

PLOWING AROUND OBERGEFELL

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Stenhouse, when I was a boy on the farm in Illinois there was a great deal of timber on the land which we had to clear away. Occasionally we would come to a log which had fallen down. It was too hard to split, too wet to burn and too heavy to move, so we plowed around it.

—Abraham Lincoln¹

INTRODUCTION

Does our national Constitution, fairly interpreted, compel each state to extend the status, privileges, and burdens of “marriage” to same-sex couples equally with opposite sex couples?

A decade ago, our national Supreme Court gave an emphatic affirmative answer to this question. In *Obergefell v. Hodges*, the Court held that under the Fourteenth Amendment, “same-sex couples may exercise the fundamental right to marry,” so the states may not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”²

The decision was controversial, endorsed by only a bare five-to-four majority. Each of the four conservative Justices offered a vigorous and extensive dissent.³ And on the same day, leading Republican politicians, including each of the Party’s major presidential candidates, repudiated the decision, some vociferously.⁴ Public opinion appeared evenly divided.⁵

But soon thereafter, opposition largely evaporated. Just two years later, the author of the lead dissent, Chief Justice Roberts, announced his acquiescence by joining an opinion endorsing *Obergefell*.⁶ Among the other conservative Justices, whether appointed before or after the decision, only two (Justices Thomas and Alito) have subsequently

1 Attributed to Abraham Lincoln. PRESTON NIBLEY, BRIGHAM YOUNG: THE MAN AND HIS WORK 369 (7th ed. 1974).

2 *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015).

3 *Id.* at 686–713 (Roberts, C.J., dissenting); *id.* at 713–20 (Scalia, J., dissenting); *id.* at 721–36 (Thomas, J., dissenting); *id.* at 736–42 (Alito, J., dissenting).

4 Jonathan Topaz & Nick Gass, *Republican Presidential Candidates Condemn Gay-Marriage Ruling*, POLITICO (June 26, 2015, at 13:58 ET), <https://www.politico.com/story/2015/06/2016-candidates-react-supreme-court-gay-marriage-ruling-119466> [<https://perma.cc/UM93-FEDE>].

5 A poll by the Associated Press showed that thirty-nine percent of Americans supported the Court’s decision, while forty-one percent opposed it. David Crary & Emily Swanson, *AP Poll: Americans Divided After Court Backs Gay Marriage*, AP NEWS (July 20, 2015, at 03:37 ET), <https://apnews.com/united-states-government-supreme-court-of-the-united-states-general-news-23805949c55041b8a5ecce4d9608fe6fc> [<https://perma.cc/8PQM-KKTP>].

6 *Pavan v. Smith*, 582 U.S. 563, 564, 567 (2017) (per curiam).

registered any opposition,⁷ and only Justice Thomas has expressly moved to reconsider.⁸ Furthermore, the national Republican Party, at the urging of President Trump, soon fell silent.⁹ Meanwhile, as measured by opinion polls, a majority of the people came to endorse not only the policy of same-sex marriage,¹⁰ but also the judicial decision adopting it.¹¹

Moreover, this general endorsement has resulted in new public policies. Within the last five years, voters in four states (Nevada, California, Colorado, and Hawaii), by comfortable majorities, amended their respective constitutions to conform with the *Obergefell* holding.¹² And in late 2022, Congress, by substantial bipartisan majorities,¹³ passed the “Respect for Marriage Act,” which largely codified the decision.¹⁴ The issue, then, seems settled.

Nonetheless, one recent development has led some commentators to fear (or hope) that *Obergefell* might be reversed: the Supreme

7 Davis v. Ermold, 141 S. Ct. 3, 4 (2020) (Thomas, J., joined by Alito, J., respecting denial of certiorari) (contending that the Court forced a policy “choice upon society through its creation of atextual constitutional rights”).

8 Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

9 Meridith McGraw, *The GOP Waves White Flag in the Same-Sex Marriage Wars*, POLITICO (Aug. 16, 2021, at 04:30 ET), <https://www.politico.com/news/2021/08/16/republicans-gay-marriage-wars-505041> [https://perma.cc/CHX2-2CLQ].

10 Megan Brennan, *Record Party Divide 10 Years After Same-Sex Marriage Ruling*, GALLUP (May 29, 2025), <https://news.gallup.com/poll/691139/record-party-divide-years-sex-marriage-ruling.aspx> [https://perma.cc/7UP2-UHN3].

11 Brendan Rascius, *Do Americans Think Same-Sex Marriage Will Be Overturned? What a New Poll Found*, MIA. HERALD (June 16, 2025, at 10:46 ET), <https://www.miamiherald.com/news/nation-world/national/article308593640.html> [https://perma.cc/K26B-5NKZ] (detailing that a majority of respondents opposed reversing *Obergefell* and only twenty-five percent favored its reversal).

12 The majorities ranged from fifty-six percent to sixty-four percent. *Hawaii Remove Legislature Authority to Limit Marriage to Opposite-Sex Couples Amendment* (2024), BALLOTPEDIA, [https://ballotpedia.org/Hawaii_Remove_Legislature_Authority_to_Limit_Marriage_to_Opposite-Sex_Couples_Amendment_\(2024\)](https://ballotpedia.org/Hawaii_Remove_Legislature_Authority_to_Limit_Marriage_to_Opposite-Sex_Couples_Amendment_(2024)) [https://perma.cc/GQJ2-9HWH] (last visited Sep. 6, 2025); *California Proposition 3, Right to Marry and Repeal Proposition 8 Amendment* (2024), BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_3,_Right_to_Marry_and_Repeal_Proposition_8_Amendment_\(2024\)](https://ballotpedia.org/California_Proposition_3,_Right_to_Marry_and_Repeal_Proposition_8_Amendment_(2024)) [https://perma.cc/AU58-H2WJ] (last visited Sep. 16, 2025); *Colorado Amendment J, Remove Constitutional Same-Sex Marriage Ban Amendment* (2024), BALLOTPEDIA, [https://ballotpedia.org/Colorado_Amendment_J,_Remove_Constitutional_Same-Sex_Marriage_Ban_Amendment_\(2024\)](https://ballotpedia.org/Colorado_Amendment_J,_Remove_Constitutional_Same-Sex_Marriage_Ban_Amendment_(2024)) [https://perma.cc/7X78-UKS5] (last visited Sep. 16, 2025); *Nevada Question 2, Marriage Regardless of Gender Amendment* (2020), BALLOTPEDIA, [https://ballotpedia.org/Nevada_Question_2,_Marriage_Regardless_of_Gender_Amendment_\(2020\)](https://ballotpedia.org/Nevada_Question_2,_Marriage_Regardless_of_Gender_Amendment_(2020)) [https://perma.cc/NL72-2FXF] (last visited Sep. 6, 2025).

