA 115–22 (2000)).

44. BASCH, *supra* note 42, at 17. Blackstone, whom Justice Thomas referred to with reverence, declared, "[b]y marriage, the husband and wife are one person in law." HARTOG, *supra* note 43, at 106.

45. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 199 ("[M]arried women were civilly dead and subject to the control of their husbands.").

46. *Baker*, 744 A.2d at 908; COTT, *supra* note 20, at 11–12 ("Coverture in its strictest sense meant that a wife could not use legal avenues such as suits or contracts, own assets, or execute legal documents without her husband's collaboration."); Leslie, *supra* note 40, at 1119.

47. See Leslie, *supra* note 40, at 1119 ("Upon marriage, the wife's prior personal property that she brought into the marriage, including her money and jewelry, became her husband's absolute property." (citing BASCH, *supra* note 42, at 51; COTT, *supra* note 20, at 12)).

property.<sup>48</sup> The husband had the legal authority to dictate his wife's religious beliefs, to decide where the couple would live and raise their family, and to physically discipline his wife.<sup>49</sup> A wife could not initiate litigation unless her husband consented.<sup>50</sup> This effectively prevented wives from suing their husbands for any torts including abuse and rape.<sup>51</sup> The marital rape exception—which lasted well into the 1970s in many states, and into the 1980s in some states, and “effectively gave a husband the legal right to rape his wife”<sup>52</sup>—was essentially a vestige of the coverture regime that survived the enactment of laws that eventually gave wives property rights.

Harkening back to his contention that everybody knew and shared the same definition of marriage, Chief Justice Roberts tried to diminish the social and legal significance of coverture laws by asserting that “[i]f you had asked a person on the street how marriage was defined, no one would ever have said, ‘Marriage is the union of a man and a woman, where the woman is subject to coverture.’”<sup>53</sup> If he is correct, it is only because—to quote the Chief Justice—it “went without saying”<sup>54</sup> that marriage eliminated a woman's independent legal identity.

For most of their existence, coverture laws were not controversial. Rather, they were considered foundational and integral to the definition of marriage.<sup>55</sup> Coverture represented a national model of marriage.<sup>56</sup> The fact that marriage eliminated “a woman's legal and economic identity” was a “once-unquestioned aspect of marriage.”<sup>57</sup> Coverture laws both reflected and reinforced “what was then considered a natural division of labor between men and women.”<sup>58</sup> As such, they proved hard to displace. Even as women gained rights, wives sometimes did not. For example, just

48. COTT, *supra* note 20, at 12 (“The legal meaning of coverture pervaded the economic realm as well. Upon marriage a woman's assets became her husband's property and so did her labor and future earnings. Because her legal personality was absorbed into his, her economic freedom of action was correspondingly curtailed.”).

49. Leslie, *supra* note 40, at 1119; HARTOG, *supra* note 43, at 116, 153, 166.

50. See Leslie, *supra* note 40, at 1119 (citing *Baker*, 744 A.2d at 908; COTT, *supra* note 20, at 11–12).

51. Leslie, *supra* note 40, at 1121; *Conaway v. Deane*, 932 A.2d 571, 593 n.22 (Md. 2007); COTT, *supra* note 20, at 162.

52. Leslie, *supra* note 40, at 1121 (2014) (citing COTT, *supra* note 20, at 211; HARTOG, *supra* note 43, at 162, 306–07) (“A man does not commit rape by having sexual intercourse with his lawful wife, even if he does so by force and against her will.”).

53. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2614 (2015) (Roberts, C. J., dissenting).

54. *Id.* at 2614.

55. Leslie, *supra* note 40, at 1119 (“Coverture was seen as a cornerstone to American marriage law.”).

56. COTT, *supra* note 20, at 3 (“Political and legal authorities endorsed and aimed to perpetuate nationally a particular marriage model: . . . [including] for the husband to be the family head and economic provider, his wife the dependent partner.”); see also HARTOG, *supra* note 43, at 123 (“The received law of nineteenth-century America provided powerful images of a wife reduced to the possession of her husband.”).

57. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992–93 (N.D. Cal. 2010).

58. *Perry*, 704 F. Supp. 2d at 959; HARTOG, *supra* note 43, at 165 (“The law of coverture rationalized and justified a structure of power. It existed for husbands as a ruling class, expressed a particular male vision of responsibility and duty and power.”).

as miscegenation laws remained in place following the Fourteenth Amendment,<sup>59</sup> coverture laws survived the Nineteenth Amendment,<sup>60</sup> even though so-called “marital unity” had been used to “explain[] the impossibility of suffrage for women.”<sup>61</sup> In short, marriage was legally defined as an institution in which wives were officially subservient to their husbands.<sup>62</sup>

Controversy arose when women’s rights advocates began to dismantle the coverture system by lobbying for Married Women’s Property Laws, which “abolished the common law fiction of a single marital entity.”<sup>63</sup> State legislators predicted that allowing wives to own property would lead to “infidelity in the marriage bed, a high rate of divorce, and increased female criminality.”<sup>64</sup> When women’s advocates successfully undermined the coverture regime through the enactments of Married Women’s Property Laws, state court judges went to great lengths to retain coverture, including by declaring some aspects of Married Women’s Property Laws unconstitutional. And “by professing their faith in the propriety and the desirability of the old common law fiction of marital unity, and by applying that fiction to the countless situations the statutes did not spell out, these judges eviscerated the spirit and intent of the legislation.”<sup>65</sup> Even when states treated a wife’s income earned outside of the home as her separate property, “courts strongly tended to interpret a wife’s household work as belonging to her husband, whether she was undertaking tasks for family members or keeping boarders or lodgers or washing laundry as a way to generate income.”<sup>66</sup> Courts still considered interspousal immunity a core part of marriage law. For example, in interpreting the District of Columbia’s version of a Married Women’s Property Law, the U.S. Supreme Court in 1910 refused to believe that legislators intended such “radical and far-reaching changes” as to allow a battered wife to sue her abusive husband.<sup>67</sup> Some judges defended coverture as necessary to keep

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59. See *infra* notes 108–16 and accompanying text.

60. COTT, *supra* note 20, at 168 (“The nineteenth amendment did not fully dismantle coverture. Laws to ensure that wife’s earnings belonged to her (rather than her husband) spread at a much slower pace, and more unevenly, than the lifting of other property constraints, because of the assumption that a husband owned his wife’s labor.”).

61. HARTOG, *supra* note 43, at 106.

62. Leslie, *supra* note 40, at 1119 (citing BASCH, *supra* note 42, at 17).

63. *In re Spears*, 308 B.R. 793, 804 (Bkr. W.D. Mich.), *rev’d*, 313 B.R. 212 (W.D. Mich. 2004).

64. EVAN WOLFSON, WHY MARRIAGE MATTERS 64 (2004) (citation omitted); COTT, *supra* note 20, at 52–53.

65. BASCH, *supra* note 42, at 202–03; see also Joseph A. Ranney, *A Fool’s Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 48 (2002) (“In some states, enactment of married women’s property laws was followed by a period of conservative judicial reaction and limitation of laws.”).

66. COTT, *supra* note 20, at 168–69; *id.* at 169 (“Legal writers who meant to stress the economic emancipation of the wife had to concede that ‘the courts have jealously guarded the right of the husband to the wife’s service in the household’ as a part of the legal definition of marriage.”).

67. *Thompson v. Thompson*, 218 U.S. 611, 618 (1910); see *id.* at 619 (“We do not believe it was the intention of Congress, in the enactment of the District of Columbia Code, to revolutionize the law governing the relation of husband and wife as between themselves.”); COTT,

wives legally controlled by their husbands.<sup>68</sup>

The elimination of coverture changed the legal definition of marriage from an institution in which a man legally controlled a woman to a more equal association.<sup>69</sup> Complementing the legislative enactment of Married Women's Property Laws, courts played a significant role in redefining marriage away from the coverture model. For example, the Vermont Supreme Court "abolished common-law doctrines arising from the common law theory that husband and wife were one person and that the wife had no independent legal existence."<sup>70</sup> When the vestiges of coverture lasted well into the modern era, the U.S. Supreme Court in 1981 struck down Louisiana's so-called "head and master" statutory scheme, which granted a husband the unilateral right to dispose of jointly-owned property without his wife's consent.<sup>71</sup> The rise and fall of coverture regimes shows the legal definition of marriage changing in a fundamental way over time,<sup>72</sup> and it shows courts first defending and then helping to dismantle the system of coverture.<sup>73</sup>

### B. The Constitutional History of Marriage in America

Not only did the *Obergefell* dissenters misrepresent the historical definition of marriage, they often wrote as if they were unaware of the constitutional history of marriage jurisprudence. All four dissents made some variation of the argument that the *Obergefell* majority overstepped its authority because the federal judiciary should play no role in defining marriage. Roberts, for example, argued that "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage."<sup>74</sup> Justices Roberts, Scalia, and Alito all opined that "the people" get to

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*supra* note 20, at 162 (noting that the *Thompson* Court was concerned that "[a]llowing interspousal tort suits would encourage wives and husbands to bring marital spats into the public spotlight, unnecessarily and inappropriately. Without even glancing at the way such public restraint perpetuated male dominance in the married couple, the court alluded to divorce as the remedy available to a battered wife suffering 'atrocious wrongs.'").

68. Leslie, *supra* note 40, at 1120 (citing *Schindel v. Schindel*, 12 Md. 294, 308 (1858); BASCH, *supra* note 42, at 140).

69. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992–93 (N.D. Cal. 2010) ("As states moved to recognize the equality of the sexes, they eliminated laws and practices like coverture that had made gender a proxy for a spouse's role within a marriage. Marriage was thus transformed from a male-dominated institution into an institution recognizing men and women as equals.").

70. *Baker v. State*, 744 A.2d 864, 909 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (noting the judicial abolition of interspousal immunity).

71. *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981).

72. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–96 ("These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.").

73. *Id.* at 2604 (citing "precedents [that] show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.").

74. *Id.* at 2611 (Roberts, C.J., dissenting).

define marriage.<sup>75</sup> Indeed, Alito went so far as to assert that the *Obergefell* “decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.”<sup>76</sup> For Justices so concerned about the judiciary creating new rights, Alito’s assertion of a citizens’ “constitutional right” to define marriage is as perplexing as it is nonexistent.<sup>77</sup> This section shows how the dissenters’ constitutional arguments are completely at odds with the history of marriage jurisprudence, particularly *Loving v. Virginia*.<sup>78</sup>

In the late 1950s, Richard Loving and Mildred Jeter wanted to get married. Richard was white and Mildred was black. Unfortunately, they lived in Virginia, a state that forbade and criminalized interracial marriage. The couple drove across the state line to Washington, D.C., which did not have a miscegenation law at that time, and were married. Upon returning to their home in Virginia, the newly married couple was indicted for violating Virginia’s miscegenation law.<sup>79</sup> The Lovings pled guilty and were sentenced to one year in jail, which the trial judge suspended on the condition that the Lovings leave Virginia and not return as a couple for twenty-five years.<sup>80</sup>

After their conviction, the couple challenged Virginia’s law as unconstitutional. Although the Virginia courts upheld the law, the U.S. Supreme Court held that Virginia’s miscegenation law violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. The Court opined that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>81</sup> The *Loving* decision invalidated all of the remaining miscegenation laws in the country.

The *Loving* opinion also provided the groundwork for courts to invalidate state restrictions on the right to marry unrelated to race. For example, in *Zablocki v. Redhail*,<sup>82</sup> the Supreme Court struck down a Wisconsin statute that denied permission to marry to people not in compliance with child support obligations. The Court reasoned that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”<sup>83</sup> In *Turner v. Safley*,<sup>84</sup> the Court extended *Loving* and *Zablocki* to prison inmates and struck down a Missouri

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75. See, e.g., *id.* at 2612 (Roberts, C.J., dissenting) (“The majority . . . seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question.”); *id.* at 2640 (Alito, J., dissenting) (“The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.”) (emphasis in original).

76. *Id.* at 2642 (Alito, J., dissenting).

77. If citizens had such a right, they would probably have had standing to defend Proposition 8 in court because the Ninth Circuit, by Justice Alito’s reckoning, violated their “constitutional right” to define marriage. Yet, the Supreme Court majority in *Hollingsworth v. Perry* found no such standing. 133 S. Ct. 2652 (2013).

78. 388 U.S. 1 (1967).

79. *Id.* at 2–3.

80. *Id.*

81. *Id.* at 12.

82. 434 U.S. 374 (1978).

83. *Id.* at 384.

84. 482 U.S. 78 (1987).

penal regulation that required inmates to establish “compelling reasons” in order to secure the necessary approval of the prison superintendent to get married.<sup>85</sup>

The *Obergefell* dissenters repeatedly attempted to distract their readers from our nation’s history of miscegenation laws and other restrictions on marriage. Chief Justice Roberts, for example, asserted that “the ‘right to marry’ cases stand for the important but limited proposition that particular restrictions on access to marriage as *traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here.”<sup>86</sup> Roberts ignored the fact that, for most of America’s history, marriage was “traditionally defined” as limited to same-race couples. His assertion that the Court’s prior marriage cases “say nothing” about making states change their definition of marriage is erroneous; the *Loving* decision compelled states with miscegenation laws to abandon their traditional definition of marriage that excluded interracial couples from marriage.<sup>87</sup>

The dissenters’ overall theme that *Obergefell* was unprecedented is inconsistent with *Loving* and the history of federal marriage jurisprudence. Moreover, the dissenters’ individual arguments were irreconcilable with the holding, the language, and the thrust of *Loving*. The following sections explain why.

### 1. States’ Rights

The dissenters argued that the *Obergefell* majority was undemocratic because it infringed upon states’ rights. Scalia, for example, quoted *Windsor* for the proposition that the “[r]egulation of domestic relations is an area that has long been regarded as a *virtually exclusive* province of the States.”<sup>88</sup> Alito asserted that “[i]t is far beyond the outer reaches of this Court’s authority to say that a State may not adhere to the understanding of marriage that has long prevailed.”<sup>89</sup> Roberts concluded that “[t]he fundamental right to marry does not include a right to make a State change its definition of marriage.”<sup>90</sup> The dissenters saw the states as having broad rights to define marriage that the majority opinion had infringed upon.<sup>91</sup>

The *Obergefell* dissenters’ insistence that the Supreme Court cannot force a state to change its definition of marriage is historically inaccurate because that is exactly

85. *Id.* at 95–99.

86. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2619 (2015) (Roberts, C.J., dissenting) (emphasis in original).

87. See James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 114 (1993) (“To Southern whites desperately striving to preserve white dominance and white womanhood, and to others claiming that interracial marriage was against the will of God, a court decision legalizing miscegenation amounted to a fundamental change in the basic definition of marriage.”).

88. *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting) (emphasis added) (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013)).

89. *Id.* at 2642 (Alito, J., dissenting).

90. *Id.* at 2611 (Roberts, C.J., dissenting).

91. See also *id.* at 2629 (Scalia, J., dissenting) (“[T]he States are free to adopt whatever laws they like . . .”); *id.* at 2640 (Alito, J., dissenting) (“The Constitution leaves that question to be decided by the people of each State.”).

what the Supreme Court did when it invalidated the miscegenation laws, which the *Obergefell* dissenters ignored or downplayed when each asserted that marriage in America had had a single, stagnant definition since the nation's founding.<sup>92</sup> The dissenters' chorus that federal courts can play no role in how states define marriage is easily disproven by the Supreme Court's opinion in *Loving v. Virginia* and its progeny. The Supreme Court's pre-*Obergefell* line of marriage cases—including *Loving*, *Redhail*, and *Turner*—had uniformly recognized a constitutional right to marry that states were forbidden from infringing by defining marriage in a manner that violated an individual's freedom to marry.

The *Obergefell* dissenters failed to see the irony of their states' rights arguments. When the dissenters condemned the *Obergefell* majority for taking the ultimate decision on the validity of same-sex marriages away from the states, the Justices appear oblivious to the fact that they were recycling the arguments used to defend miscegenation laws for over a century. When civil rights advocates began challenging state miscegenation laws in earnest following the end of the Civil War, states vigorously defended the criminalization of interracial marriage. The most common defense was based on states' rights,<sup>93</sup> namely that neither state nor federal judges had the authority to interfere with the prerogative of state legislatures to define marriage however they pleased, including prohibiting interracial couples from marrying. These arguments succeeded for nearly a century across all regions of the country.

Some early court decisions took an almost apocalyptic view of judicial interference with the definition of marriage. In 1871, for example, the Indiana Supreme Court opined that “[t]he right, in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith. If the federal government can determine who may marry in a state, there is no limit to its power.”<sup>94</sup> Other state supreme courts were less melodramatic but no less unequivocal in their holdings that “[t]he power of each state to regulate and control marriages within its jurisdiction[] is as unquestionable as state sovereignty.”<sup>95</sup>

Federal courts were of a like mind in deferring to states' power to forbid interracial marriages.<sup>96</sup> Despite a few early isolated victories by civil rights advocates

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92. Later in his dissent, Chief Justice Roberts acknowledged that the *Loving* Court “struck down” “[r]acial restrictions on marriage,” but he failed to understand the simple fact that this meant the Supreme Court did “make a State change its definition of marriage,” something that he claimed the Supreme Court could not do when protecting the fundamental right to marry. *Id.* at 2614 (Roberts, C.J., dissenting).

93. BOTHAM, *supra* note 25, at 131 (“In nearly every case—from *Scott v. State of Georgia* in 1869 to *Loving v. Virginia* in 1967—and in nearly every region of the country, the states’ right argument formed the most commonly cited legal basis for antimiscegenation statutes.”).

94. *State v. Gibson*, 36 Ind. 389, 403 (1871).

95. *State v. Jackson*, 80 Mo. 175, 178 (1883); *see also* Leslie, *supra* note 19, at 1590 (“Most post-Reconstruction southern courts in miscegenation cases thought the supremacy of state sovereignty to be beyond question.”).

96. *See, e.g., State v. Tutty*, 41 F. 753, 763 (C.C.S.D. Ga. 1890); *Ex parte Francois*, 9 F. Cas. 699, 701 (C.C.W.D. Tex. 1879); *In re Hobbs*, 12 F. Cas. 262, 264 (C.C.N.D. Ga. 1871).

during Reconstruction,<sup>97</sup> the states' rights defense of miscegenation laws proved powerful well into the twentieth century, including in regions well beyond the former confederacy. In 1922, for example, the Arizona Supreme Court upheld that state's miscegenation law by reasoning that marriage "is peculiarly a matter of state regulation."<sup>98</sup> More pointedly, the Oklahoma Supreme Court in 1923 upheld its miscegenation law because "the laws regulating marriages come clearly within the police power of the state, and, in the exercise of the state's sovereign right, it has the sole and only power within the state to regulate who shall, or who shall not, marry."<sup>99</sup> Even as American troops fought in Europe to defeat the Nazi regime—and its racist laws, such as the Nuremberg Laws, which prohibited marriages between Jews and non-Jews—American judges continued to uphold the constitutionality of racist miscegenation laws that prohibited marriages between whites and non-whites because, according to the Tenth Circuit in 1944, "a state is empowered to forbid marriages between persons of African descent and persons of other races or descents."<sup>100</sup>

The *Obergefell* dissenters' invocation of state rights as a basis to uphold state bans on same-sex marriage is troubling for two reasons. First, as explained, this was the cornerstone argument used to defend miscegenation laws. Second, the *Loving* Court rejected the states' rights defense of marriage restrictions. Like other states, for several decades, Virginia had successfully defended its miscegenation law as within "the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens."<sup>101</sup> Before the U.S. Supreme Court, Virginia's lawyers cited the near century of federal and state judicial opinions upholding miscegenation laws as a valid exercise of state power, entitled to deference.<sup>102</sup> The *Loving* Court unanimously rejected the state's argument, holding that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."<sup>103</sup> In sum, the *Obergefell* dissenters' reliance on states' rights arguments to justify deferring to state-imposed marriage restrictions is inconsistent with America's constitutional history.<sup>104</sup>

97. BOTHAM, *supra* note 25, at 27.

98. Kirby v. Kirby, 206 P. 405, 406 (Ariz. 1922).

99. Blake v. Sessions, 220 P. 876, 879 (Okla. 1923).

100. Stevens v. United States, 146 F.2d 120, 123 (10th Cir. 1944). *See also In re Shun T. Takahashi's Estate*, 129 P.2d 217, (Mont. 1942) (permitting state to not recognize marriage between a Japanese man and a white woman).

101. Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955).

102. Brief for Appellee at 28–29, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 93641, at \*28–29.

103. *Loving*, 388 U.S. at 12.

104. The states' rights argument rings false when coming from Alito because he made the same arguments in *Windsor*, in which he voted to uphold the DOMA by which Congress commanded the federal government to ignore states' definitions of marriage if a state protected marriage equality. Leslie, *supra* note 19, at 1589. Justice Alito's assertion in his *Obergefell* dissent that the matter of same-sex marriage is better left in the hands of state legislatures and electorates is odd because the *Windsor* decision itself did not override the decisions of state legislatures. It would appear that Justice Alito believes that federal officials should defer to the state definition of marriage only when states discriminate against same-sex couples, not when states protect these couples.



## 2. Fourteenth Amendment

The dissenters' misunderstanding of the constitutional history of marriage extends to the Fourteenth Amendment itself. After striking an overarching theme that invalidating state marriage laws is antidemocratic, Justice Scalia proceeded to misconstrue the history of the Fourteenth Amendment. Justice Scalia correctly observed that the text of the Fourteenth Amendment does not mention marriage and, he argued, that a same-sex marriage ban "bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification."<sup>105</sup> He further argued that in 1868, when the Fourteenth Amendment was ratified, "no one doubted the constitutionality" of gender restrictions on marriage that limited the institution to one man and one woman.<sup>106</sup> Finally, Justice Scalia mocked the majority for having "discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification" and he sarcastically accused the majority of hubris for finding a right to marriage equality in the Fourteenth Amendment when "lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not."<sup>107</sup>

Justice Scalia's invocation of the history of the Fourteenth Amendment in order to deny that Amendment's protections to same-sex couples suffers from several omissions and oversimplifications. First, conspicuously missing from Scalia's screed on the Fourteenth Amendment's (alleged) indifference to marriage restrictions is any reference to *Loving*. This oversight is intentional, no doubt, because Scalia could not reconcile his desire to discriminate against same-sex couples with the well-established precedent that marriage restrictions can violate the Fourteenth Amendment. The Fourteenth Amendment's omission of any reference to marriage applies equally to miscegenation laws. Under Justice Scalia's approach, miscegenation laws would be as constitutional under the Fourteenth Amendment as same-sex marriage bans, which Scalia argued were constitutional.

Second, while Justice Scalia was safe in assuming that the 1860s politicians could not conceive of same-sex marriage when ratifying the Fourteenth Amendment, we know with certainty that these legislators explicitly represented that the Fourteenth Amendment would not invalidate racial restrictions on marriage.<sup>108</sup> The Republicans

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105. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting). Of course, Scalia is wrong when he asserts that the same-sex marriage bans have an "unchallenged use," as same-sex couples had been challenging these bans for over four decades. *See, e.g.*, *Baker v. Nelson*, 409 U.S. 810 (1972); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974).

106. *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting) ("When it comes to determining the meaning of a vague constitutional provision—such as 'due process of law' or 'equal protection of the laws'—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification." (citing *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818–19 (2014))).

107. *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

108. Leslie, *supra* note 19, at 1583 ("Although the Fourteenth Amendment does not mention marriage, miscegenation laws featured prominently in the congressional debates over that

championing the Fourteenth Amendment neither desired nor believed that the Amendment would affect miscegenation laws.<sup>109</sup> Republican senators who vocally supported civil rights for black Americans simultaneously proclaimed the wisdom and constitutionality of miscegenation laws.<sup>110</sup> Even black congressmen of the Reconstruction era working to pass federal civil rights legislation, such as South Carolina Congressman Joseph H. Rainey, assured their colleagues that “we do not ask . . . that the two races should intermarry one with the other. God knows we are perfectly content.”<sup>111</sup> In short, in adopting the Fourteenth Amendment, Congress—and the ratifying states—were focused on protecting racial (but not gender) restrictions on marriage.

Although Justice Scalia is correct that the post-Civil War Congress did not intend the Fourteenth Amendment to invalidate state marriage restrictions,<sup>112</sup> he misread the significance of this fact and the implications of his own argument. Scalia’s interpretation of the legislative history of the Fourteenth Amendment mirrors the arguments made by champions of miscegenation laws. For example, the State of Virginia in *Loving* argued that the “States which ratified the Fourteenth Amendment clearly signified their intent by continuation of their anti-miscegenation laws contemporaneously with the ratification of the Fourteenth Amendment.”<sup>113</sup> The State directed the *Loving* Justices to the fact that “as late as 1951 . . . the list of States which ratified the Fourteenth Amendment reveals that a majority of such States maintained their anti-miscegenation laws in force after ratification of the Fourteenth Amendment.”<sup>114</sup> The *Loving* Court unanimously rejected these arguments and refused to limit the reach of the Fourteenth Amendment to the confines of nineteenth-century imaginations.

amendment and related civil rights legislation. In the congressional debates over the Civil Rights Act of 1866 and the Fourteenth Amendment, members of Congress believed that miscegenation laws would remain intact.” (citing KENNEDY, *supra* note 22, at 250)).

109. Leslie, *supra* note 19, at 1584–85 (“Though some disagreement exists among scholars, evidence suggests that even Republicans who supported the Fourteenth Amendment neither favored nor viewed the Amendment as invalidating state miscegenation statutes. Many Republicans seeking equal rights for freed slaves did not intend these rights to extend to interracial marriage.”) (citing COTT, *supra* note 20, at 100).

110. Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1231–33 (1966); see also Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1209 (1992).

111. Avins, *supra* note 110, at 1246.

112. HARTOG, *supra* note 43, at 16–17. Soon after the passage of the 14th Amendment, the U.S. Supreme Court in 1883 upheld the constitutionality of miscegenation laws. *Pace v. Alabama*, 106 U.S. 583 (1883). State courts, too, upheld miscegenation laws well into the 1950s. Most notably, the Virginia Supreme Court held in 1955 that it was “unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intentment which prohibits the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.” *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955).

113. Brief for Appellee at 28, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 93641, at \*28.

114. *Id.*

In reciting his legislative history, Scalia ignored the subsequent constitutional history of the Fourteenth Amendment. Scalia literally never mentioned *Loving* anywhere in his dissent. When Justice Scalia observed that “no one doubted the constitutionality” of gender-based marriage laws, he omitted the fact that the constitutionality of race-based restrictions on marriage was similarly undisputed when the Fourteenth Amendment was ratified. Justice Scalia was neither bold nor honest enough to admit that his constitutional philosophy would necessitate validating state miscegenation laws. Ultimately, Justice Scalia erred by focusing exclusively on the Fourteenth Amendment at the time of passage but ignoring the subsequent history of how the Supreme Court has interpreted and applied the Amendment to constitutional claims, including claims involving marriage.<sup>115</sup>

Finally, Scalia’s invocation of great legal minds of the past who never recognized same-sex marriage is an interesting rhetorical flourish, but of no significance as none of these jurists ever considered the issue of same-sex marriage. While it is true that these judges did not strike down same-sex marriage bans, neither did they overturn any of the nation’s miscegenation laws.<sup>116</sup> Does that somehow make the prohibition of interracial marriage constitutional?

In sum, Scalia neither addressed the history of challenges to marriage restrictions under the Fourteenth Amendment nor explained why his imagined projection of the legal opinions of jurists past somehow estops current Justices from applying the precedent of *Loving* to contemporary controversies. Scalia failed to consider—let alone appreciate—that his approach to applying the Fourteenth Amendment would render miscegenation laws constitutional. He cherry-picked historical facts that supported his desire to uphold same-sex marriage bans while failing to acknowledge that the cherries he picked would also demand upholding racist marriage laws.

### 3. Framing the Marriage Question

Even when not mentioning *Loving* directly, the *Obergefell* dissenters tried to obfuscate the significance of *Loving* by framing the constitutional question in a manner that obscured how the Court had historically addressed questions involving marriage rights. They did so by asserting that the *Obergefell* petitioners were asking the Court to create a new fundamental right to same-sex marriage. After asserting that “‘liberty’ under the Due Process Clause should be understood to protect only those rights that are ‘deeply rooted in this Nation’s history and tradition,’”<sup>117</sup> Justice Alito asserted that “it is beyond dispute that the right to same-sex marriage is not among those rights.”<sup>118</sup> Chief Justice Roberts, too, argued that fundamental rights must have

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115. The reach of the Fourteenth Amendment is not limited to “only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 847–48 (1992) (critiquing alternative viewpoint as “inconsistent with our law”).

116. In contrast to same-sex marriage litigation, these judges lived in an era when miscegenation laws were regularly challenged and consistently upheld as constitutional.

117. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2640 (2015) (Alito, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

118. *Id.* (“For today’s majority, it does not matter that the right to same-sex marriage lacks

historical roots<sup>119</sup> as he spoke about “the new right to same-sex marriage.”<sup>120</sup> He was more subtle than Justice Alito who explicitly accused the majority of “invent[ing] a new right and impos[ing] that right on the rest of the country.”<sup>121</sup> Framing the case as involving a new right to same-sex marriage would seem to make *Loving* distinguishable because the *Loving* Court never considered same-sex relationships and, thus, did not recognize a right to same-sex marriage.<sup>122</sup>

If the dissenting Justices’ goal was to render *Loving* inapplicable to the constitutionality of same-sex marriage bans, they failed for several reasons. First, *Obergefell* was never about creating a right to “same-sex marry.” Instead, the case was about the right to marry, which is “deeply rooted in this Nation’s history and tradition.” *Loving* never held that the right to *heterosexual* marriage is fundamental; the *Loving* Court held that the right to marry is fundamental. The state must have a compelling reason to infringe that right. A state law that denies couples this right to marry “cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”<sup>123</sup> *Obergefell* did not create a new right, as such.<sup>124</sup> Instead, the respondent states failed to justify denying an existing right—the fundamental right to marry—to same-sex couples.<sup>125</sup>

Second, using the framing of the *Obergefell* dissenters, *Loving* itself would have upheld the constitutionality of miscegenation laws because the relevant question in *Loving* would have been whether—before *Loving*—the Constitution included a fundamental right to interracial marriage. Before the issuance of the *Loving* opinion, the answer would have been negative under the approach of the *Obergefell* dissenters. The right to interracial marriage was not “deeply rooted in this Nation’s history and tradition.”<sup>126</sup> The concept was not mentioned in the Constitution and most states prohibited interracial marriage for most of American history; nor did the constitutional

deep roots or even that it is contrary to long-established tradition.”).

119. Chief Justice Roberts opined that—to prevent substantive due process from being used a vehicle for “converting personal preferences into constitutional mandates”—fundamental rights must be “‘objectively, deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.’” *Id.* at 2618 (Roberts, C.J., dissenting) (quoting *Glucksberg*, 521 U.S. at 720–21).