13 See *Respect for Marriage Act of 2022*, BALLOTPEDIA, https://ballotpedia.org/Respect_for_Marriage_Act_of_2022 [https://perma.cc/LM4D-44W9] (last visited Sep. 16, 2025).

14 Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

Court's momentous decision, in *Dobbs v. Jackson Women's Health Organization*, to reverse *Roe v. Wade*.¹⁵ To be sure, the *Dobbs* majority expressly distinguished abortion from same-sex marriage, and called "unfounded" any "fear that our decision will imperil" same-sex marriage.¹⁶

But *Dobbs* imperils *Obergefell* in two ways. First, the case set a precedent that a generally popular, decades-old progressive holding¹⁷ may nonetheless be reversed in favor of state authority to adopt conservative policies. From a conservative standpoint, what *Dobbs I* did for state authority to protect prenatal life, a *Dobbs II* might do for state promotion of "traditional marriage." Second, *Dobbs* rejected two premises essential to the *Obergefell* reasoning: *viz.*, (1) that the Fourteenth Amendment's authors, believing constitutional "liberty" and "equality" to be evolutionary, "entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning," and (2) assigned to the judiciary the chief authority to discern and enforce each generation's redefinitions.¹⁸ Justice Kennedy expressly relied on these "established tenets" to reach the Court's holding.¹⁹ But in *Dobbs*, the majority plainly disestablished these tenets: The Court held that the liberties secured by the Amendment consisted *only* in a fixed set of fundamental rights—those "deeply rooted in this Nation's history and tradition."²⁰ Some of these fundamental rights are enumerated in the Constitution (chiefly the Bill of Rights), while others—a "select list" only—are "not mentioned anywhere in the Constitution" but remain deeply rooted.²¹ The job of the Court, then, was to safeguard these fundamental enumerated and unenumerated rights, not to discover new ones.

15 *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973)); *see, e.g.*, Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS L. REV. 1323, 1408–09 (2025) (contending that "*Dobbs* leaves *Obergefell* and its other substantive due process precedents that recognize liberty more dynamically to future erasure and erosion—the contours and timing of which are unknown today"); Matthew J. Franck, *The Legacy of Obergefell, Ten Years Later*, PUB. DISCOURSE (June 26, 2025), <https://www.thepublicdiscourse.com/2025/06/98289/> [<https://perma.cc/E5C4-SQ7P>] ("If the abortion precedent could be overturned—though it took a horrifying forty-nine years—perhaps *Obergefell* can be as well.").

16 *Dobbs*, 142 S. Ct. at 2261.

17 *See Abortion*, GALLUP (Apr. 10, 2026), <https://news.gallup.com/poll/1576/abortion.aspx> [<https://perma.cc/7KL5-52A6>] (showing that in the decade before *Dobbs*, substantial majorities of Americans consistently opposed reversing *Roe*).

18 *Obergefell v. Hodges*, 576 U.S. 644, 663–64 (2015); *cf. Dobbs*, 142 S. Ct. at 2247–48.

19 *Obergefell*, 576 U.S. at 664.

20 *Dobbs*, 142 S. Ct. at 2260 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

21 *Id.* at 2246.

Abortion is neither constitutionally enumerated, nor on the “select list” of otherwise deeply rooted rights.²² The same is true of “same-sex marriage.” Indeed, in his majority opinion in *Dobbs*, Justice Alito made precisely the same fundamentalist argument found in his dissent in *Obergefell*, as well as his plurality opinion in *McDonald v. City of Chicago*.²³

Therefore, the fears (and hopes) that *Obergefell* might meet the same fate as *Roe* appear well founded. Accordingly, since *Dobbs*, and especially in the last year, a small (but significant) number of prominent officials have called for *Obergefell*’s reversal, most notably state legislative chambers in Idaho and South Dakota.²⁴

In this Article, I will contend that these conservative efforts are misguided. Although *Obergefell*, like *Roe*, was “egregiously wrong,”²⁵ the decision cannot and should not be overturned in our time. Nor is such reversal even necessary. Conservative states can vigorously promote “natural” and even “traditional” marriage by policies that leave *Obergefell* alone. Social conservatives should seek merely to contain *Obergefell* and otherwise “plow around” it.

This Article will proceed in four parts, corresponding to the following conclusions:

- (1) *Obergefell* reflected and imposed a radically new definition of “marriage,” one that wholly replaced matrimony with romantic partnership.
- (2) As a matter of constitutional law, this compulsory redefinition was egregiously wrong, in some ways that have not yet been fully elaborated. In particular, the decision:
 - (a) violated the reserved rights of the states, as secured by not only the Tenth Amendment, but also the Republican Guarantee Clause and the First Amendment;
 - (b) was irreconcilable with the original text and purpose of the Fourteenth Amendment; and
 - (c) has proven a menace to parental and speech rights protected by that Amendment.
- (3) Further, the compulsory redefinition harmed natural marriage or “matrimony” itself—that association indispensable

22 *Id.* at 2245, 2253.

23 *Id.* at 2246; *Obergefell*, 576 U.S. at 737 (Alito, J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

24 See Jason Lemon, *Ten Years After Landmark Supreme Court Ruling, Is Same-Sex Marriage at Risk?*, NEWSWEEK (June 26, 2025, at 13:33 ET), <https://www.newsweek.com/2025/07/04/ten-years-after-landmark-supreme-court-ruling-same-sex-marriage-risk-2088309.html> [https://perma.cc/Z4FT-7ZZE]; H.R.J. Mem’l 1, 68th Leg., 1st Reg. Sess. (Idaho 2025); H.R. Con. Res. 6012, 2025 Legis. 100th Leg. Sess. (S.D. 2025).

25 *Dobbs*, 142 S. Ct. at 2243.

to the common good of any political community, and especially our Republic “conceived in liberty, and dedicated to the proposition that all men are created equal.”²⁶

- (4) But nonetheless, because the redefinition largely reflected a century of disintegration in the popular understanding of “marriage,” overturning *Obergefell* is neither possible nor desirable, nor even necessary, as lawmakers can renew matrimony merely by containing *Obergefell* and “plowing around” it.

I. REDEFINITION: MATRIMONIAL V. ROMANTIC PARTNERSHIP

Critics of *Obergefell* have frequently objected that the Supreme Court “redefine[d]” marriage.²⁷ Some supporters have energetically contested the claim.²⁸ According to Justice Kennedy’s majority opinion, the Court did not redefine marriage but accepted an old definition and simply removed an unjust exclusion of some persons from its benefits.

“Excluding same-sex couples from marriage,” he wrote, “conflicts with a central premise of the right to marry.”²⁹ In identifying this “central premise,” he relied on “four principles,”³⁰ one of which was the following old definition of marriage:

[M]arriage is a right “older than the Bill of Rights” “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is

26 President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript available at https://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm [<https://perma.cc/S4XF-5NDF>]).

27 *Obergefell*, 576 U.S. at 702 (Roberts, C.J., dissenting); see, e.g., Robert P. George, *Obergefell Must Go*, FIRST THINGS (July 1, 2025), <https://firstthings.com/obergefell-must-go/> [<https://perma.cc/9SLA-NFAL>]; Helen M. Alvaré, *Alvaré, J., Dissenting*, in WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S SAME-SEX MARRIAGE DECISION 241, 250 (Jack M. Balkin ed., 2020).

28 Patrick Parkinson, *Can Marriage Survive Secularization?*, 2016 U. ILL. L. REV. 1749, 1750 (contending that the Court did not redefine marriage, but merely reflected its secularization); Zack Ford, *No, The Supreme Court Did Not Just ‘Redefine’ Marriage*, THINK PROGRESS (June 26, 2015, at 19:20 ET), <https://archive.thinkprogress.org/no-the-supreme-court-did-not-just-redefine-marriage-b965c85690b0/> [<https://perma.cc/5L2V-AQSG>] (cited by Steven A. Young, Note, *Retroactive Recognition of Same-Sex Marriage for the Purposes of the Confidential Marital Communications Privilege*, 58 WM. & MARY L. REV. 319, 321 n.9 (2016)).

29 *Obergefell*, 576 U.S. at 668.

30 *Id.* at 665.

an association for as noble a purpose as any involved in our prior decisions.”³¹

This definition is found in the final paragraph, a peroration of sorts, to the Court’s opinion in *Griswold v. Connecticut*.³²

As indicated by the date of *Griswold*, by the time *Obergefell* was decided, the definition was already a half-century old. Indeed, the *Griswold* Court suggested that this definition was as old as our Republic, if not older. If so, the *Obergefell* Court did not presume to redefine but merely reaffirmed marriage, as understood for decades if not centuries, and simply removed the unjust exclusion of same-sex couples from its benefits.

With more nuance, William Eskridge has acknowledged that *Obergefell* did involve a modern redefinition.³³ Still, he contends that by 2015, the new definition had already been adopted across the several states; the Court’s decision merely welcomed all couples under its aegis:

When the *Obergefell* dissenters complained that the majority was redefining marriage, they were missing [the] point, that Americans had redefined marriage through their choices [moving] away from the communitarian, children-based vision of traditional marriage and toward a liberal, choice-based regime where almost anybody can marry and just as easily get divorced—everyone, that is, except for lesbian and gay couples.³⁴

Here, I will largely agree with Eskridge, that *Obergefell* did not invent a new definition, but simply accepted the new one. Nonetheless, to the extent that this new definition was still contested by a substantial portion of the citizenry, especially in the most conservative states, *Obergefell* not only accepted but imposed a new definition.

To elaborate this point, I must begin with some distinctions that, though imperfect, I hope will prove serviceable for present purposes. I will distinguish (1) “natural marriage” (or “matrimony”), (2) “American traditional marriage,” and (3) romantic partnership (“*Griswoldian* marriage”).

A. Natural Marriage: “Matrimony”

Young children, even under the age of seven, frequently ask their parents, “Where did I come from?” or “Where do babies come from?” Parents often respond as follows: When mommy and daddy “love each

31 *Id.* at 666–67 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

32 *Griswold*, 381 U.S. at 486.

33 William N. Eskridge, Jr., *The Marriage Equality Cases and Constitutional Theory*, CATO SUP. CT. REV., 2014–2015, at 111, 126.

34 *Id.* at 126–27.

other, they can make a baby, and the baby grows inside mommy's tummy until it's ready to come out."³⁵

Critics often allege that such responses are misleading or otherwise harmfully uncandid. But here I will contend that the common parental response is the best: Parents are telling a noble truth. For the most part, that is where babies come from—that is the origin of the entire human race. That origin, properly speaking, is “natural marriage,” or “matrimony.” We are, for the most part, children of matrimony.

Nonetheless, that's not the whole story—there is something veiled. And here we note a challenge. To defend the propriety of any veil requires some attention to what is veiled. Social conservatives regularly face this problem. Any robust defense of public morals seems offensive to public morals, for it requires lifting the same veil that we cherish. Conservatives sometimes must negotiate, in Augustine's apt phrase, that narrow and difficult space that sometimes lies “between modesty and reason.”³⁶

Accordingly, I ask the reader's indulgence as I speak within that narrow space. I do not intend to offend. Still, I have little fear of giving grave offense either to anyone's feelings or public morals. The readership of this Article is likely relatively old and world hardened. Moreover, in our time, there may be few, if any, “public morals” left to offend.

1. Children of Unfreedom and Inequality

Let's begin with facts as real as rocks. The entire human race, without exception, has come from the same place: a long, unbroken tradition of unions between a decidedly male human gamete (sperm) and a decidedly female human gamete (ovum), which union resulted, against enormous odds, in not only (a) a pregnancy, but also (b) a live birth, and (c) a child that reached adulthood and (d) even fertile adulthood. Every last one of our ancestors, until our time, came about this way.

Further, until our time, nearly all (but not quite all) these microscopic male-female unions resulted from the macroscopic union between one decidedly male human (as the sperm provider) and one decidedly female human (as the ovum provider). That is to say, nearly

35 See, e.g., Kathy Sisson, *Hard Conversations: Where Do Babies Come From?*, THE EVERYMOM (Jan. 27, 2020), <https://theeverymom.com/hard-conversations-where-do-babies-come-from/> [https://perma.cc/FV44-ZSXU].

36 1 ST. AUGUSTINE, *DE CIVITATE DEI*, bk. I, ch. XVI, at 56 (P.G. Walsh ed. & trans., Liverpool Univ. Press 2005) (c. 426) (translation is my own) (responding to allegations that Christian women, when threatened with rape by barbarians, should have defended their chastity to the death, and noting that an adequate defense involved a difficult discussion “*inter pudorem atque rationem*”).

all these conceptions were copulatory. And until our time, in all the resulting pregnancies, the egg provider was also the womb provider—the “genetic” mother was also the “gestational” mother—she nourished the offspring first from the ovum and then from the womb.

Now the facts get rather unseemly. Of the countless fertile copulations that made us, some of them were radically unfree and unequal—so scandalous as to be almost unspeakable.

Some of our ancestors resulted from *force* (rape). Others resulted from *fraud* (false identity). Still others resulted from *accident*. The accidents fall into two categories. In some cases, even the copulations were accidental, with the parties unconscious or semiconscious (by mutual intoxication or otherwise). In many more cases, the copulations were freely chosen, but the conception was wholly accidental because decidedly *against* the intention of the copulating parties. The clearest example of such an accident is conception by prostitution. In this simple fee-for-service agreement, the parties intend to copulate and only copulate; any fertility is *adverse* to the parties’ intent. By the nature of the agreement, neither party has any intent whatsoever to conceive or receive offspring. Babies happen *despite* the agreement.