120. *Id.* at 2625.

121. *Id.* at 2643 (Alito, J., dissenting).

122. Some lower courts explicitly tried to distinguish *Loving* by reframing the marriage equality cases brought by same-sex couples as not about the right to marry but instead about the right to same-sex marriage, which was not an issue in *Loving*. *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1097 (D. Haw. 2012).

123. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

124. See generally Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685 (2008).

125. This is similar to the *Loving* Court’s invalidation of miscegenation laws because states could not justify denying the right to marry to interracial couples.

126. Leslie, *supra* note 19, at 1598 (“More importantly for our purposes, at the time of the *Loving* opinion, interracial marriage was certainly ‘not deeply rooted in this Nation’s history and tradition.’ Miscegenation laws were older than the nation itself. Most of the original thirteen colonies prohibited interracial marriage or sex.” (citing COTT, *supra* note 20, at 43 (detailing various prohibitions))).

drafters think that they were protecting such a right.<sup>127</sup> Well into the mid-twentieth century, judges upheld miscegenation laws because of the nation's historical prohibition of interracial marriage.<sup>128</sup> Even when states did not maintain active anti-miscegenation regimes, this often did not indicate any support for interracial marriage, let alone recognition of a constitutional right to marry across defined racial boundaries.<sup>129</sup> This lack of historical protection or recognition of interracial marriage, however, did not prevent miscegenation laws from violating the substantive due process clause.<sup>130</sup>

Some *Obergefell* dissenters tried to evade this conundrum by misrepresenting the facts and context of *Loving*. For example, Justice Roberts sought to distinguish *Loving* by asserting that the case did not alter the definition of marriage because “the interracial marriage ban at issue in *Loving* [did not] define marriage as ‘the union of a man and a woman of the same race.’”<sup>131</sup> Yet that is exactly what miscegenation laws—such as the Virginia law invalidated in *Loving*—did. It is absurd to assert that Virginia's marriage statute did not define marriage as a function of race.<sup>132</sup>

In short, the dissenters framed the constitutional question in *Obergefell* in a manner entirely inconsistent with the Court's approach in *Loving*. *Loving* did not create a fundamental right to interracial marriage; instead it held that the already-existing right to marry applied to interracial couples. Similarly, *Obergefell* did not create a new right to same-sex marriage; it simply held that the well-established right to marry extended to same-sex couples.<sup>133</sup> The *Obergefell* dissenters misconstrued *Loving* in

127. Leslie, *supra* note 19, at 1598 (“Prohibitions in America against interracial marriage and intimacy date back to the 1600s.”) (citing BOTHAM, *supra* note 25, at 52); *id.* at 1598 (“Between the nation's unification in the 1770s and its temporary division in the 1860s, the nationwide coverage of miscegenation laws expanded and contracted, but was always extensive.” (citing PASCOE, *supra* note 20, at 21)); *id.* at 1598 (“By 1860, the vast majority of states maintained miscegenation statutes . . .”).

128. *Id.* at 1601–02.

129. *Id.* at 1598–99.

130. See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”).

131. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2619 (2015) (Roberts, J., dissenting) (emphasis in original) (quoting Irving G. Tragen, Comment, *Statutory Prohibitions Against Interracial Marriage*, 32 CAL. L. REV. 269 (1944)); see *id.* (“Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was.”).

132. Leslie, *supra* note 40.

133. In the future, same-sex marriage will just be seen as “marriage,” in much the same way that people don't generally refer to married couples of different races as members of an “interracial marriage,” but simply as married. *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1163–64 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir. 2014) (“It is clear that the fundamental right to marry shall not be deprived to some individuals based solely on the person they choose to love. In time, Americans will look at the marriage of couples such as Plaintiffs, and refer to it simply as a marriage—not a same-sex marriage. These couples, when gender and sexual orientation are taken away, are in all respects like the family down the street.”).

order to construct their false frame and to make *Obergefell*'s extension of constitutional rights to gay Americans seem more extraordinary than it was.<sup>134</sup>

#### 4. Attempts To Distinguish *Loving*

Of the four *Obergefell* dissenters, Justice Thomas made the most direct attempt to distinguish *Loving*. He argued that three distinguishing features of Virginia's miscegenation law made *Loving* and its progeny distinguishable from *Obergefell*. In doing so, he erred thrice.

First, Thomas asserted that the pre-*Obergefell* troika of *Loving*, *Zablocki*, and *Turner* were distinguishable because they "all involved absolute prohibitions on private actions associated with marriage."<sup>135</sup> As an initial matter, Thomas was wrong to characterize *Turner* as involving an "absolute prohibition" because the statute at issue required inmates to show "compelling reasons" to obtain permission to marry. Similarly, the statute in *Zablocki* did not involve an absolute prohibition because individuals could marry by complying with child support obligations. More importantly, Thomas did not explain how same-sex marriage bans did not also absolutely prohibit same-sex couples from similar "private actions associated with marriage."<sup>136</sup>

Second, Thomas implied that the Court's prior marriage cases involved criminal laws and that because same-sex marriage bans were civil, *Loving* and its progeny were inapplicable to *Obergefell*. He reported that the Lovings had been criminally prosecuted and that violation of the statute in *Zablocki* could result in unnamed "criminal penalties." Thomas also noted that *Turner* involved a prison regulation that required state inmates to present "compelling reasons" in order to secure permission to get married—thus disproving his earlier claim that the case involved an absolute prohibition on marriage. Trying to emphasize this criminal angle, Thomas asserted that "[i]n none of those cases [*Loving*, *Zablocki*, and *Turner*] were individuals denied solely governmental recognition and benefits associated with marriage."<sup>137</sup> Thomas argued that because the *Obergefell* petitioners sought only recognition and benefits, they could not rely upon the *Loving* line of cases.

Thomas's attempt to distinguish *Obergefell* from *Loving*, *Zablocki*, and *Turner* by highlighting the criminal strand in the latter cases is unpersuasive. As an initial matter, Thomas misrepresented the facts of *Turner* when he claimed that the case did not involve an individual who was solely seeking "governmental recognition and benefits associated with marriage."<sup>138</sup> Unlike the Lovings, the inmate in *Turner* did

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134. Under the approach of the *Obergefell* dissenters, all of the Supreme Court's right-to-marriage cases would have had to come out differently. See *Obergefell*, 135 S. Ct. at 2602 ("*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.' Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.").

135. *Id.* at 2636–37 (Thomas, J., dissenting).

136. *Id.* at 2636.

137. *Id.* at 2637 (emphasis in original).

138. *Id.*

not risk criminal prosecution; he merely challenged the prison policy that required inmates to secure permission in order to exercise their right to marry. Similarly, in *Zablocki*, the respondent was suing because he was denied a marriage license, not because he had ever been threatened with any punishment.<sup>139</sup> He—like the *Obergefell* petitioners—only wanted the recognition and benefits of marriage.

Moreover, although some miscegenation laws had a criminal component, the *Loving* case was atypical; most challenges to miscegenation laws involved states refusing to grant or recognize interracial marriages. For example, in 1942, the Montana Supreme Court invoked that state's miscegenation regime to deny a surviving white wife's rights regarding her husband's estate because he was Japanese, even though the couple had married in Washington state where their marriage was legal.<sup>140</sup> Although that Montana case was not criminal, *Loving* overturned it. The *Loving* Court did not merely require states to stop criminalizing miscegenation laws; it required them to recognize all otherwise valid interracial marriages and afford all applicable benefits to married interracial couples. This is what the Lovings requested and what the Court granted them.

Thus, even if *Loving* had a criminal origin, the holding applies to all civil contexts involving antimiscegenation regimes. While the miscegenation law at issue in *Loving* did have a criminal component, the *Loving* Court never mentioned this aspect of the law when it held that the right to marry is a “fundamental freedom” and that “classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment . . . surely . . . deprive all the State's citizens of liberty without due process of law.”<sup>141</sup> Under Thomas's interpretation, the *Loving* opinion would allow states to prohibit and to refuse to recognize interracial marriages so long as states did so through civil, not criminal, law. This is not what *Loving* held; the opinion secured interracial couples the benefits of marriage, not simply immunity from criminal penalties.

Furthermore, same-sex marriage bans in some states did implicate criminal law if a couple evaded the law by marrying someplace else and then returning home, just as the Lovings had done. For example, Wisconsin law prescribed a criminal punishment of being “fined not more than \$10,000 or imprisoned for not more than 9 months or both” for “[a]ny person residing and intending to continue to reside in this state who goes outside the state and there contracts a marriage prohibited or declared void under the laws of this state.”<sup>142</sup> Although Wisconsin's district attorneys had not yet actively enforced the law against same-sex couples, conservative leaders in the state publicly advocated such enforcement<sup>143</sup> and the risk of criminal enforcement deterred some Wisconsin same-sex couples from getting married in other states

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139. *Zablocki v. Redhail*, 434 U.S. 374, 376 (1978).

140. *In re Takahashi's Estate*, 129 P.2d 217, 222 (Mont. 1942).

141. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

142. WIS. STAT. ANN. § 765.30 (West 2009 & Supp. 2015).

143. Louis Weisberg, *Prisoners of Love: Despite New IRS Rules, Wisconsin Gay Couples Who File Joint State Taxes Could Face Jail Time*, WIS. GAZETTE (Sept. 5, 2013), <http://wisconsingazette.com/2013/09/05/prisoners-of-love/> (quoting Julaine Appling, CEO of Wisconsin Family Council, who “advocated for the prosecution of same-sex couples under the marriage evasion law”) [<https://perma.cc/3HZU-XYGT>].

because they feared prosecution in Wisconsin.<sup>144</sup> Wisconsin was not alone in criminalizing the evasion of state marriage laws by getting married in another state.<sup>145</sup> In short, the criminal undertones of *Loving* do not provide a sufficient basis for distinguishing *Obergefell*.

For his third attempt to differentiate *Loving* and its progeny from *Obergefell*, Justice Thomas asserted that Virginia's miscegenation statute was distinguishable from same-sex marriage bans because Virginia's law "extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment's Free Exercise Clause."<sup>146</sup> Here, Thomas is grasping at straws. This aspect of Virginia's miscegenation law played no role in the *Loving* opinion and cannot be used to distinguish *Loving* from *Obergefell*. Moreover, *Loving*'s progeny did not involve any such religious restrictions and cannot be distinguished from *Obergefell* on these grounds.

Perhaps more importantly, Thomas was apparently unaware that some same-sex marriage bans similarly constrained religious ceremonies. Some states, such as North Carolina, made it a criminal offense for "[e]very minister, officer, or any other person authorized to solemnize a marriage" to marry "any couple without a license."<sup>147</sup> Clergy in North Carolina understood the statute "to make it unlawful for a pastor, priest, or rabbi to solemnize the marriage of same-sex couples."<sup>148</sup> Several states had similar laws, many of which provided for imprisonment of the officiant.<sup>149</sup> Although

144. Stacy Forster, *Wisconsin Gay Couples Who Marry Outside State Could Face Penalty*, MILWAUKEE J. SENTINEL (July 3, 2008), <https://web.archive.org/web/20160403194206/http://www.jsonline.com/news/wisconsin/29412299.html> (noting same-sex couple feared inability to afford costs of a legal defense); see also Weisberg, *supra* note 143 ("ACLU of Wisconsin executive director Chris Ahmuty said it's not difficult to imagine a rogue district attorney apprehending a same-sex couple married out of state in order to make a statement or score political points, just as renegade county clerks in New Mexico and Pennsylvania are handing out marriage licenses to test the law in those states.")

Same-sex couples challenging this Wisconsin law were denied standing after the district attorneys for Milwaukee and Eau Claire Counties agreed not to prosecute these plaintiffs. *Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 1729098, at \*1 (W.D. Wis. Apr. 30, 2014). While this seems like a good result, judges and prosecutors have cleverly employed standing doctrine in the past to prevent gays from being able to challenge antigay laws. See Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine To Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29.

145. Forster, *supra* note 144.

146. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2637 n.6 (2015) (Thomas, J., dissenting) (citation omitted).

147. N.C. GEN. STAT. ANN. § 51-7 (West 2013).

148. *Thigpen v. Cooper*, 739 S.E.2d 165, 168 (N.C. Ct. App. 2013).

149. ARIZ. REV. STAT. ANN. (2007) § 25-128 ("It is unlawful for any person who is authorized to solemnize marriages to . . . [s]olemnize a marriage without first being presented with a marriage license as required by the laws of this state."); IDAHO CODE ANN. § 32-406 (West 2006) ("If any such minister or officer shall presume to solemnize any marriage between parties without such a license, or with knowledge that either party is legally incompetent to contract matrimony as is provided for by the laws of this state, he shall be deemed guilty of a misdemeanor . . . ."); 750 ILL. COMP. STAT. ANN. 5/219 (West 1999 & Supp. 2016) ("Any official issuing a license with knowledge that the parties are thus prohibited from marrying



such laws were not actively enforced, neither were they necessarily dead letters. For example, Wisconsin's attorney general opposed efforts to enjoin enforcement of this section of the penal code against officiants who solemnize same-sex marriages.<sup>150</sup> Several clergy from various denominations were challenging North Carolina's law when *Obergefell* came down and rendered their lawsuit unnecessary.<sup>151</sup>

### 5. Summary

Each of the dissenters concluded that the *Obergefell* decision was fundamentally antidemocratic. Chief Justice Roberts, for example, condemned the majority for removing the issue of marriage equality "from the realm of democratic decision" and for "shutting down the political process."<sup>152</sup> The Justices condemned the purported antidemocratic nature of *Obergefell* with varying degrees of embellishment. In relatively mild language, Justice Thomas asserted that the Constitution requires that "the definition of marriage to be left to the political process."<sup>153</sup> On the more extreme end

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and any person authorized to solemnize marriage who shall knowingly solemnize such a marriage shall be guilty of a Class C misdemeanor."); MICH. COMP. LAWS ANN. § 551.106 (West 2005) ("Any clergyman or magistrate who shall join together in marriage, parties who have not delivered to him a properly issued license, as provided for in this act, or who shall violate any of the provisions of this act, shall be adjudged guilty of a misdemeanor, and shall be punished by a fine of 100 dollars, or, in default of payment thereof, by imprisonment in the county jail for a term of 90 days."); OKLA. STAT. ANN. tit. 43, § 15 (West 2016) ("any person knowingly performing or solemnizing the marriage ceremony contrary to any of the provisions of this chapter, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail not less than thirty (30) days nor more than one (1) year or by both such fine and imprisonment."); S.D. CODIFIED LAWS § 25-1-31 (2013) ("If any marriage is solemnized without the license required by this title being procured, the parties so married and all persons aiding in such marriage are guilty of a Class 1 misdemeanor."); UTAH CODE ANN. § 30-1-15 (West 2013) ("Any person who knowingly, with or without a license, solemnizes a marriage between two adults prohibited by law is guilty of a class A misdemeanor."); VA. CODE ANN. § 20-28 (West 2016) ("If any person knowingly perform the ceremony of marriage without lawful license, or officiate in celebrating the rites of marriage without being authorized by law to do so, he shall be confined in jail not exceeding one year, and fined not exceeding \$500."); WIS. STAT. ANN. § 765.30 (West 2009 & Supp. 2015) ("Any officiating person who solemnizes a marriage . . . knowing of any legal impediment thereto . . . shall be fined not less than \$100 nor more than \$500, or imprisoned not more than 6 months, or both.").

150. *Wolf v. Walker*, 26 F. Supp. 3d 866, 870 (W.D. Wis.), *aff'd sub nom.* *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

151. Michael Gordon, *United Church of Christ Sues over NC Ban on Same-Sex Marriage*, CHARLOTTE OBSERVER (Apr. 28, 2014), <http://www.charlotteobserver.com/news/local/article9116723.html> [<https://perma.cc/A35J-MJQT>].

152. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, J., dissenting); *see also id.* at 2629 (Scalia, J., dissenting) (claiming that the *Obergefell* majority were not "functioning as judges").

153. *Id.* at 2639 (Thomas, J., dissenting) ("Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part

of the hyperbolic scale, Justice Scalia quipped that a governmental system that permitted judges instead of “the People” to define the constitutional parameters of marriage “does not deserve to be called a democracy.”<sup>154</sup> Justice Scalia concluded that the opinion constitutes a “threat to American democracy.”<sup>155</sup>

The *sturm und drang* of the dissenters’ lament—that *Obergefell* portends the end of American democracy as we know it—is both overwrought and historically disproven. The republic, after all, has survived the *Loving* decision’s removal of miscegenation laws from the political process. Fundamental to the dissenters’ contention is their misrepresentation of the evolution of the legal definition of marriage in America and the role that courts played in redefining marriage. Properly understood, *Obergefell* is not an aberration but another point on the trajectory begun by *Loving*.

## II. THE HISTORY OF SUBSTANTIVE DUE PROCESS

In addition to condemning constitutional protections for same-sex couples, the dissenting Justices argued that *Obergefell* resurrected what the dissenters characterized as the discredited doctrine of substantive due process. Justice Kennedy’s opinion concluded 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 Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”<sup>156</sup> Although the opinion invoked both substantive due process and equal protection concepts, the *Obergefell* dissenters aimed their fire at the former.<sup>157</sup>

Chief Justice Roberts sought to delegitimize the majority opinion by painting substantive due process as synonymous with repudiated Supreme Court opinions of the past. Roberts condemned the *Obergefell* majority by highlighting two infamous uses of the substantive due process doctrine in now-renounced cases. First, Roberts condemned the doctrine of substantive due process as commencing in the Supreme Court’s *Dred Scott* decision,<sup>158</sup> which protected the rights of slaveholders to possess slaves.<sup>159</sup> *Dred Scott* is universally condemned as one of the worst opinions ever issued by the Supreme Court. While the repulsive nature of *Dred Scott* is readily apparent, Roberts never attempted to explain how allowing loving couples to exercise a constitutional right to marry was somehow analogous to allowing slaveholders to recapture and own other human beings.

of their deliberative process.”).

154. *Id.* at 2629 (Scalia, J., dissenting).

155. *Id.* at 2626.

156. *Id.* at 2604 (majority opinion).

157. This may be because substantive due process may prove more protective of gay rights than equal protection. *See, e.g.*, Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509 (2005) (explaining why substantive due process was superior to equal protection as a mechanism to invalidate state sodomy laws).

158. *Dred Scott v. Sandford*, 60 U.S. 393 (1856). *But see* *Washington v. Glucksberg*, 521 U.S. 702, 763 (1997) (Souter, J., concurring in judgment) (“For two centuries American courts, and for much of that time this Court, have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth. The obligation was understood before *Dred Scott* . . .”).

159. *See Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

Second, Roberts invoked *Lochner v. New York* and its progeny. In the Progressive Era of economic regulation, the *Lochner* Court struck down a New York law that limited bakery employees to working no more than 60 hours per week, describing such regulation as “meddlesome interferences with the rights of the individual.”<sup>160</sup> Roberts condemned *Lochner* for improperly constitutionalizing an economic philosophy, quoting Justice Holmes’s *Lochner* dissent for the proposition that the Constitution “is not intended to embody a particular economic theory.”<sup>161</sup> Roberts lamented that “[i]n the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty,” which had the effect of “empowering judges to elevate their own policy judgments to the status of constitutionally protected ‘liberty.’”<sup>162</sup> He claimed that during the 1950s and early 1960s, the Supreme Court had “recognized its error” of the *Lochner*-era cases and had repudiated substantive due process as a doctrine.<sup>163</sup> Roberts then asserted that *Obergefell* constituted a reversion to *Lochner*. Most significantly, the Chief Justice proclaimed that “only one precedent offers any support for the [*Obergefell*] majority’s methodology: *Lochner v. New York*.”<sup>164</sup>

Justice Thomas took Chief Justice Roberts’s indictment of substantive due process one step further and claimed that the doctrine did not actually exist but was instead a “dangerous fiction.”<sup>165</sup> He disparaged the doctrine for “distort[ing] the constitutional text, which guarantees only whatever ‘process’ is ‘due’ before a person is deprived of life, liberty, and property.”<sup>166</sup> The principal exhibit in his critique was the *Obergefell* decision, which Justice Thomas argued showed how judges invoke substantive due process to convert their “personal views” into constitutional law.<sup>167</sup> Thomas proclaimed the doctrine of substantive due process to be indefensible.<sup>168</sup>

Although exercising different approaches, both Chief Justice Roberts and Justice Thomas used their dissents to present an incomplete—and thus false—narrative of substantive due process. In doing so, they made several mistakes. First, Chief Justice Roberts erred when asserting that the contours and application of substantive due process are defined solely by *Dred Scott* and the *Lochner*-era cases.<sup>169</sup> Roberts characterized *Dred Scott*’s substantive due process analysis as lying dormant and then

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160. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

161. *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting)).

162. *Id.*

163. *Id.* (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Day–Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)) (claiming that the Court “vowed not to repeat” the mistakes of the *Lochner* era).

164. *Id.* at 2621.

165. *Id.* at 2631 (Thomas, J., dissenting).

166. *Id.*

167. *Id.*; see also *id.* at 2631–32 (“They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a ‘bare majority’ of this Court, *ante*, at 2606, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only ‘due process’ is but further evidence of the danger of substantive due process.”).

168. *Id.* at 2632.

169. See generally Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

reappearing through *Lochner* and its kin.<sup>170</sup> From Roberts's opinion, it would appear that there were only two episodes of substantive due process in American legal history: *Dred Scott* and the *Lochner*-era cases. Roberts treated *Obergefell* as the final part of a *Dred Scott-Lochner-Obergefell* trilogy—a set of illegitimate opinions. Through selective citation, Roberts tried to present a history of substantive due process that began with *Dred Scott* and ended with the demise of the *Lochner* era, only to be resurrected more than a half a century later by *Obergefell*. Roberts concluded that the *Obergefell* opinion's "aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*."<sup>171</sup>

Chief Justice Roberts conspicuously neglects Supreme Court jurisprudence in the post-*Lochner* era, most notably *Loving*. The *Loving* decision had strands of both substantive due process and equal protection. Following its equal protection analysis, the *Loving* opinion explicitly held that Virginia's miscegenation "statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment."<sup>172</sup> The *Loving* Court thus relied on substantive due process to recognize a fundamental right to marry and to strike down miscegenation laws even though "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century."<sup>173</sup> The doctrine of substantive due process helped remove miscegenation laws from the criminal codes of over a dozen states.<sup>174</sup>

The fact that *Loving* was a substantive due process case exposes the inaccuracy of Chief Justice Roberts's assertion that *Lochner* is the "only . . . precedent [that] offers any support for the majority's methodology" in *Obergefell*. Roberts claimed the need to ground legal doctrines in history,<sup>175</sup> but then he sought to distort history by omitting the most relevant cases from his analysis. When looking for the appropriate analogy, the relevant question is whether marriage restrictions against

170. *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) ("*Dred Scott*'s holding was overruled on the battlefields of the Civil War and by constitutional amendment after *Appomattox*, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York*, this Court invalidated state statutes that presented 'meddlesome interferences with the rights of the individual,' and 'undue interference with liberty of person and freedom of contract.'").

171. *Id.* at 2618–19.

172. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

173. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–48 (1992) (noting "the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*").

174. Ironically, Justice Thomas mocked the very existence of substantive due process. Yet he would be a felon but for the doctrine. Clarence Thomas is African-American, his wife Caucasian. It is the height of folly to belittle a legal doctrine as indefensible when one's marriage and freedom depends on that very doctrine.

175. *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting) ("Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. . . . The only way to ensure restraint in this delicate enterprise is 'continual insistence upon respect for the teachings of history . . .'" (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment))).

same-sex couples look more like economic regulations or more like marriage restrictions based on race. The answer is self-evident: marriage restrictions (*Obergefell*) look more like marriage restrictions (*Loving*) than like economic regulations (*Lochner*). Roberts is distracting readers from the most relevant line of substantive due process authority by focusing exclusively on a discredited—and irrelevant—line of authority.

Second, Roberts also ignored nonmarriage precedent. Well before *Loving*—and overlapping with the *Lochner* era—the Supreme Court employed substantive due process to outlaw racial segregation in the public schools of our nation’s capital,<sup>176</sup> to protect the rights of parents to direct their children’s education,<sup>177</sup> to recognize the right to procreate,<sup>178</sup> and to allow the teaching of foreign languages.<sup>179</sup> These cases are uncontroversial.<sup>180</sup> By claiming *Dred Scott* and *Lochner* as the only precedents, Roberts sought to erase these other noncontroversial uses of substantive due process from the historical record.

Third, the modern era of substantive due process began in the 1960s and included far more than the *Loving* Court’s use of the doctrine to invalidate state miscegenation laws. In 1961, the Supreme Court in *Poe v. Ullman* dismissed a declaratory action challenging Connecticut’s prohibitions against using contraceptive devices and giving any medical advice regarding the use of such devices.<sup>181</sup> Justice Harlan issued a powerful dissent that commended the substantive component of due process. He noted “[w]ere due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.”<sup>182</sup> Harlan’s position ultimately carried the day in *Griswold v. Connecticut*,<sup>183</sup> in which the Court cited Harlan’s dissent while striking down Connecticut’s anti-contraception law. Discussing Harlan’s dissent over three decades later, Justice Souter noted that “[t]he text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words ‘liberty’ and ‘due process

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176. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

177. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

178. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring).

179. *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923).

180. *McDonald v. City of Chicago*, 561 U.S. 742, 863–64 (2010) (Stevens, J., dissenting) (proposing that “[s]ome of our most enduring precedents, accepted today by virtually everyone, were substantive due process decisions” (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Bolling*, 347 U.S. at 499–500; *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399–403)).

In addition to these now-uncontroversial decisions, the antagonists of substantive due process have been more accepting of the doctrine when it served their policy goals. For example, when the five conservative Justices—including all four *Obergefell* dissenters—struck down Chicago’s handgun ban, they did so on reasoning that—while invoking the Second Amendment—was essentially substantive due process. *See id.* at 861 (“This is a substantive due process case.”).

181. *Poe v. Ullman*, 367 U.S. 497, 498 (1961).

182. *Id.* at 541 (Harlan, J., dissenting).

183. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

of law.”<sup>184</sup> In the modern era of substantive due process ushered in by Harlan’s *Poe* dissent, Justices have invoked the doctrine to protect marital privacy,<sup>185</sup> private sexual conduct between consenting adults,<sup>186</sup> personal decision making over medical treatment,<sup>187</sup> against physical confinement,<sup>188</sup> and the rights to custody of one’s children<sup>189</sup> and to control the upbringing of one’s children.<sup>190</sup>

Each of these opinions soundly disproves Roberts’ insinuation that before *Obergefell*, substantive due process was used solely to protect slaveholders’ interests and to strike down reasonable economic regulations. The Supreme Court has decided a wide range of cases based on substantive due process. One branch of substantive due process cases has been widely discredited, namely those associated with the *Lochner* era. Yet another branch of cases are widely embraced; the *Loving* opinion today is uncontroversial. The *Obergefell* opinion follows much more in the proud tradition of *Loving* than the tyranny of *Dred Scott* or the excesses of *Lochner*. Yet Roberts downplays *Loving* in order to create a false analogy.

Learning the history of substantive due process by reading the *Obergefell* dissents would result in a serious miseducation. Substantive due process is far more rich than Roberts suggests. The legal issue in *Obergefell* looks more like *Loving* than it looks like *Lochner*, but Chief Justice Roberts wants to distract the reader from *Loving* by emphasizing the red herring of *Lochner*. Through omission and sleight of hand, Roberts misrepresented the history of substantive due process. This is no doubt due to his inability to properly distinguish *Obergefell* from *Loving*.<sup>191</sup>

### III. GAY LIFE BEFORE MARRIAGE EQUALITY

In their dissents, both Roberts and Thomas pontificated on what they described as the unhampered ease of life for same-sex couples in America. Roberts asserted, without any citation, that even without having any marriage rights, “[s]ame-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is ‘condemned to live in loneliness’ by the laws challenged in these cases—no one. At the same time, the laws *in no way* interfere with the ‘right to be let alone.’”<sup>192</sup> In a similar vein, Thomas claimed, also without any evidence, that same-sex couples enjoyed the full breadth of “liberty” because

they have been able to cohabit and raise their children in peace. They

184. *Washington v. Glucksberg*, 521 U.S. 702, 764 (1997) (Souter, J., concurring in judgment).

185. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–91 (1977).

186. *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003).

187. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 287–89 (1990) (O’Connor, J., concurring); *id.* at 302 (Brennan, J., dissenting); *id.* at 331 (Stevens, J., dissenting); *see also id.* at 278 (majority opinion).

188. *Foucha v. Louisiana*, 504 U.S. 71, 80–83 (1992).

189. *Stanley v. Illinois*, 405 U.S. 645 (1972).

190. *Troxel v. Granville*, 530 U.S. 57, 57 (2000).

191. *See supra* Part I.B.

192. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, J., dissenting) (emphasis added) (citation omitted).

have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.<sup>193</sup>

Thomas asserted that “States have imposed no . . . restrictions” that would limit same-sex couples’ “ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children.”<sup>194</sup> He further claimed that states had not “prevented [same-sex couples] from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.”<sup>195</sup> Thus, in the dissenters’ view, same-sex couples led untroubled lives, largely unaffected by their inability to legally marry. This part shows how—and why—the *Obergefell* dissenters misrepresented how gay lives are lived in America.

#### A. Difficulty of Gay Life

Justices Roberts and Thomas recited a litany of privileges that they claimed same-sex couples can exercise with impunity even without the right to marry. However, their blithe descriptions of the happy-go-lucky lives of gay Americans belie a fundamental misunderstanding of how state actors mistreat unmarried same-sex couples. In order to appreciate the errors in the dissents, the Justices’ claims need to be unpacked and scrutinized individually.

##### 1. Living Together

The *Obergefell* dissenters argued that same-sex couples do not need to be married because they can build homes together without marriage. For example, Roberts claimed that “[s]ame-sex couples remain free to live together.”<sup>196</sup> Thomas similarly asserted that the “Petitioners . . . have been able to cohabit . . . in peace.”<sup>197</sup>

These claims are facile and false. First, the *Obergefell* dissenters were apparently unaware of how localities can use zoning ordinances to prevent unmarried couples from living together. Some cities restrict land use to single-family dwellings where family is defined as people related by blood, adoption, or marriage. Unmarried same-sex couples do not constitute families in these jurisdictions and may legally be prohibited from living together.<sup>198</sup> The Supreme Court has upheld the constitutionality

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193. *Id.* at 2635 (Thomas, J., dissenting).

194. *Id.*

195. *Id.*

196. *Id.* at 2620 (Roberts, J., dissenting).

197. *Id.* at 2635 (Thomas, J., dissenting).

198. Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 985 (2012) (“[S]ome American localities—usually suburbs and townships—have zoning and land use ordinances that de facto restrict, or even prevent, gay families from residing within them.”); *id.* at 985 n.119 (“The affluent suburb of Ladue, Missouri, denied a residency permit

of such ordinances.<sup>199</sup> As a result, “in thousands of communities across the country where single family dwelling ordinances are in force, same-sex couples cannot live together with any degree of constitutional protection.”<sup>200</sup> Modern courts have suggested that these zoning restrictions survive *Lawrence v. Texas*, which invalidated state sodomy laws.<sup>201</sup> Indeed, the year before *Obergefell* was decided, the Louisiana Supreme Court upheld a residential zoning restriction that excluded same-sex couples.<sup>202</sup> In addition to zoning restrictions, the inability to marry could prevent same-sex couples from living together in public housing or some university housing.<sup>203</sup> Thus, Roberts and Thomas were mistaken to assert that unmarried same-sex couples can necessarily live together wherever they please.

Second, for same-sex couples raising children, the denial of marriage rights can preclude a couple from living together. Many gay Americans have their own biological children from prior heterosexual relationships, often marriages. When such couples divorce, custody battles sometimes ensue. When they do, judges often condition the gay parent’s access to his or her child on that parent not residing with a same-sex partner. For example, the Idaho Supreme Court upheld a magistrate’s order that a father’s right to visit his own children was conditioned on his “not residing in the same house with his male partner’ during those visits.”<sup>204</sup> Such conditions are all too common<sup>205</sup> and are applied to same-sex partners but not opposite-sex partners.<sup>206</sup> As a result, courts in custody cases can essentially force unmarried same-sex couples to break up or at least not live together. If these same-sex couples were legally married,

to a lesbian couple since Ladue had an ordinance preventing two “unrelated” people from living together. The fact that the women were in a long-term relationship and raised their children together did not matter to the locality.” (citing Nancy Larson, *Gay Families, Keep Out!*, *ADVOC.*, July 18, 2006, at 34)).

199. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 1–2 (1974).

200. Nancy K. Kubasek, Kara Jennings & Shannon T. Browne, *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages*, 7 *L. & SEXUALITY* 55, 71–72 (1997).

201. *Westhab, Inc. v. City of New Rochelle*, No. 03 CIV. 8377(CM), 2004 WL 1171400, at \*9 (S.D.N.Y. May 3, 2004) (“Zoning ordinances limiting the number of unrelated persons who can occupy a dwelling have nothing to do with whether sex between consenting adults of the same gender can be criminalized consistent with constitutional guarantees.”).

202. *City of Baton Rouge/Par. of E. Baton Rouge v. Myers*, 145 So. 3d 320, 326 (La. 2014).

In response to the argument that Baton Rouge’s restrictive definition of “family” would exclude same-sex couples from housing, the Louisiana Supreme Court was persuaded, in part, by the City-Parish’s argument that same-sex relationships do not actually exist in the locality. Patrick D. Murphree, Note, *All in the Family: Assessing the Definition of “Family” in City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 61 *LOY. L. REV.* 407, 433 (2015).

203. NAN D. HUNTER, COURTNEY G. JOSLIN & SHARON M. MCGOWAN, *THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE* 89, 94 (4th ed. 2004).

204. *McGriff v. McGriff*, 99 P.3d 111, 120 (Idaho 2004).

205. *See, e.g., Burns v. Burns*, 560 S.E.2d 47, 47 (Ga. Ct. App. 2002) (finding mother in contempt of consent decree because she cohabited with lesbian partner during her children’s visits; court refused to recognize civil union as equivalent to marriage); *White v. Thompson*, 569 So. 2d 1181, 1185 (Miss. 1990) (denying custody to lesbian mother and forbidding visitation in presence of mother’s girlfriend).

206. *See, e.g., Lacey v. Lacey*, 822 So. 2d 1132, 1137 (Miss. Ct. App. 2002).



judges would have less latitude to exercise their own prejudices or to use societal prejudice as an excuse for discriminating against same-sex couples in custody battles.<sup>207</sup>

Third, in the absence of marriage, some nursing homes have separated elderly same-sex couples. Many nursing homes refuse to let unmarried same-sex partners live together in a dual-occupancy room and some forbid them from being in the same nursing care facility altogether.<sup>208</sup> One case illustrates the problem vividly. Clay Greene and Harold Scull had been partners for over twenty years when Scull, eighty-eight at the time, fell down the front steps of their home and injured himself. After Clay summoned an ambulance, county and health care workers blocked Clay's access to Harold in the hospital. The county demoted Clay to roommate status, got temporary authority to revoke Clay's power of attorney to make decisions for Harold, and then "arranged for the sale of the men's personal property, cleaned out their home, terminated their lease, confiscated their truck, and eventually disposed of all of the men's worldly possessions, including family heirlooms, at a fraction of their value and without any proper inventory or determination of whose property was being sold."<sup>209</sup> The county forced Clay out of the couple's home and confined him in a different nursing home from Harold. The men were prevented from seeing each other for the last three months of Harold's life when Harold died alone in a nursing home that refused to let him see his partner of twenty years.<sup>210</sup> The legal documents that the couple had faithfully executed did nothing to replicate the rights that married couples receive automatically.

The ballad of Clay and Harold is extreme but, unfortunately, not unique. In one instance when a nurse assistant happened upon a pair of elderly male residents having sex, the officials separated the men immediately and transferred one of the men "to a psychiatric ward, where he was placed in four-point restraints, based on the patient's 'deviant behavior.'"<sup>211</sup> Some nursing homes completely ban same-sex partners,<sup>212</sup>

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207. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

208. See INST. OF MED., *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* 275 (2011).

209. *A Devastating Loss: Clay and Harold and the Rights of LGBT Elders*, NAT'L CTR. FOR LESBIAN RTS. (Apr. 2010), <http://www.nclrights.org/about-us/newsletters/out-for-justice-april-2010/> [<https://perma.cc/96KR-RYLA>].

210. Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2034 (2010) ("After Scull fell and injured himself, officials in Sonoma County, California ignored the medical and other decision-making provisions in the power of attorney, separated the couple, terminated their lease, auctioned their possessions, forced Greene into a nursing home, and refused to allow Greene to make medical decisions for Scull or even see him."); *A Devastating Loss: Clay and Harold and the Rights of LGBT Elders*, *supra* note 209.

211. Annick Persinger, Note, *Still Pioneers: Special Social and Economic Hardships for Elderly Gays and Lesbians*, 21 HASTINGS WOMEN'S L.J. 137, 142 (2010).

212. Alex Edelman, Note, *Show-Me No Discrimination: The Missouri Non-Discrimination Act and Expanding Civil Rights Protections to Sexual Orientation or Gender Identity*, 79 UMKC L. REV. 741, 750 (2011) ("As the generation that came out during the early gay rights movement of the seventies ages, couples who have lived together for forty years cannot find nursing homes that will allow them to continue to cohabitate.").

while others prevent them from having conjugal visits.<sup>213</sup> Being involuntarily separated from one's partner is a constant risk, and often a painful reality, for many gay people in nursing homes.<sup>214</sup> In short, the *Obergefell* dissenters' blithe assertion that unmarried same-sex couples can live together is too often not true.

## 2. Raising Children

The *Obergefell* dissenters declared that marriage rights did not affect gay couples' ability to parent. Roberts asserted same-sex couples denied the right to marry could still "raise their families as they see fit."<sup>215</sup> Thomas similarly alleged that states have not restricted the ability of same-sex couples "to raise children."<sup>216</sup> In particular, Thomas claimed that the "Petitioners . . . raise their children in peace."<sup>217</sup> The Justices offered no citations or support for their claims. This is understandable, because their claims are false.

The inability of same-sex couples to marry both complicated and thwarted the adoption process in many states. In some states, same-sex couples were statutorily prohibited from adopting.<sup>218</sup> However, even states that allowed gay individuals to adopt sometimes banned gay couples from adopting, meaning that an adopted child could only have one parent.<sup>219</sup> Other states prevented adoption by a gay co-parent by forbidding second-parent adoptions, in which a person can adopt his or her partner's biological (or adoptive) child, unless the parents are legally married.<sup>220</sup> As a result, in many states without marriage equality, children being raised by same-sex couples had two parents, but one of those parents had no parental rights.<sup>221</sup>

213. Jaime E. Hovey, Comment, *Nursing Wounds: Why LGBT Elders Need Protection from Discrimination and Abuse Based on Sexual Orientation and Gender Identity*, 17 ELDER L.J. 95, 110–11 (2009).

214. Nancy J. Knauer, "Gen Silent": *Advocating for LGBT Elders*, 19 ELDER L.J. 289, 318–19 (2012) ("The more common recurring complaints include: the refusal to recognize long-term partners, separation from long-term partners, deferring to the wishes of next of kin . . ." (footnotes omitted)).

215. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, J., dissenting).

216. *Id.* at 2635 (Thomas, J., dissenting).

217. *Id.*

218. See MISS. CODE ANN. § 93–17–3(5) (West 2007 & Supp. 2015) ("Adoption by couples of the same gender is prohibited."); UTAH CODE ANN. § 78–30–9(3)(a) (LexisNexis 2002) ("The Legislature specifically finds that it is not in a child's best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.") (amended 2008).

219. *Obergefell*, 135 S. Ct. at 2595 ("Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent.")

220. See, e.g., *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 815 (Ky. Ct. App. 2008) ("Stepparent status requires a legal marriage to the child's parent."); *S.B. v. L.W.*, 793 So. 2d 656, 663 (Miss. Ct. App. 2001) ("[O]ther states have declined to permit homosexuals from even adopting their partner's biological child. This practice is often referred to as 'second-parent adoptions.'")

221. See, e.g., *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 913 (S.D. Miss. 2014) ("Becky Bickett and Andrea Sanders are partners who have shared a committed relationship

This denial of parental rights to one of a child's parents had real consequences. In case of emergencies, schools and hospitals could refuse to recognize one of an injured child's parents as having decision-making authority.<sup>222</sup> This could delay the start of necessary medical treatment. Furthermore, if the child's sole legally recognized parent were to die, the state could take a child away from his or her surviving parent, who had no legal relationship despite the familial bonds.<sup>223</sup> In such cases, the child could lose both parents—one by death and one by forcible legal removal—and the only family he or she had ever known, simply because the child's parents were forbidden from marrying.<sup>224</sup> Conversely, if the nonlegally recognized parent were to die, the child would be denied certain entitlements that would automatically flow to the child if the deceased parent had been legally recognized.<sup>225</sup> In either case, children suffer more when both of their parents are not legally recognized, because the same-sex couple cannot marry.<sup>226</sup>

The absence of marriage rights can also affect parental status when a same-sex couple moves. In addition to legal adoption, parental rights may be established through legal presumptions, namely that a person married to the woman giving birth is the presumed legal parent of the child.<sup>227</sup> As judicial judgments, adoptions by parents in a same-sex couple must generally be recognized in all states.<sup>228</sup> However, parental rights created through legal presumptions are not necessarily entitled to full faith and credit. As a result, when a same-sex married couple secured equal parental rights in their home state through a legal presumption, one parent could lose his or her parental rights upon crossing the border into some states that didn't recognize same-sex marriage.<sup>229</sup> This could make simple family vacations treacherous because the family unit legally dissolved and reformed as the family drove across the country.

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with each other for 10 years. Together they raise twin 16-month-old boys, whom Becky legally adopted. Andrea has no parental rights.”)

222. *Obergefell*, 135 S. Ct. at 2595 (“If an emergency were to arise, schools and hospitals may treat . . . children as if they had only one parent.”).

223. *Id.* (“And, were tragedy to befall either [lesbian mother], the other would have no legal rights over the children she had not been permitted to adopt.”).

224. Mary Ann A. van Dam, *Mothers in Two Types of Lesbian Families: Stigma Experiences, Supports, and Burdens*, 10 J. FAM. NURSING 450, 475 (2004) (“Mothers in lesbian families who live in states where second-parent adoption by the other partner is not legally allowed are concerned about the death or incapacitation of the legal mother. Because the surviving partner or co-mother may be a legal stranger to her own child, partner death can mean the loss of the surviving mother's life partner and her children.”).

225. WOLFSON, *supra* note 64, at 95–96 (2004).

226. See *Obergefell*, 135 S. Ct. at 2600–01 (“Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.” (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013))).

227. See generally Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1190 (2016).

228. *V.L. v. E.L.*, 136 S. Ct. 1017 (2016).

229. Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families*

The *Obergefell* dissenters' argument is bewildering given that the primary argument made by opponents of marriage equality was that marriage is necessary to raise children. The dissenters essentially delinked marriage and child-rearing by asserting that same-sex parents can raise their children perfectly fine without marriage, which completely undermines the primary justification advanced for same-sex marriage bans. Of course, this was always a fallacious defense because denying the children of same-sex couples the stability of marriage does nothing to increase the stability of heterosexual-led households. Instead, denying marriage to same-sex couples harms their children.<sup>230</sup> As the *Obergefell* majority explained, "[w]ithout the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life."<sup>231</sup> The *Obergefell* dissenters never explained why the children of opposite-sex parents need the stability of married parents, but the children of same-sex parents do not.

Finally, same-sex couples cannot "raise their children in peace" when courts legally forbid children to be in the presence of one parent's same-sex partner, as happens in some custody battles.<sup>232</sup> In short, the claim that unmarried same-sex couples can "raise their families as they see fit" is false.

### 3. Approximating Marriage Through Legal Documents

Justice Thomas asserted that same-sex couples could easily create many of the benefits of legal marriage through contracts and other legal documents. He claimed that states have not "prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney."<sup>233</sup> His dissent belies a fundamental ignorance about the legal lives of same-sex couples in the decades before marriage equality.

Justice Thomas's facile approach to contract-as-marriage substitute is fundamentally flawed for several reasons. First, the process of trying to replicate marriage benefits through contracts is itself extremely burdensome. As the Washington Supreme Court observed:

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*Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 33 (2010) ("Currently, even when one state views both members of a same-sex couple as legal parents, this legal parental status is not secure when the family moves about the country. Many states likely will continue to view the non-birth parent as a legal stranger to the child, possibly without any rights or obligations with respect to the child.").

230. *Obergefell*, 135 S. Ct. at 2590 ("The marriage laws at issue thus harm and humiliate the children of same-sex couples.").

231. *Id.*; see also *United States v. Windsor*, 133 S. Ct. 2675, 2693–94 (2013) ("And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.").

232. See *supra* notes 204–07.

233. *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting).

many day-to-day decisions that are routine for married couples are more complex, more agonizing, and more costly for same-sex couples. A married person may be entitled to health care and other benefits through a spouse. A married person's property may pass to the other upon death through intestacy laws or under community property laws or agreements. Married couples may execute community property agreements and durable powers of attorney for medical emergencies without fear they will not be honored on the basis the couple is of the same sex and unmarried. Unlike heterosexual couples who automatically have the advantages of such laws upon marriage, whether they have children or not, same-sex couples do not have the same rights with regard to their life partners that facilitate practical day-to-day living, involving such things as medical conditions and emergencies (which may become of more concern with aging), basic property transactions, and devolution of property upon death.<sup>234</sup>

The requirement to execute private contracts can impose "significant financial and estate planning obstacles" on same-sex couples denied the ability to marry.<sup>235</sup> Those same-sex couples that cannot afford a lawyer may be unable to procure and execute the necessary legal documents.<sup>236</sup> Many same-sex couples mistakenly believe that their partners would inherit their property intestate and are thus less likely to protect themselves through private measures.<sup>237</sup> After all, opposite-sex couples can gain inheritance rights in some states through common law marriage, which is denied to same-sex couples.<sup>238</sup>

Second, many benefits of marriage cannot be replicated through contracts. For example, state (and federal) tax benefits and prison visitation rights cannot be secured through private contracts between same-sex partners.<sup>239</sup> Same-sex partners were

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234. *Andersen v. King Cty.*, 138 P.3d 963, 985 (Wash. 2006).