Fornication, in the purest sense of the anonymous hook-up, appears in a similar light. The liaison, though lacking monetary consideration, nonetheless is intentionally transitory and sterile. A mutually consensual “one-night stand,” as such, can never imply any intent to accept hundreds of nights of pregnancy (nine months), let alone thousands of nights of childcare (over decades).

Therefore, so many of our common ancestors were conceived without the consent, and often against the will, of one or both parents. That is to say, countless numbers of our ancestors were the children not of freedom, but of *unfreedom*: by force, fraud, or accident.

Moreover, many of these fertile unions, even if free, were decidedly *unequal*. Now all human fertility begins with radical sex inequality: One sex supplies the active gamete, the other the receptive gamete. That receptive sex, in turn, has always borne the physical and emotional burden of pregnancy. She and she alone nourishes the child from her own body, first from the egg, then from the womb, and frequently then from the breast—for months if not years. And for good reason we call this sex “female”—from the word “to suck.”³⁷ In contrast, the role of the “male” is peripheral and obscure—so much that

37 *Female*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/female_n [<https://perma.cc/JA8Q-KEB5>] (last visited Sep. 26, 2025) (tracing “female” to the Latin *femina*, which originates from an Indo-European base meaning “to suck”).

we cannot readily trace the etymology of the word.³⁸ It is harder to answer the question, “What is a man?”

Moreover, in so many cases, our male ancestor did no more than provide the gamete. He either could not or would not provide any assistance to the mother in her arduous postcoital work. This work includes not only nourishment, but also years of care and education so that the child might reach fertile adulthood. In this respect, the human female faces a challenge far greater than that of any other mammal.³⁹ The distribution of burdens seems terribly unfair. As Simone de Beauvoir pointed out, in the human female, more than any other mammal, “the subordination of the organism to the reproductive function” is the most “imperious” and “accepted with great[est] difficulty.”⁴⁰

Given the origin and antiquity of the human race—that is, originating in a very small number of common human ancestors and proceeding through thousands and thousands of generations—we are all now radically equal in this unfreedom and inequality. Whatever may be the immediate circumstances of our conception and birth, we all share equally in this heritage. To be blunt, to some extent, we are all *equally* the daughters of rapists and the sons of whores. And in such a heritage of unfreedom and inequality, we find a remarkable (and disturbing) convergence of both personal authenticity and human solidarity. It’s how we were born, who we are, *every one*.

2. Conceived in Liberty, Received for Equality

Parents do not tell their children this truth. And ladies and gentlemen do not speak about such matters in public. The reason is the same. These facts are scandalous. They seem to refute the notion of human dignity. Moreover, they are especially offensive to American public morals. Our public creed is we are a nation “conceived in liberty, and dedicated to the proposition that all men are created equal.”⁴¹ But Americans, like the rest of the human race, were, in so many generations, not conceived in liberty and not dedicated to equality.

38 See *Male*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/male_adj [<https://perma.cc/HL9Y-7L7S>] (last visited Sep. 26, 2025) (no clear etymology for “male” beyond the Latin *masculus*).

39 See Margaret Harper McCarthy, *Modern Women—Modern Mothers: Resetting the Biological Clock*, HUMANUM, no. 2, 2014, at 39, 40 (explaining Simone de Beauvoir’s view that the woman, “as compared to all [sic] other females in the animal world, is the one *most* absorbed by the fact of maternity”).

40 SIMONE DE BEAUVOIR, *THE SECOND SEX* 66 (Constance Borde & Sheila Malovany-Chevallier trans., Vintage Books 2011) (1949); see also McCarthy, *supra* note 39.

41 Lincoln, *supra* note 26.

But there is another consideration. Most of our ancestors were actually conceived in liberty and received for equality.

In many cases, the male and female agreed, freely and mutually, whether impliedly or expressly, not only to copulate but also to jointly receive and care for any offspring that might result. This association, by its nature, implies at least five elements: (1) freedom, (2) two natural persons (because artificial persons like corporations do not have offspring), (3) one male and one female, (4) indefinite duration, and (5) the joint receptivity to the conception and care of their offspring.

It is the fifth element that explains the others. For instance, the duration is indefinite because the needs of offspring are themselves indefinite. Some children, because of disability, require assistance through life, even for daily needs. Moreover, virtually all children require assistance to live as adults who flourish at least as well as their parents did. Such *equal* flourishing requires that the children of this fertile coupling may participate in a similar fertile association. Hence, as Aquinas pointed out, this association (for now, let us call it “marriage”) is indefinite because its primary purpose—the care of offspring—is “not merely for a time, but throughout [a child’s] whole life. Hence it is of natural law that parents should lay up for their children, and that children should be their parents’ heirs.”⁴² Matrimony is about children—and grandchildren.

This last element, indefiniteness, does not require that the association be indissoluble or interminable. Still, any termination requires something extrinsic to the agreement itself. The bond has no expiration date, and is not for a mere term of years, but is defeasible by force of divorce or death.

We note here a common misunderstanding. Contrary to the suggestion of many conservatives, such as Justice Alito, the primary purpose of this natural association is not procreation.⁴³ The parties’

42 ST. THOMAS AQUINAS, SUMMA THEOLOGIAE pt. III, q. 67, art. 1 (Fathers of the Eng. Dominican Province trans., Christian Classics Complete Eng. ed. 1981) (c. 1270) (citation omitted) (contending that indissolubility is of natural law); cf. JOHN LOCKE, *Two Treatises of Government*, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION §§ 78–80, at 1, 133–34 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) (claiming that natural marriage ends when a child attains reason and is therefore by nature provisional). Locke’s failure to identify fertile adulthood is contrary to his larger premise of interpersonal equality, that the child is born to equality with his or her parents. See *id.* § 55, at 123. Such equality necessarily implies the child’s equal right to do the same—to participate in the same joint parenthood, to enter matrimony, to receive and care for offspring. Consequently, the proper end of matrimony is the matrimony of one’s offspring, including flourishing grandchildren.