235. *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 914 (S.D. Miss. 2014).

236. Mary Louise Fellows, Monica K. Johnson, Amy Chiericozzi, Ann Hale, Christopher Lee, Robin Preble & Michael Voran, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 21 (1998) ("One underlying problem with relying on contract law is that the cost of obtaining legal advice to accomplish the contract may be prohibitive for some couples and lead to postponement for others."); *see, e.g.*, WILLIAM ESKRIDGE, *GAYLAW* 273 (1999) (discussing lesbian couple who "were not rich enough to afford an attorney needed to draft documents such as a will, a power of attorney, or a joint property agreement").

237. Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 442 n.132 (1999) (reporting that "45.5% of respondents with same-sex partners (45 respondents) mistakenly believed that their partner would be among their heirs").

238. *See* T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 60 (2004) ("In a minority of states, opposite-sex partners who satisfy the requirements of a common law marriage within that state are treated as legal spouses for all purposes, including inheritance.").

239. Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives To Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 786 (1995) ("Moreover, many benefits of marriage—such as tax deductions or prison visitation rights—can be granted only by the government and are not susceptible to creation by private contract.").

denied survivor benefits when their partners died in the line of duty.<sup>240</sup> Even legally married same-sex couples were sometimes denied federal rights if they resided in a state that banned same-sex marriage. For example, after *Windsor* invalidated DOMA and provided that the federal government would recognize same-sex marriage, states without marriage equality were able to evade the Family and Medical Leave Act (FMLA) and effectively prevent gay employees from taking unpaid leave to care for a sick spouse.<sup>241</sup> In light of the *Obergefell* ruling, the Attorneys General of Texas, Arkansas, Georgia, Louisiana, and Nebraska dropped their litigation to prevent same-sex couples from taking advantage of the FMLA.<sup>242</sup>

Moreover, even when the two parties in a same-sex relationship contract with each other, this does not create rights with respect to third parties. For example, if a third party wrongfully killed or injured one's lawful spouse, the surviving (or un-injured) spouse could sue the tortfeasor for wrongful death or loss of consortium. However, in most jurisdictions without marriage equality, the unmarried couple could not contract to make third parties so liable.<sup>243</sup> As a result, a gay person would suffer the loss of a life partner without legal recourse.

Furthermore, even when same-sex couples execute contracts to protect their rights, third parties often ignored these documents, sometimes with devastating results.<sup>244</sup> For example, Bill Flanigan and Robert Daniel were registered as domestic partners in their home city of San Francisco when the couple was visiting Washington D.C. and Robert became critically ill.<sup>245</sup> Although Bill had Robert's medical power of attorney, the emergency room staff at the University of Maryland Health Care System refused to share Robert's information or even let Bill see his dying partner.<sup>246</sup> Bill was denied access until hours later when Robert's mother arrived and demanded that Bill be admitted. By then, Robert was unconscious and died

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240. See, e.g., *Glossip v. Missouri Dep't of Transp. & Highway Patrol Emp. Ret. Sys.*, 411 S.W.3d 796 (Mo. 2013).

241. *Texas v. United States*, 95 F. Supp. 3d 965, 970 (N.D. Tex. 2015).

242. Alexa Ura, *Texas Concedes Case Over Benefits for Same-Sex Couples*, TEXAS TRIB. (July 20, 2015), <http://www.texastribune.org/2015/07/20/texas-concedes-case-over-benefits-same-sex-couples/> [<https://perma.cc/ZTF8-GA7G>].

243. See *Bashaway v. Cheney Bros.*, 987 So. 2d 93, 95–96 (Fla. Dist. Ct. App. 2008) (holding that same-sex couples cannot bring loss of consortium claims because same-sex marriage is banned).

244. Historically, many same-sex couples tried to replicate the incidents of marriage through private contracts but were thwarted when judges treated private contracts between long-term same-sex couples as nothing more than prostitution and thus unenforceable. *Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Cal. App. 1981). Even wills executed by gay people may not be carried out by probate judges. Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 227 (1981) (discussing cases and risk that “courts might be more inclined to strike down a will that bequeaths an estate to a testator’s homosexual lover than one that leaves the estate to a testator’s spouse or heterosexual lover.”); see also Camille M. Quinn & Shawna S. Baker, *Essential Estate Planning for the Constitutionally Unrecognized Families in Oklahoma: Same-Sex Couples*, 40 TULSA L. REV. 479, 502–04 (2004) (discussing examples of gay decedents’ wills being challenged).

245. Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals To Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1274–75 (2006).

246. *Id.*

without ever knowing that Bill was desperately trying to say goodbye.<sup>247</sup> If they had been married, this never would have happened.<sup>248</sup> Bill and Robert's ordeal is not unique.<sup>249</sup> In too many cases, "Hospitals, employers and other institutions will say, 'We don't care what the law says, you are not married.'"<sup>250</sup> Legal documents are not a substitute for marriage because many administrators refuse to read these papers and simply deny access to long-term partners, often forcing people to die alone, unaware that their loved one is in another room anxiously trying to get to them.<sup>251</sup> In the context of elderly gays, one report found that in ten percent of reported cases, nursing home staff ignored a medical power of attorney when it was assigned to a resident's same-sex partner.<sup>252</sup> Ultimately, private agreements provide less predictability and less protection than marriage rights.<sup>253</sup>

Finally, several states tried to make resort to private arrangements more difficult. While some states allowed same-sex couples to contract with respect to property rights,<sup>254</sup> several states enacted so-called super-DOMAs that included in "state constitution[s] not just a ban on same-sex marriage but also anything 'like marriage,' such as domestic partnerships."<sup>255</sup> For example, Michigan's DOMA provided that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."<sup>256</sup> The Michigan Supreme Court interpreted this to mean that—because same-sex unions could not be

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247. *Id.*

248. GEORGE CHAUNCEY, *WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* (2005) ("Because they were never allowed to marry and because anything less than marriage is still seen as less significant, Bill and Robert never got to say goodbye to one another.").

249. See Shawna S. Baker, *Where Conscience Meets Desire: Refusal of Health Care Providers To Honor Health Care Proxies for Sexual Minorities*, 31 *WOMEN'S RTS. L. REP.* 1, 8–9 (2009) (discussing the ordeal of Janice Langbehn and Lisa Pond: "For eight hours, Janice and the children waited in the hospital's emergency room. For eight hours, each and every one of Janice's attempts to be with her partner were thwarted. For eight hours, the hospital denied Lisa's three children access to their mother's bedside. For eight hours, Lisa lay dying alone."); *Reed v. ANM Health Care*, 225 P.3d 1012, 1012 (Wash. App. 2008).

250. Tina Kelley, *Couples Not Rushing to Civil Unions in New Jersey*, *N.Y. TIMES* (Mar. 21, 2007) (quoting Steven Goldstein, Chairman of Garden State Equality), <http://www.nytimes.com/2007/03/21/nyregion/21civil.html> [<https://perma.cc/F6TK-RQL9>]. Hospital staffs withhold information from partners that is freely given to spouses. See *Lewis v. Harris*, 908 A.2d 196, 202 (N.J. 2006). Same-sex couples are sometimes forced to lie and claim to be siblings in order to secure hospital visitations and participation in medical decision-making. *Griego v. Oliver*, 316 P.3d 865, 874 (N.M. 2013).

251. See DAVID MOATS, *CIVIL WARS: A BATTLE FOR GAY MARRIAGE* 155 (2004).

252. *New Report Shows Long-Term Care Facilities Aren't Safe for LGBT Elders*, *NLCR* (Apr. 5, 2011), <http://www.nclrights.org/new-report-shows-long-term-care-facilities-arent-safe-for-lgbt-elders/> [<https://perma.cc/85JP-NGK9>].

253. Fellows et al., *supra* note 236, at 18 ("Although persons in committed relationships can protect their respective interests under current law through private agreements, the protections fall short of the predictability and enforceability provided to persons who are married.").

254. See *Forum for Equal. PAC v. McKeithen*, 893 So. 2d 715, 737 (La. 2005) (Calogero, C.J., concurring).

255. AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* 131 (2012).

256. *MICH. CONST. Art. 1, § 25* (West).

recognized “for any purpose”—Michigan “prohibits public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners.”<sup>257</sup> The law prevented both the state and local governments of Michigan from providing benefits to the same-sex partners of employees in their contracts.<sup>258</sup>

Virginia’s same-sex marriage ban seemed to go even further. It provided that any “civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.”<sup>259</sup> As Jonathan Rauch explained, “[o]n its face, the law could interfere with wills, medical directives, powers of attorney, child custody and property arrangements, even perhaps joint bank accounts. If a gay Californian was hit by a bus in Arlington, her medical power of attorney might be worthless there.”<sup>260</sup> Other states similarly sought to interfere with the contractual rights of same-sex couples.<sup>261</sup> At a minimum, such laws created anxiety and uncertainty for same-sex couples.<sup>262</sup>

In sum, private contracts, wills, and powers of attorney are not satisfactory substitutes for marriage. Thomas was wrong to imply that they were.

#### 4. Private Religious Ceremonies

Thomas asserted that same-sex marriage bans did not interfere with religious liberty because gay couples could hold private religious ceremonies, albeit without conferring any actual legal rights or benefits upon the couples. Thomas claimed that states have not restricted the ability of same-sex couples “to make vows to their

257. Nat’l Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524, 543 (Mich. 2008).

258. Mich. Op. Att’y Gen. No. 7171 (2005), 2005 WL 639112 at \*9 (stating that Kalamazoo’s “policy of offering benefits to same-sex domestic partners violates the amendment’s prohibition against recognizing any ‘similar union’ other than the union of one man and woman in marriage”); see also *Michigan Attorney General: Marriage Ban Also Bans DP Benefits*, ADVOC. (Mar. 18, 2015), <http://www.advocate.com/news/2005/03/18/michigan-attorney-general-marriage-ban-also-bans-dp-benefits-15457> [<https://perma.cc/S48M-KGA2>] (“Local governments and the state of [f] Michigan won’t be able to provide benefits for same-sex partners of employees in future contracts now that voters have approved a constitutional ban on same-sex marriage, the state’s attorney general said Wednesday.”).

259. VA. CODE ANN. § 20-45.3 (West).

260. Jonathan Rauch, *Virginia’s New Jim Crow*, WASH. POST (June 13, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A36314-2004Jun12.html> [<https://perma.cc/WUC8-XWG7>].

261. See Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 130 (1996) (discussing Georgia, Arkansas, and Florida); Symposium, *Same-Sex Marriage Symposium*, 16 GEO. MASON U. C.R. L.J. 329, 332 (2006) (statement of Jim Dyke) (“Indeed, existing laws make civil unions, partnership contracts, and anything else resembling traditional marriage illegal between Virginia gays.”).

262. Virginia’s Attorney General eventually issued an opinion that “the marriage amendment will not affect the current legal rights of unmarried persons involving contracts, wills, advance medical directives, shared equity agreements, or group accident and sickness insurance policies, or alter any other rights that do not ‘approximate the design, qualities, significance, or effects of marriage’ or create ‘the rights, benefits, obligations, qualities, or effects of marriage.’” Va. Op. Att’y Gen. No. 06-003 (2006), 2006 WL 4286442 at \*1. That opinion was not, however, binding. See *Beck v. Shelton*, 593 S.E.2d 195, 200 (Va. 2004).



partners in public ceremonies [or] to engage in religious wedding ceremonies . . . .”<sup>263</sup> Specifically, he asserted that the *Obergefell* petitioners “have been able to hold . . . private religious ceremonies in all States.”<sup>264</sup>

Justice Thomas again oversimplified the legal landscape. First, a same-sex couple could face legal consequences for holding a private religious wedding ceremony. The case of Robin Shahar is the best known example. As a top law student from Emory Law School, Shahar spent her second summer of law school working at the Georgia Attorney General’s office. She received and accepted an offer of a permanent job. In the months before her start date, Shahar was planning her wedding to another woman to be performed by the couple’s rabbi.<sup>265</sup> Upon learning of Shahar’s religious ceremony, Attorney General Michael Bowers terminated Shahar’s already-accepted job offer because Georgia did not recognize same-sex marriages.<sup>266</sup> Shahar never claimed to be legally married; she never claimed to be entitled to any of the rights or benefits associated with marriage. Instead, she participated in a religious ceremony, the kind that Thomas claimed same-sex couples have a right to engage in even without same-sex marriage rights. Nevertheless, Shahar was punished by her government employer, and when Shahar sued, the Eleventh Circuit rejected her claims that the revocation of her offer violated her First Amendment rights, as well as her rights to equal protection and substantive due process.<sup>267</sup>

Second, many states prohibited officiants—including clergy—from solemnizing same-sex marriages, even when the marriage was religious, not legal, in nature.<sup>268</sup> Before *Obergefell*, it was unclear whether clergy could be criminally liable for performing a religious marriage for same-sex couples.<sup>269</sup> One clergyman in Michigan, for example, sued to challenge Michigan’s law, because such “laws prohibit or discourage him from performing private religious marriage ceremonies, including for those in same-sex . . . relationships, because he might face civil and criminal penalties for doing so.”<sup>270</sup> This is reminiscent of the provision in Virginia’s miscegenation regime that Thomas found troubling.<sup>271</sup>

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263. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2635 (2015) (Thomas, J., dissenting).

264. *Id.*

265. *Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997).

266. *Id.* at 1101.

267. *Id.*

268. *See supra* notes 147–51.

269. Oralandar Brand-Williams, *Minister Seeks Right To Marry Couples Without License*, DETROIT NEWS (Jan. 1, 2016), <http://www.detroitnews.com/story/news/politics/2016/01/01/minister-sues-right-marriages-without-licenses/78182022/> [<https://perma.cc/DR5T-F4R6>].

270. *Carrick v. Snyder*, No. 15-CV-10108, 2016 WL 520942, at \*2 (E.D. Mich. Feb. 10, 2016).

271. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2637 n.6 (2015) (Thomas, J., dissenting) (citation omitted). Some jurisdictions also criminalized officiating at non-religious same-sex weddings. For example, the mayor of the upstate New York village of New Paltz, Jason West, was charged with nineteen criminal counts—for which he faced imprisonment for up to nineteen years—for performing marriage ceremonies for same-sex couples. Thomas J. Lueck, *Police Charge New Paltz Mayor for Marrying Same-Sex Couples*, N.Y. TIMES (Mar. 3, 2004), [http://www.nytimes.com/2004/03/03/nyregion/police-charge-new-paltz-mayor-for-marrying-same-sex-couples.html?\\_r=0](http://www.nytimes.com/2004/03/03/nyregion/police-charge-new-paltz-mayor-for-marrying-same-sex-couples.html?_r=0) [<https://perma.cc/X6VH-6AS2>].

In sum, Thomas was too quick to claim that same-sex couples could participate in religious ceremonies without negative consequence in the same way that different-sex couples could.

### 5. Hold Themselves Out As Married

In addition to his claim that same-sex couples could participate in private religious ceremonies, Justice Thomas also claimed that states had not restricted the ability of same-sex couples “to hold themselves out as married . . . .”<sup>272</sup> This is a curious argument; Thomas voted to deny same-sex couples the *legal* ability to marry but asserted that these couples could nonetheless tell the world that they were, in fact, married. Both his premise and his conclusion are wrong.