43 See *Obergefell v. Hodges*, 576 U.S. 644, 738 (2015) (Alito, J., dissenting) (“[M]arriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.”).

consent extends beyond conception to the protection, maintenance, and education of joint offspring. This postconception and postnatal work is the principal and defining end of this agreement. The parties consent not merely to conceive, but mainly to receive. As Blackstone observed, the parent-offspring relation is the “principal end and design” of “marriage,” for “by virtue of this relation . . . infants are protected, maintained, and educated.”⁴⁴

This receptive association, in turn, involves not only freedom but substantial equality. First and foremost, there is a measure of equality between the parents. The male approaches (though always imperfectly) a certain equality with the female. By the agreement, the male becomes a *hus-band*, that is *bound* to the woman’s *house*.⁴⁵ This *hus* is not just her dwelling, but the dwelling of her children after birth, and even the *hus* of her children before birth—her womb. And thus bound, he shares in her enormous postcoital work, first prenatal and then postnatal.

Further, of great importance, the equality of this association extends also to the parent-child relation. To be sure, parenthood begins with an inequality between parent and child that is much greater than that between male and female. This inequality is aggravated when parents selectively destroy, breed, or (in our time) even manufacture a child. Nonetheless, where the parents, instead, choose *receptivity* to inalienable children of unknown identity (of whatever beauty, intelligence, disability, etc.), the inequality is greatly mitigated.⁴⁶ Such parents do not make the child in inequality, but instead receive the child for equality. To adopt Locke’s formula, children are not “born in this state of *equality*, though they are born to it.”⁴⁷ Such children, we might say, are both *conceived in liberty* and *received for equality*.

Among the English-speaking peoples, this free and equal association has long been called “marriage” or “matrimony” from the Latin *mātrēm* (mother) and *mōnium* (state).⁴⁸ Relative to “marriage,”

44 1 WILLIAM BLACKSTONE, COMMENTARIES *410; *see also* Alvaré, *supra* note 27, at 243.

45 *See Husband*, ETYMONLINE, <https://www.etymonline.com/word/husband> [<https://perma.cc/BU6K-X44C>] (last visited Sep. 11, 2025) (“Hus” is the Old Norse word for “house.” “Band” comes from the Old Norse for “dwell” but later took on the sense of “bondage”).

46 *Cf.* John Makdisi & June Mary Zekan Makdisi, *The Transformation of Marriage as a State Institution*, 14 INTERCULTURAL HUM. RTS. L. REV. 371, 380–81 (2019) (“The ‘manufactured’ child becomes an object that is obtained for their love rather than a gift that is expressed by their love.” *Id.* at 380.).

47 LOCKE, *supra* note 42, § 55, at 123 (emphasis added).

48 *Matrimony*, ETYMONLINE, <https://www.etymonline.com/word/matrimony> [<https://perma.cc/MRJ5-W2JQ>] (last visited Sep. 10, 2025).

“matrimony” is the more descriptive word, with a clearer etymology.⁴⁹ The term indicates a *mātrēm* whose relation to the child is a *mōnium* (a state or condition). That is, the mother has not only a genetic, gestational, or other possessory relation, but she herself is under a condition that implies obligation and action.⁵⁰ Under this *mōnium*, the mother holds the child for a time, but for a longer time, motherhood holds her.

But why should we use such uni-gendered language to describe something that necessarily involves both sexes? Thomas Aquinas answered that the word is appropriate because the *principal* and *defining* purpose of matrimony is the care of offspring, and the *principal* bearer of that *mōnium* is the *mater*.⁵¹ At the same time, we might observe, by the Latinate usage, we gently veil this sex inequality in the interest of matrimony itself. We do not wish to proclaim that the male becomes a mere mother’s helper. The mitigation of sex inequality is an essential function of matrimony; by matrimony, the father becomes a substantial participant in the arduous work of caring for children—not just an assistant but a joint partner.

Further, this matrimony, properly speaking, is “natural” marriage. Matrimony is natural to us: the *normal* way that our ancestors were made. This *norm* is *statistical* as well as *ethical*. That is, the unfree or unequal modes of conception we mentioned were unusual as well as improper, but the free and equal mode was proper and more common.

I submit we can know this noble truth by reason alone. In four ways, without the assistance of the Bible or any other mode of putative revelation, we can know that matrimony is our norm.

First, our natural inclinations indicate the normality of matrimony. At least three are relevant here: *viz.*, (1) to embrace as husband and wife (marital copulation), (2) to know and care for one’s own children, and (3) to know and honor one’s parents. Matrimony serves and largely fulfills each of these natural inclinations. We generally experience these inclinations because we were generally made that way.

49 Compare *Marry*, 9 THE OXFORD ENGLISH DICTIONARY 400 (2d ed. 1989) (The word comes from the Latin word for “man” or “male.” Thus, the Latin “marita” carried the indelicate sense of a female who had been “manned.”), *with Marry*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/marry_v?tab=meaning_and_use#38160621 [<https://perma.cc/T5RW-SJ33>] (last visited Sep. 10, 2025) (finding that “marry” may be a cognate for young man or young woman).

50 See ETYMONLINE, *supra* note 48.

51 See AQUINAS, *supra* note 42, at pt. III q. 44, art. 2 (noting that “matrimony” refers to “the effect, which is the offspring, . . . [and] the *duty* of bringing up the children chiefly devolves on the women” (emphasis added)).

These relational inclinations can take the form of subrational appetite or rational apprehension. That is, we can *feel* and/or *apprehend* that it is *good* and even *praiseworthy* for a husband and wife to embrace receptively, for adults (male and female) to know and care for their resulting offspring, and for a human being, in childhood and beyond, to know and even honor his father as well as his mother.

These inclinations are, of course, never felt or apprehended perfectly. Nobody experiences all these feelings and apprehensions fully without qualification. And we experience these inclinations in diverse and unequal ways. For instance, with respect to one or more of these goods, some feel, but don't apprehend; others apprehend, but don't feel. Some find the marital embrace pleasant, but ignoble; others find it unpleasant, though noble. The same is true of inclinations between parents and offspring. These disinclinations include, but are not limited to, those feelings by which some identify as "LGBT," and the like.

Further, these inclinations often come and go. Virtually everyone experiences one of these disinclinations in some way. To cite but one common example, even the most affectionate and dutiful mother sometimes gets downright sick of her own children (though she makes a point of hiding the fact).

But conversely, among mature adults, almost no one is alien to *all* these feelings or apprehensions. All mature adults experience one or more of these three inclinations. They are, in this sense, human and universal.

Second, we can know that matrimony is natural by a consideration of our disinclinations—our aversions—if not our hatreds. We do not like the idea of conception by force, fraud, or accident—we do not enjoy thinking of ourselves that way. No one, for instance, takes pride in his or her conception by rape or prostitution. Rape is hateful to us. Prostitution is contemptible, especially as a mode of conception. "Son of a whore" is never a compliment, and always an insult.

Even conception by (uncompensated) hook-up is unseemly. The child of fornication may honor one or even both natural parents, but rarely if ever does the child honor a parent precisely for his intentional absence.

In our time, an interesting question has emerged. Now more than ever, children are not so much received, but acquired, under artificial processes of manipulation and manufacture. Artificial reproduction, via in vitro fertilization, is widely practiced⁵² and even more widely

52 Madeline Holcombe, *About 2% of Babies Born in the US Are From IVF. Here's What You Need to Know About It*, CNN (Feb. 21, 2024, at 13:01 ET), <https://www.cnn.com/2024/02/21/health/ivf-egg-freezing-explainer-wellness> [<https://perma.cc/QGD6-D85D>].

approved.⁵³ More and more forms of such manufacture are being devised, subsidized, and celebrated.⁵⁴ At the same time, one might well speculate whether the children thus manufactured will feel any particular pride, joy, or satisfaction that they were made by hand rather than by mutual embrace, that they were acquired rather than received.⁵⁵

Our hatred of the unfree and unequal modes of reproduction by which each of us was *partly* made indicates that our ancestors were *generally* not made that way. If, in fact, our ancestors had been mostly made by force, fraud, or accident, we would likely not find the idea so offensive. We would not say, “That’s not the way it’s supposed to be.” To be sure, as children of rape and prostitution, we might say it would be interesting, perhaps transcendent, to have been made by matrimonial love. And for the same reason, we might hope to sprout wings and fly: “Oh that I had wings like a dove!”⁵⁶ But at the same time, we would find our conception by force or accident no more offensive than our absence of wings.

For good reason we are not ashamed of our flightlessness; we don’t hesitate to inform children that they will never have wings. But for good reason, we do find our conception by rape or prostitution quite offensive, if not unspeakable. Freedom and equality are not merely our imaginary aspirations, but our nature. It was never proper for us to be made by unfreedom and inequality. For this reason, we disclose this fact to children of rape or prostitution with great caution;

53 Jeffrey M. Jones, *Americans Back IVF; Divide on Morality of Destroying Embryos*, GALLUP (June 13, 2024), <https://news.gallup.com/poll/646025/americans-back-ivf-divide-morality-destroying-embryos.aspx> [https://perma.cc/23US-65J7].

54 See Holcombe, *supra* note 52; Rumiana Tenchov, *CAS Insights Report: New Techniques in Assisted Reproductive Technology*, CHEM. ABSTRACTS SERV. (June 11, 2025), <https://www.cas.org/resources/cas-insights/assisted-reproductive-technology-report> [https://perma.cc/79MD-YSSH] (discussing new forms of artificial reproduction); *Fact Sheet: President Donald J. Trump Expands Access to In Vitro Fertilization (IVF)*, THE WHITE HOUSE (Feb. 18, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-expands-access-to-in-vitro-fertilization-ivf/> [https://perma.cc/XXT5-2M82] (discussing government subsidizing of IVF).

55 Cf. *Genesis* 4:1, 25 (King James Version) (“And Adam knew Eve his wife; and she conceived, and bare Cain, and said, I have *gotten a man* from the LORD. . . . And Adam knew his wife again; and she bare a son, and called his name Seth: For God, said she, *hath appointed me* another seed instead of Abel, whom Cain slew.” (emphases added)). The name “Cain” indicates possession, while “Seth” means appointed. Nicholas J. Schaser, *The Meaning of Abel’s Name*, ISRAEL BIBLE CTR. (Sep. 20, 2022), <https://weekly.israelbiblecenter.com/meaning-abels-name> [https://perma.cc/MEX9-UPKZ]; M.G. Easton, *Seth*, ILLUSTRATED BIBLE DICTIONARY 616 (New York, Harper & Bros. 1893).

56 *Psalms* 55:6 (King James Version).

if children hear of it at the wrong time or in the wrong way, they might forget their natural dignity.⁵⁷

Third, we know matrimony is natural by considering our universal fragility. The fertile human adult (that is, every one of our ancestors) is something of a miracle. To go from conception, to implantation, to live birth, through infancy and childhood, to adulthood, and finally *fertile adulthood*, is extremely difficult. The vast majority of human embryos never make it that far—but every last one of our ancestors did.⁵⁸ Given our fragility, it is highly likely that, for the most part, our ancestors were not conceived in force, fraud, or accident, nor received by a beleaguered single parent. Much more promising was to have two, mutually cooperative (even affectionate?) parents—and better still that those parents themselves also be children of matrimony. With two generations of matrimony, the child might even enjoy not only two parents, but also four grandparents, and very frequently, a much larger clan of kinfolk. Babies received into such multigenerational matrimonial families were much more likely to survive the arduous path from conception all the way to fertile adulthood.⁵⁹

Fourth, modern genetic and social science largely confirms the same. Before contemporary political disputes over the meaning of “marriage,” social scientists readily identified “marriage,” whether monogamous or polygamous, as a cross-cultural phenomenon, and defined it as a lawful bond of male and female oriented toward the procreation and joint care of offspring.⁶⁰ Moreover, there is now

57 We publicly honor matrimony, but not prostitution, in part precisely to avoid teaching children an ignoble lie. See discussion *infra* Section III.B.

58 See Anthony A. Volk & Jeremy A. Atkinson, *Infant and Child Death in the Human Environment of Evolutionary Adaptation*, 34 *EVOLUTION & HUM. BEHAV.* 182, 182 (2013) (analyzing historical infant mortality rates and observing that “[b]efore modernized civilizations, across all times and cultures, children faced grim odds of survival”); Gavin E. Jarvis, *Estimating Limits for Natural Human Embryo Mortality*, F1000 RESEARCH (Dec. 6, 2016), <https://f1000research.com/articles/5-2083/v2> [<https://perma.cc/2UQK-ULW4>] (concluding “that a plausible range for normal human embryo and fetal mortality from fertilisation to birth is 40–60%”).

59 See, e.g., Kathleen Marie Heath, *The Effects of Kin Propinquity on Infant Mortality*, 50 *SOC. BIOLOGY* 270 (2003).

60 Robert F. Winch, *Family Formation, in Marriage*, 10 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 1, 2 (David L. Sills ed., 1968) (defining marriage as “a culturally approved relationship of one man and one woman” with a general “expectation that children will be born of the relationship,” such that within the relationship “sexual intercourse is legitimate” and a resulting child receives a “socially recognized father”); Gloria A. Marshall, *Comparative Analysis, in Marriage*, 10 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES supra*, at 9, 9 (summarizing marriage as “a union between a man and a woman such that children born to the woman are the recognized legitimate offspring of both partners” (quoting *THE ROYAL ANTHROPOLOGICAL INST. OF GR. BRIT. & IR., NOTES AND QUERIES ON ANTHROPOLOGY* 110 (6th ed. 1951))).

substantial reason to believe that among our hunter-gatherer ancestors, before the Neolithic Revolution, monogamy was the norm.⁶¹ Polygamy and prostitution, like chattel slavery, were largely dependent on the new and steep interpersonal hierarchies that resulted from agriculture and metallurgy.⁶² For good reason, then, the Republican Party's first platform called polygamy and slavery the "twin relics of barbarism."⁶³

3. Objections to the Definition

This sketch here no doubt is incomplete and imprecise. It may be open to many substantial objections—in particular, that the definition involves the improper inclusion or omission of certain elements. I'll briefly address a few of these objections here.