With respect to his premise, Thomas is wrong that same-sex couples could easily hold themselves out as married. One way that couples hold themselves out as married is by sharing a common last name. Sharing a last name allows a couple to communicate their commitment to the world and show that they represent a family. Before *Obergefell*, some courts had held it unlawful and “against public policy to even allow the petitioner and the lifetime partner to [hold] themselves out as being married” by adopting a common last name.<sup>273</sup> In amicus briefs opposing specific requests by same-sex couples to change their names, religious conservatives accused gay couples of “using the change of name statute as a Trojan horse in a political agenda designed in derogation of values inherent in heterosexual marriage.”<sup>274</sup> In many cases, appellate courts reversed lower courts’ rejections of same-sex couples’ applications to share a common last name.<sup>275</sup> While ultimately reaching a correct legal result, this forces same-sex couples to wait and to spend significant amounts of money for a right that is perfunctory for married couples.

Despite same-sex couples’ successes in some states’ appellate courts, before *Obergefell*, other states effectively invoked their same-sex marriage bans to prevent committed couples from holding themselves out as married by sharing a last name. For example, Scott and Daniel Wall-DeSousa had legally married in New York and had their new hyphenated last names on their Florida drivers’ licenses. When it heard what the couple had done, the Florida “DMV sent a letter threatening to revoke their

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272. *Obergefell*, 135 S. Ct. at 2635 (2015) (Thomas, J., dissenting).

273. *In re* Application for Change of Name by Bacharach, 780 A.2d 579, 581 (N.J. Super. Ct. App. Div. 2001) (quoting and reversing lower court opinion) (brackets in original); *In re* Bicknell, 2001-Ohio-4200, *rev’d*, 771 N.E.2d 846 (Ohio 2002) (“Similarly, it is not ‘reasonable and proper’ for a court to change the last name of a woman living with a woman to whom she cannot legally marry, to the same last name as that of the other woman.”) (quoting and affirming trial court rejection of application to share common last name). The Ohio Supreme Court eventually allowed same-sex couples to share a last name, but not without dissent. *In re* Bicknell, 771 N.E.2d 846, 849 (Ohio 2002) (Lundberg-Stratton, J., dissenting) (“Allowing unmarried couples, whether homosexual or heterosexual, to legally assume the same last name with the stamp of state approval is directly contrary to the state’s position against same-sex and common-law marriages, neither of which Ohio recognizes.”).

274. *Bacharach*, 780 A.2d at 584.

275. *See, e.g., In re* Miller, 824 A.2d 1207 (Penn. Super. 2003); *In re* Reynolds, No. CIV. 2013-0031, 2013 WL 6705984, at \*4 (V.I. Dec. 17, 2013).

licenses if they did not reapply in their former names [because] Florida law prohibits recognition of same-sex marriages from any jurisdiction and for any purpose.”<sup>276</sup> When Daniel refused to remove his hyphenated name from his—legally issued—Florida drivers license, the State cancelled his driving privileges indefinitely.<sup>277</sup> Although they were legally married in New York, the Florida DMV sent the couple a letter stating that their marriage “certificate from another state is not considered as a legal basis for a name change on a Florida driver license.”<sup>278</sup>

Furthermore, Thomas was wrong to imply that holding oneself out as married in any way compensates for being denied the legal right to marry. Marriage confers significant material benefits on couples, both legal and social. Applying the label “married” to an unmarried couple does not bestow social recognition equivalent to marriage upon the couple.<sup>279</sup> Moreover, holding oneself out as married confers none of the legal benefits of marriage.

Finally, Thomas was wrong to suggest that same-sex couples could hold themselves out as married without repercussions. The case of Robin Shahar again is prophetic. Michael Bowers, the Georgia Attorney General, punished Shahar for holding herself out as married.<sup>280</sup> Bowers asserted that “[t]o hold yourself out as married when you can’t be is to flaunt [sic] the law.”<sup>281</sup> He elaborated, “I’m not going to hire someone who holds themselves out to the public by their own admission as being engaged in a homosexual marriage.”<sup>282</sup> It is noteworthy that Shahar’s temple considered Shahar and her partner to be married in the eyes of their religion. Shahar herself made this distinction, noting that she was religiously married, not legally married. Yet Bowers punished her nonetheless.

In another example, Tracy Thorne-Begland, a prosecutor in Richmond, Virginia who was nominated to be a judge, was punished by state legislators for holding himself out as married to his partner. Because Thorne-Begland lived with his partner, with whom he was raising two children,<sup>283</sup> Delegate Bob Marshall successfully killed

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276. John Wright, *Florida Couple Sues DMV, State Officials Over ‘Driving While Gay-Married’ Policy*, TOWLEROAD (Dec. 2, 2014), <http://www.towleroad.com/2014/12/florida-couple-sues-dmv-state-officials-over-driving-while-gay-married-policy/> [<https://perma.cc/RHG5-27W6>].

277. *Id.*

278. Rene Stutzman, *Brevard Men File Challenge to Florida Ban on Gay Marriage in Orlando Federal Court*, ORLANDO SENTINEL (Nov. 28, 2014), <http://www.orlandosentinel.com/news/breaking-news/os-florida-gay-marriage-challenge-orlando-20141128-story.html> [<https://perma.cc/8RKY-2Y7D>].

279. Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1415 (2009) (“[W]hen same-sex couples hold themselves out as married in a state that forbids them from marrying, they do not access all of the connotations of marriage afforded to same-sex couples, even if they obtain some of them.”).

280. *See* Shahar v. Bowers, 114 F.3d 1097, 1107 (11th Cir. 1997) (“If Shahar is arguing that she does not hold herself out as “married,” the undisputed facts are to the contrary.”).

281. Richard Shumate, *Setting the Record Straight*, THE ADVOCATE, Feb. 21, 1995, at 34.

282. *Georgia Denies Gay Lawyer a Job*, N.Y. TIMES (Oct. 6, 1991), <http://www.nytimes.com/1991/10/06/us/georgia-denies-gay-lawyer-a-job.html> [<https://perma.cc/M9NZ-NJNX>] (quoting Bowers).

283. Alix Bryan & Lorenzo Hall, *State Lawmaker Challenges Gay Judge Nominee*, WTVR NEWS (May 12, 2012), <http://wtvr.com/2012/05/13/marshall-challenges-gay-judge-nominee>

the nomination in the Virginia House of Delegates by arguing that the nominee was improperly “hold[ing] himself out as being married,” and that this was in “contradiction to the requirement of submission to the [Virginia] constitution,” which forbids same-sex marriage.<sup>284</sup> Neither Shahar nor Thorne-Begland were engaging in any deception but each was nonetheless punished for revealing their commitment with their partners. Neither couple was claiming the legal benefits of marriage, but merely holding themselves out as half of a couple in a committed relationship. Both were penalized, thus disproving Thomas’s assertion that same-sex couples can necessarily hold themselves out as married.

## 6. Travel

Similar to his assertion that same-sex couples can live together without restraint, Justice Thomas also claimed that same-sex couples “have been able to travel freely around the country, making their homes where they please.”<sup>285</sup> Again, Thomas misrepresented how gay lives are lived in America.<sup>286</sup>

The ability of same-sex couples to travel is complicated when some states refuse to recognize same-sex marriages. A couple can be legally married in one state and yet be treated as unmarried should the couple move to a state without marriage equality.<sup>287</sup> Same-sex couples cannot travel to some states because one parent will lose

-tracy-thorne-begland/ [https://perma.cc/Z48U-HVRW].

284. Laura Vozzella, *House of Delegates Rejects Gay Judge Tracy Thorne-Begland*, WASH. POST (May 15, 2012), [https://www.washingtonpost.com/blogs/virginia-politics/post/house-of-delegates-rejects-gay-judge/2012/05/15/gIQAPN5YQU\\_blog.html](https://www.washingtonpost.com/blogs/virginia-politics/post/house-of-delegates-rejects-gay-judge/2012/05/15/gIQAPN5YQU_blog.html) [https://perma.cc/38KY-FSR2] (quoting Marshall).

Thorne-Begland received a positive vote the following year, though Marshall again stood in opposition. See Jim Nolan, *Legislature Elects 1st Openly Gay Judge to Richmond Court*, RICHMOND TIMES-DISPATCH (Jan. 15, 2013), [http://www.richmond.com/news/latest-news/legislature-elects-st-openly-gay-judge-to-richmond-court/article\\_787f7360-5f3c-11e2-9d1d-001a4bcf6878.html](http://www.richmond.com/news/latest-news/legislature-elects-st-openly-gay-judge-to-richmond-court/article_787f7360-5f3c-11e2-9d1d-001a4bcf6878.html) [https://perma.cc/B8WS-N5FL].

285. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2635 (2015) (Thomas, J., dissenting).

286. Some states denied marriage rights to same-sex couples with the apparent intent to deter gay people from residing there. As then-Governor of Texas Rick Perry famously announced when asked about gay veterans returning to Texas from the Iraq war, “Texas has made a decision on marriage, and if there’s a state with more lenient views than Texas, then maybe that’s where they should live.” R.A. Dyer, *Gay-Rights Group Demands Apology*, FORT WORTH STAR-TELEGRAM, June 10, 2005, at 5B. In other words, Texas did not want gay couples (or individuals) making their homes there. See Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2234 (2005) (noting that historically, before the debate about same-sex marriage, “courts have sometimes suggested as a reason for denying effect to an out-of-state marriage has been a state’s desire to dissuade couples in a disfavored relationship from moving to the state in the first place”).

Even outside of the context of same-sex marriage, many states have worked to make themselves inhospitable to gay people. Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579 (2017); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by ‘Unenforced’ Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000) [hereinafter Leslie, *Creating Criminals*].

287. *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 914 (S.D. Miss. 2014).

parental rights over the couple's children.<sup>288</sup> In states without marriage equality, legal documents are more likely to be ignored and gay people are more likely to die alone.<sup>289</sup>

Recognizing these hardships, several pre-*Obergefell* courts held that “the fundamental right to marry necessarily includes the right to remain married.”<sup>290</sup> The *Obergefell* dissenters would have rolled back this line of authority and stripped married couples of their legal status should they travel into non-equality states. This gives the lie to Thomas's assertion that same-sex couples could “travel freely around the country, making their homes where they please.” This is true only to the extent that same-sex couples are willing to have their previously-legal marriages become invalid and to have their families not legally recognized. That is hardly traveling freely where one pleases.

### 7. The Right To Be Left Alone

The *Obergefell* dissenters concluded with sweeping declarations about the ease of gay life and the superfluity of marriage equality. Roberts asserted same-sex marriage bans do not meaningfully affect gay couples because “the laws *in no way* interfere with the ‘right to be let alone.’”<sup>291</sup> Thomas parroted that “Petitioners . . . have been left alone to order their lives as they see fit.”<sup>292</sup> These are awfully strident proclamations on how carefree life was for gay couples denied access to marriage.

Thomas specifically claimed that states have not restricted the ability of same-sex couples “to enter same-sex relationships”<sup>293</sup> and “to engage in intimate behavior.”<sup>294</sup> This claim is particularly ironic because until 2003, over a dozen states did criminalize exactly such behavior until the Supreme Court applied substantive due process to invalidate sodomy laws in *Lawrence v. Texas*.<sup>295</sup> Justice Thomas voted to uphold the constitutionality of sodomy laws. In other words, Thomas opposed any right for same-sex couples to be left alone, but he then invoked this right to deny same-sex couples the right to marry.

More importantly, Thomas's factual assertions are again wrong. States did not leave gay couples alone to live in peace. Because they were denied marriage rights, same-sex couples lived in greater fear that a partner would die alone because hospital workers would ignore their legal rights; that their children could be taken away from them; that they could be penalized for having a religious ceremony or holding themselves out as married; or that their legal documents would be ignored.

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288. *In re Sebastian*, 879 N.Y.S.2d 677, 682–83 (Sur. Ct. 2009).

289. *See supra* notes 244–53.

290. *Kitchen v. Herbert*, 755 F.3d 1193, 1213 (10th Cir. 2014) (collecting cases).

291. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, J., dissenting) (emphasis added).

292. *Id.* at 2635 (Thomas, J., dissenting).

293. *Id.*

294. *Id.*

295. 539 U.S. 558, 565 (2003) (“[T]he protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”).

*B. Understanding the Dissenters' Whitewashing of Anti-Gay Discrimination*

The *Obergefell* dissenters misrepresented the lives of gay Americans and gay couples. In response to the personal stories and the public policy analyses demonstrating the harms imposed by same-sex marriage bans, Thomas and Roberts tried to create a counter-narrative that same-sex couples were able to live lives on par with opposite-sex couples. The dissenters sought to make same-sex marriage seem unnecessary.

Their narrative plays into—and legitimizes—the false narrative created by opponents of equality that gays in America do not deserve any legal protection because their lives are privileged and they face no discrimination.<sup>296</sup> Scalia made this argument in his *Romer* dissent when he opined that Colorado could constitutionally strip gays of non-discrimination protections in part because they “have high disposable income” and “possess political power much greater than their numbers.”<sup>297</sup> This picked up on the state’s argument that gay Coloradans should be excluded from non-discrimination protections because they are not discriminated against.<sup>298</sup> This is now a common refrain in campaigns to prevent the inclusion of sexual orientation in non-discrimination ordinances.<sup>299</sup>

Perhaps the *Obergefell* dissenters were attempting to build a foundation for the argument that sexual orientation should not be considered a suspect classification because gays are not discriminated against. One of the factors for suspect classification is whether the class has suffered a history of discrimination. At least one court has asserted that this factor counsels against applying heightened scrutiny to anti-gay laws because of recent gains.<sup>300</sup> Discounting the discrimination imposed on gay Americans could make it less likely that courts will strike down anti-gay laws of the sort that the *Obergefell* dissenters have supported in every gay rights case that has reached the Supreme Court.

No one should learn gay history from the *Obergefell* dissents. These sections of the dissents are bare of any citation to any scholarship, any case law, or any source for a reason: they present a false history. American society and every level of government have historically treated gay people cruelly and often barbarically. Gay people have been castrated, lobotomized, tortured through electroshock therapy, and discriminated against in almost every facet of their lives.<sup>301</sup> Recent years have brought much improvement but, in many parts of the country, invidious discrimination still

296. This narrative is false because gay people are more vulnerable to poverty than are heterosexuals. See M.V. LEE BADGETT, LAURA E. DURSO & ALYSSA SCHNEEBBAUM, *NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* (June 2013) (noting that the rates of poverty are higher for gay people than for the general population), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> [<https://perma.cc/G8KZ-LX9Y>].

297. *Romer v. Evans*, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting).

298. CARLOS A. BALL, *FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION* 123 (2010).

299. STONE, *supra* note 255, at 25–26 (noting use of argument “that gays did not qualify for minority status because of their wealth, power, and lack of discrimination”).

300. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1007–08 (D. Nev. 2012), *rev'd and remanded sub nom. Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

301. ESKRIDGE, *supra* note 236, at 82; Leslie, *Creating Criminals*, *supra* note 286.

prevails. The national movement to prevent marriage equality was but one aspect of this history of discrimination. This movement was driven in large part by an unrestrained desire to condemn and mistreat gay people, as Part IV discusses.