First, one might object that the definition wrongly includes freedom and twoness. After all, arranged marriages and polygamy are intelligible and have been quite common.

This objection proceeds from a misunderstanding of the terms. The "arranged marriage" is not an unfree marriage; it is not a "coerced marriage." The parties' freedom may be limited in various ways, such as parental supervision and even parental veto. But such restrictions on marital choice do not entail a compulsion to marry. A certain freedom of the parties, at least a tacit veto, seems a cross-cultural norm. Indeed, very often in traditional cultures, the parties' express consent by vow is indispensable.⁶⁴ And even where the bride or groom makes no vows and otherwise has little formal "say," the parties still have a presumptive veto; a proper marriage involves at least the tacit consent evinced by affection.⁶⁵

61 WILLIAM TUCKER, *MARRIAGE AND CIVILIZATION: HOW MONOGAMY MADE US HUMAN* 57 (2014).

62 *See id.* at 57, 60–61.

63 Republican Platform of 1856, *reprinted in* NATIONAL PARTY PLATFORMS: 1840–1960, at 27, 27 (Kirk H. Porter & Donald Bruce Johnson eds., 1961).

64 *See, e.g., Order for Consecration of Marriage: Sarum Use*, CLASSICALLY CHRISTIAN, <https://thepocketscroll.wordpress.com/classic-christian-texts/order-for-consecration-of-marriage-sarum-use/> [<https://perma.cc/7ATQ-XE6N>] (last visited Oct. 7, 2025); *see also* Hina Gupta, *A Comparative Analysis Between the Institution of Hindu and Christian Marriage*, 7 INT'L J. FOR MULTIDISCIPLINARY RSCH. art. no. 250135464, at 8.

65 As for tacit consent by affection, *see, for example*, CATULLUS, *Epithalamium on Vinia and Manlius*, in THE CARMINA OF CAIUS VALERIUS CATULLUS 110, 120 (Richard F. Burton & Leonard C. Smithers trans., London, Richard F. Burton & Leonard C. Smithers 1894) (c. 54 B.C.) (poetically urging the bride to acknowledge that her mother and father have a right to give her away, but also envisioning "the mistress, *eager for her new yoke*, firm-prisoning her soul in love; as tight-clasping ivy, wandering hither, thither, enwraps the tree around" (emphasis added)).

Similarly, “polygamy” does not violate duality. It does not designate a “marriage” between three (or more) persons. Rather, as the word indicates, poly-gamy means plural concurrent marriages, with a wife connected to multiple husbands (polyandry), or more commonly, a man connected to multiple wives (polygyny).⁶⁶ Under polygamy, a person has concurrent bilateral accords with two or more spouses.

More controversial, and central to the dispute over same-sex marriage, is the inclusion of fertility. In response to conservative claims that marriage’s procreative purpose renders “marriage” necessarily male-female, the *Obergefell* Court denied any such essential purpose. Writing for the majority, Justice Kennedy pointed to (1) the judicial precedent establishing a right to sterile marriage, and (2) the fact that intentionally sterile marriages have always been valid throughout the Union.⁶⁷ Alluding to *Griswold* and its progeny, the Court said that the Constitution protects “the right of a married couple not to procreate.”⁶⁸ Moreover, state laws had never “conditioned the right to marry on the capacity or commitment to procreate,” for the “ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State.”⁶⁹ Indeed, some prominent conservatives had virtually conceded the point.⁷⁰

As we’ll discuss below, the *Griswold* precedent reflected a radically new, decidedly non-matrimonial view of marriage. Only in the last century could one speak intelligibly of the “right” of a married couple not to procreate. When marriage was “matrimonial,” the right to a deliberately non-matrimonial matrimony was absurd, like the right to form a profitless for-profit corporation.

Further, lawmakers had compelling reason to omit any fertility prerequisite. The analogy between matrimony and incorporation provides a ready explanation. Prudence dictates, and experience seems to confirm, that such regulations may defeat the very purpose of the regulation. The very public goals promoted by these associations—fertility or profitable commerce—would be ill-served by a legal requirement that the parties prove to some magistrate both their capacity and sincere intent, either to receive children or to make profits. For much the

66 *Polygamy*, ETYMONLINE, <https://www.etymonline.com/word/polygamy> [<https://perma.cc/6GK8-8B5G>] (last visited Sep. 10, 2025); *Polyandry*, ETYMONLINE, <https://www.etymonline.com/word/polyandry> [<https://perma.cc/KR8T-PXKL>] (last visited Sep. 10, 2025); *Polygyny*, ETYMONLINE, <https://www.etymonline.com/word/polygyny> [<https://perma.cc/7489-PFD2>] (last visited Sep. 10, 2025); see also Marshall, *supra* note 60, at 14 (properly defining polygyny and polyandry as “[c]oncurrent marriages”).

67 See *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015).

68 *Id.*

69 *Id.*

70 SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 74–77 (2012).

same reason, despite the express constitutional purpose of the copyright power—to “promote the *Progress* of Science and useful Arts”⁷¹—our statutes have never required copyrighted words to be any good, let alone an improvement over existing work.⁷² The very progress of the arts requires a refusal to adjudicate progress.

Indeed, the adjudication of fertility requires even greater legislative restraint. The procedure would pose a substantial deterrent to persons of average sensitivity. Many would be less likely to enter matrimony if they had to endure such an examination of body or mind. This difficulty was humorously illustrated in Thomas More’s *Utopia*, where, in the interest of informed consent, Utopia subjected the prospective bride and groom to an antenuptial inspection of one another’s nude bodies.⁷³ Such intrusions do not foster mutually enjoyable nuptial unions. Likewise, the state’s interest in promoting fertility implies a compelling interest in not adjudicating the same.⁷⁴ Thus, it is not precisely true, as Robert George has written, that the “law has always recognized that infertile opposite-sex partners can enter into marriage.”⁷⁵ Rather, the law has wisely refused to make the inquiry at all.

Second, one might object that the definition omits at least two essential elements: *exclusivity* and *permanence*. Some conservatives, most notably George, along with Sherif Girgis and Ryan Anderson, have argued that marriage is “a comprehensive union: a union of will (by consent) and body (by sexual union); inherently ordered to procreation

71 U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

72 *Cf.* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“[T]he requisite level of creativity” to qualify for a copyright “is extremely low The vast majority of works make the grade quite easily.”)