#### IV. THE HISTORY OF THE DEBATE OVER SAME-SEX MARRIAGE

The *Obergefell* dissenters also attempted to rewrite the history of the national debate over marriage equality for same-sex couples. Justice Scalia lamented that “[u]ntil the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but *respectfully*, attempted to persuade their fellow citizens to accept their views.”<sup>302</sup> Roberts condemned the *Obergefell* majority for effectively stopping this “*vibrant* debate.”<sup>303</sup> Similarly, Justice Thomas asserted that same-sex marriage bans were not anti-gay<sup>304</sup> and did not have a “sordid history,” as did miscegenation laws.<sup>305</sup> In the dissenters’ telling, the national campaign to pass DOMA and to amend state constitutions to prohibit same-sex marriage was respectful, vibrant, and not anti-gay. Don’t believe them.

The *Obergefell* dissenters attempted to use their Supreme Court writings to white-wash the history of animus, invective, and lies that animated the national push to ban same-sex marriage. The national debate over marriage equality began when Congress proposed the misnamed Defense of Marriage Act in response to the Hawaii Supreme Court holding that the state’s same-sex marriage ban constituted gender discrimination would have to survive heightened scrutiny.<sup>306</sup> Congress sought to ensure that neither the federal government nor other states would have to recognize same-sex marriages performed in Hawaii or any other state that legalized same-sex marriages. Debating DOMA on the floor of the House of Representatives, “members of Congress repeatedly voiced their disapproval of homosexuality, calling it ‘immoral,’ ‘depraved,’ ‘unnatural,’ ‘based on perversion,’ and ‘an attack upon God’s principles.’”<sup>307</sup> Representative Barr accused “homosexual extremists” of leading a “direct assault” against “an institution basic not only to this country’s foundation and to its survival but to every Western civilization,” while openly gay representative Studds noted that words like “promiscuity, perversion, hedonism, narcissism . . . depravity and sin” had been “thrown around” by opponents of marriage equality.<sup>308</sup>

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302. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting) (emphasis added).

303. *Id.* at 2612 (Roberts, C.J., dissenting) (emphasis added).

304. His sole support was the fact that ancient Greece accepted homosexual conduct but limited marriage to opposite sex couples. He does not explain how that proves that the same-sex marriage bans adopted within the previous twenty years in America were not motivated by anti-gay animus.

305. *See Obergefell*, 135 S. Ct. at 2636 n.5 (2015) (Thomas, J., dissenting).

306. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); H.R. Rep. No. 104-664, at 2–11 (1996), <https://www.gpo.gov/fdsys/pkg/CRPT-104hrpt664/pdf/CRPT-104hrpt664.pdf> [<https://perma.cc/2PSF-FM4L>].

307. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 378–79 (D. Mass. 2010).

308. Mark Strasser, *Life After DOMA*, 17 DUKE J. GENDER L. & POL’Y 399, 414 n.110 (2010).

Some congressmen openly condemned homosexuality as “immoral and harmful.”<sup>309</sup> Given their expressed anti-gay feelings, DOMA supporters seemed more intent on hurting same-sex couples than defending marriage. When striking down DOMA in *Windsor*, the Supreme Court noted:

The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States. The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.<sup>310</sup>

Like DOMA, state same-sex marriage bans were motivated by animus against same-sex couples and gay Americans more broadly.<sup>311</sup> During the house floor debate in Washington state, for example, the legislature’s prime sponsor of that state’s same-sex marriage ban “told the legislature’s only openly gay member that homosexuals should be put on a boat and shipped out of the country.”<sup>312</sup> In legal briefs before the Tenth Circuit, attorneys supporting same-sex marriage bans approvingly quoted the Bible for the proposition that same-sex sexual activity is “an abomination” whose participants should be killed.<sup>313</sup> On the day of the *Obergefell* oral argument, opponents of marriage equality held signs in front of the Supreme Court proclaiming that “Homo Sex Is Sin” and “Your Sin of Sodomy Is Worthy of Death” among other slanders.<sup>314</sup> Within the Court itself, just as Solicitor General Donald Verrilli was set to begin his argument, a man stood up and starting yelling, “If you support gay marriage, you will burn in hell!”<sup>315</sup> The Supreme Court Justices knew firsthand the tone of the debate. One wonders, if this is civil debate, what does incivility look like?

The most inflammatory lie told to generate opposition to same-sex marriage was that gay people are child molesters who will assault children if gay marriage is legally recognized. One of the main promoters of California’s Proposition 8 asserted that voters must oppose same-sex marriage because “homosexuals are twelve times more

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309. Mark Strasser, *DOMA, the Constitution, and the Promotion of Good Public Policy*, 5 ALB. GOV’T L. REV. 613, 618 (2012) (quoting Rep. Funderburk).

310. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

311. *Andersen v. King Cty.*, 138 P.3d 963, 1039 (Wash. 2006) (Bridge, J., dissenting) (“[T]here is little doubt that the DOMA was enacted because of, not merely in spite of, its adverse effects upon gays and lesbians.”).

312. *Id.* at 980.

313. *See, e.g.*, Brief of Amicus Curiae in Support of Utah’s Constitutional Amendment No. 3 at 1, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (quoting Leviticus); *see also* Melissa A. Yasinow, *When Romer Met Feeney: Why the Second Sentence of the Ohio Marriage Amendment Violates Equal Protection*, 61 CASE W. RES. L. REV. 1315, 1375 (2011) (noting how during debate over Ohio’s ban on same-sex marriage, proponent of ban “stated that it was not necessarily unreasonable to punish gays and lesbians with the death penalty”).

314. MARC SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON* 355 (2015).

315. *Id.* at 357.



likely to molest children.<sup>316</sup> Opponents of marriage equality have accused gay Americans of being child molesters in their legal briefs<sup>317</sup> and in their campaign literature.<sup>318</sup> This was a retread of long-used fabrication that gay people should not be allowed to marry, to teach, or to be near children because they molest children.<sup>319</sup>

This “molestation libel” is a lie that “has been thoroughly discredited.”<sup>320</sup> Professor William Eskridge has explained that the molestation lie “is the most vicious anti-gay myth, not only because it is false, but also because it is an inversion of the data.”<sup>321</sup> Unfortunately, the molestation accusation was just one of many lies told by opponents of marriage equality. As the Montana Supreme Court observed, “[t]he scare tactics, misinformation, and propaganda used by the promoters of the Marriage Amendment were then, and remain now, not only false, but patently absurd as well.”<sup>322</sup> These false claims hurt gay people, especially parents, who were routinely called evil and dangerous to children.<sup>323</sup> The molestation libel also disproves Scalia’s assertion that opponents of marriage equality were respectful.

Roberts sought to show the civil nature of the debate over same-sex marriage by denying that any disrespectful arguments were made by the opponents of marriage equality. Specifically, he declared that the *Obergefell* “opinion describes the ‘transcendent importance’ of marriage and repeatedly insists that petitioners do not seek to ‘demean,’ ‘devalue,’ ‘denigrate,’ or ‘disrespect’ the institution. Nobody disputes those points.”<sup>324</sup> Roberts’s claim is interesting because it is so adamant and so easily

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316. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 937 (N.D. Cal. 2010). This promoter also argued that “Proposition 8 will cause states one-by-one to fall into Satan’s hands.” *Id.*

317. Ruth Butterfield Isaacson, “Teachable Moments”: *The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 136 (2010) (“An amicus brief authored by several family and religious organizations took the child-centered argument against same-sex marriage a step further, asserting that children raised by same-sex parents are at higher risk of being molested, experiencing domestic violence, and ‘being drawn into homosexual behavior themselves.’” (citation omitted)).

318. *See Perry*, 704 F. Supp. 2d at 937.

319. *See Trosino*, *supra* note 87, at 110–11.

320. Samuel A. Marcossan, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their “Second Line of Defense,”* 35 U. LOUISVILLE J. FAM. L. 721, 729 n.31 (1997) (citing Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL’Y 207, 216–17 (1995); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 156 (1991)); *see Elovitz, supra*, at 216–17 (1995) (“There is also no evidence supporting the second myth, that lesbian or gay parents are more likely to sexually abuse their children or to allow others to molest their children. In fact, research on the sexual abuse of children shows that offenders are disproportionately heterosexual men.”)

321. William N. Eskridge Jr., *Six Myths That Confuse the Marriage Equality Debate*, 46 VAL. U. L. REV. 103, 103 (2011) (“[L]esbians are far less likely to molest children than straight or gay men, and even less than straight women; openly gay men are much less likely to molest children than either straight men, or especially, closeted bisexual or gay men.” (citing Carole Jenny, Thomas A. Roesler & Kimberly A. Poyer, *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41 (1994))).

322. *Donaldson v. State*, 292 P.3d 364, 420 (Mont. 2012).

323. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 938 (N.D. Cal. 2010).

324. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2619 (2015) (Roberts, J., dissenting).

disproven. Throughout the national debate over marriage equality, gays were accused precisely of demeaning, devaluing, and denigrating the institution of marriage.

Opponents of same-sex marriage argued vociferously that marriage equality devalues marriage. In enacting DOMA, members of Congress “argued that marriage by gays and lesbians would ‘demean’ and ‘trivialize’ heterosexual marriage and might indeed be ‘the final blow to the American family.’”<sup>325</sup> In an exchange with openly gay Representative Barney Frank, Representative Henry Hyde asserted that same-sex marriage “demeans the institution . . . . The institution of marriage is trivialized by same-sex marriage.”<sup>326</sup> Representative Smith famously proclaimed that “Same-sex ‘marriages’ demean the fundamental institution of marriage. They legitimize unnatural and immoral behavior. And they trivialize marriage as a mere ‘lifestyle choice.’ The institution of marriage sets a necessary and high standard. Anything that lowers this standard, as same-sex ‘marriages’ do, inevitably belittles marriage.”<sup>327</sup> The House Report on DOMA claimed that allowing same-sex marriage “trivializes the legitimate status of marriage and demeans it by putting a stamp of approval . . . on a union that many people . . . think is immoral.”<sup>328</sup>

The proponents of same-sex marriage bans and DOMA similarly argued that gay unions would devalue marriage. For example, the California Supreme Court noted that amici defending California’s ban on same-sex marriage argued “that recognizing that the constitutional right to marry applies to same-sex couples ‘will eventually *devalue* the institution [of marriage] to the detriment of children.’”<sup>329</sup> Similarly, the drafters of Virginia’s ban on same-sex marriage asserted that “the provision of ‘same sex unions would obscure certain basic moral values and further *devalue* the institution of marriage and the status of children.’”<sup>330</sup> The DOMA supporters in Congress not only argued that same-sex marriage would devalue marriage but they would

325. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 378–79 (D. Mass. 2010) (citations omitted).

326. David B. Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 950 (2001) (citing edited transcript of debate, *House Debate on the Defense of Marriage Act*, in SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997)); see also Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 197 (1998) (“In the end, Congress concluded that same-sex marriage would ‘belittle,’ ‘demean,’ ‘trivialize,’ and ultimately destroy real marriage.”).

327. Strasser, *supra* note 308, at 414 n.110 (quoting Rep. Smith).

328. Scott Titshaw, *A Modest Proposal To Deport the Children of Gay Citizens, & Etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L.J. 407, 472 n.381 (2011) (quoting H.R. Rep. No. 104-664, at 16 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905).

329. *In re Marriage Cases*, 183 P.3d 384, 433 n.51 (Cal. 2008) (emphasis added) (noting how opponents of marriage equality misrepresented the work of philosopher John Rawls in making their argument).

330. Bostic v. Rainey, 970 F. Supp. 2d 456, 474 (E.D. Va. 2014); see also Holning Lau, *Would a Constitutional Amendment Protect and Promote Marriage in North Carolina? An Analysis of Data from 2000 to 2009*, 2012 CARDOZO L. REV. DE NOVO 173, 173 (“State Representative Paul Stam, one of the . . . chief architects [of the amendment to ban same-sex marriage in North Carolina], has argued that the amendment is necessary to protect marriage from ‘depreciation.’”).

“devalue the love between a man and a woman and weaken us as a Nation.”<sup>331</sup> In sync with religious conservative leaders,<sup>332</sup> the leading legal academic defender of marriage bans argued that “[a]nother general social effect of legalizing same-sex civil unions is the enhancement and increase in the devaluation of marriage.”<sup>333</sup> Several politicians, such as California’s then-Governor Pete Wilson argued that even “domestic partner benefits ‘devalu[ed] the institution of marriage and the family.’”<sup>334</sup> Based on this argument, then-Governor Wilson vetoed a domestic partnership bill that “would have provided very limited rights such as hospital visitation to same-sex couples.”<sup>335</sup>

Finally, Roberts was also wrong to assert that no one claimed that same-sex marriage would denigrate traditional marriage. In the *Obergefell* case itself, the states defended their marriage bans by asserting that only heterosexual couples need the stability of marriage in the case of accidental procreation. When the Sixth Circuit judges “asked counsel why that goal required the simultaneous exclusion of same-sex couples from marrying, we were told that permitting same-sex marriage might *denigrate* the institution of marriage in the eyes of opposite-sex couples who conceive out of wedlock, causing subsequent abandonment of the unintended offspring by one or both biological parents.”<sup>336</sup> You read that correctly: a primary defense of same-sex marriage bans was that same-sex marriages would denigrate marriage so much that heterosexual parents will abandon their biological children. Roberts cannot credibly claim that he was unaware of such arguments—they are referenced in the actual Sixth Circuit opinion that the Supreme Court was considering in *Obergefell*.

In sum, the *Obergefell* dissenters failed to appreciate the history of the national and statewide debates over same-sex marriage. These dissents should not serve as any part of the historical record of how the debate over same-sex marriage actually transpired. In the wake of *Romer*, most savvy opponents of equal rights have taken greater efforts to conceal their animus towards their neighbors and fellow citizens who happen to be gay. But their true colors still sometimes shine through. The dissenters either ignored the invective hurled against gay Americans or they believed that slandering millions of gay Americans as child molesters is somehow “respectful.”

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331. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 379 (D. Mass. 2010) (quoting 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski)).

332. Marcia Zug, *Mail Order Feminism*, 21 WM. & MARY J. WOMEN & L. 153, 157 n.26 (2014) (“James Dobson of Focus on the Family has argued that same-sex marriage devalues marriage and thus makes opposite marriage less attractive.”).

333. Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401, 440 (2002)

334. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 149 (2014); see also David B. Cruz, *The New “Marital Property”: Civil Marriage and the Right to Exclude?*, 30 CAP. U. L. REV. 279, 296 (2002) (referring to “those who insist, like California state legislator Pete Knight, author of my state’s anti-same-sex marriage Proposition 22, that even domestic partnership provisions ‘cheapen’ or demean the institution of marriage”).

335. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 59 (2014).

336. DeBoer v. Snyder, 772 F.3d 388, 422 (6th Cir. 2014) (Daughtery, J., dissenting), *rev’d sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

## CONCLUSION

The *Obergefell* dissenters collectively sought to rewrite the histories of marriage, of constitutional law, of the debate over same-sex marriage, and of the legal treatment of same-sex couples. Their motivation is evident: Through a combination of ignoring and misrepresenting *Loving* and the nation's history of miscegenation laws, the dissenters tried to make the *Obergefell* opinion appear to be an unprecedented and antidemocratic power grab by the federal courts. By misrepresenting the difficulty of gay life in America, they sought to make marriage equality—and non-discrimination laws that include sexual orientation—unnecessary. By misrepresenting the cruelty of the campaign against same-sex marriage, the *Obergefell* dissenters sought to make opponents of civil rights appear both respectful and respectable. Future generations should not read the *Obergefell* dissents and believe that the *Obergefell* majority ended a civil debate.

If the *Obergefell* dissents have value as historical documents, it is not as an accurate chronicle of history but rather as a cautionary tale of how the desire to discriminate can be so powerful as to blind people to historical truths.