73 Thomas More wrote:

Before marriage some grave matron presents the bride, naked, whether she is a virgin or a widow, to the bridegroom, and after that some grave man presents the bridegroom, naked, to the bride. We, indeed, both laughed at this, and condemned it as very indecent. But they, on the other hand, wondered at the folly of the men of all other nations, who, if they are but to buy a horse of a small value, are so cautious that they will see every part of him, and take off both his saddle and all his other tackle, that there may be no secret ulcer hid under any of them, and that yet in the choice of a wife, on which depends the happiness or unhappiness of the rest of his life, a man should venture upon trust, and only see about a handsbreadth of the face, all the rest of the body being covered, under which may lie hid what may be contagious as well as loathsome.

ST. THOMAS MORE, *UTOPIA* 135–36 (Gilbert Burnet trans., Cassell & Co., Ltd. 1909) (1516).

74 Justice Kagan contended, at oral argument, that if the state’s only interest was in procreation, a state could prevent any infertile couple from marrying. Transcript of Oral Argument at 56, *Obergefell*, 576 U.S. 644 (No. 14-556).

75 George, *supra* note 27.

and thus the broad sharing of family life; and calling for permanent and exclusive commitment.”⁷⁶

But matrimony does not, by nature, require either mutual exclusivity or permanence. Concurrent marriages are plainly intelligible. And impermanent marriage seems the norm; by nearly all accounts, marriage is *terminable* by death if not also divorce.

These scholars, I believe, wrongly entwine universal definitional elements with certain refinements arising from our peculiar Judeo-Christian tradition. Indeed, the authors acknowledge a distinction; they call copulation “basic,” but exclusivity and permanence “derived.”⁷⁷ Accordingly, as they acknowledge, all cultures distinguish as “marriage” (or some comparable term) the male-female union oriented toward offspring, but many permit both concurrent marriages and casual divorce.⁷⁸

To add these derivative elements to the definition impedes our legal analysis. Our laws have long drawn a sharp distinction, treating the basic elements of *twoness* and *sex-diversity* as simply *definitional*, but prohibitions on polygamy or casual divorce as *regulatory*.⁷⁹ Thus, as to its effect, *Obergefell* differed sharply in kind from a hypothetical holding that might identify polygamy as a constitutional right. *Obergefell* was more radical. It represented a wholesale redefinition of “marriage,” but the hypothetical would be less radical, a mere invalidation of a local prohibition; the former compelled speech, while the latter would bar certain prosecutions.

Moreover, the “permanence” of marriage (in the sense of “till death do us part”) is not a rational refinement but an opinion that seems almost *unique* to Christian revelation. As the Gospels attest, the Nazarene’s near-total prohibition on divorce and remarriage was a hard saying; its reception required not just a rarefied reason but special grace. He said, “All men cannot receive this saying, save they to whom it is given.”⁸⁰ And as the history of Christianity attests, even among professing and apparently sincere Christians, the acceptance and retention of that teaching has proven extremely difficult.⁸¹ If so, that

76 GIRGIS, ANDERSON & GEORGE, *supra* note 70, at 6 (emphasis omitted).

77 *Id.* at 48, 48–49.

78 *See id.*

79 *See, e.g.,* Reynolds v. United States, 98 U.S. 145, 165 (1879) (“From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity.”).

80 Matthew 19:11 (King James Version); *see also* Mark 10:10 (King James Version) (“And in the house his disciples asked him again of the same matter.”).

81 *See On the Sacrament of Matrimony*, in THE CANONS AND DECREES OF THE SACRED AND OECUMENICAL COUNCIL OF TRENT 194, 194–95 (J. Waterworth trans., Burns & Oates, Ltd. 1848) (1563) (requiring clear statements and strict discipline to maintain this teaching).

acceptance will be nearly impossible for our increasingly non-Christian citizenry.⁸²

Moreover, the word “permanence” suggests something endless, if not eternal. But if Christianity is true, then marriage ends with death.⁸³ The authors indicate as much by asserting that “till death do us part” is synonymous with “permanence.”⁸⁴ These terms, however, are not synonyms.

To make exclusivity and permanence definitional is not only false, but sows confusion in our time. In the face of our attachment to equality, the word “exclusivity” dodges what we must candidly acknowledge and explain: matrimony’s necessary *inequality*. Matrimony begins with a naked and scandalous fact: the pregnancy gap, with its reciprocal, but asymmetrical inequalities between male and female. And perhaps more aggravating to our passionate love of equality,⁸⁵ matrimony, even Christian matrimony, can only mitigate, but never eradicate, this stubborn inequality.⁸⁶ The female bears the pregnancy, the male does not. That means the woman bears the primary (and initially exclusive) *mōnium* of parenthood. At the same time, the male bears his own peculiar burden: uncertainty as to the identity of his offspring. By entering matrimony, he risks, and she does not, a lifetime of sacrifice for offspring that are not his. The latter unequal fear is the source of the anti-adultery norm, and the perennial double standard.⁸⁷ Her duty of exclusivity is primary, obvious, and thus nearly universal, while his is more of a construct, a refinement that makes their association only somewhat less unequal.

To defend natural marriage, and especially traditional marriage, we must, therefore, avoid the reassuringly egalitarian but simply false claim that natural marriage requires that perfect mutual exclusivity

82 See, e.g., *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CTR. (Oct. 17, 2019), <https://www.pewresearch.org/religion/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/> [<https://perma.cc/BUH7-Q8SR>]. But see Gregory A. Smith et al., *Decline of Christianity in the U.S. Has Slowed, May Have Leveled Off*, PEW RSCH. CTR. (Feb. 26, 2025), <https://www.pewresearch.org/religion/2025/02/26/decline-of-christianity-in-the-us-has-slowed-may-have-leveled-off/> [<https://perma.cc/D5K9-9X4M>] (finding that the decline in Christian share of U.S. population has stabilized in recent years).

83 See *Matthew* 22:30 (King James Version) (“For in the resurrection they neither marry, nor are given in marriage, but are as the angels of God in heaven.”).

84 GIRGIS, ANDERSON & GEORGE, *supra* note 70, at 74, 104.

85 See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 406 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

86 See Pope Pius XI, *On Christian Marriage*, 29 CATH. MIND 21, 44–45 (1931) (teaching that under Christian marriage, “there must be a certain inequality and due accommodation”).

87 See Brooke A. Scelza et al., *Patterns of Paternal Investment Predict Cross-Cultural Variation in Jealous Response*, 4 NATURE HUM. BEHAV. 20, 20 (2020).

demanded by our Judeo-Christian tradition. We may even agree with President John Quincy Adams's observation:

In all the stages of human society, the marriage contract confines the woman exclusively to one man; but it is believed that Christianity alone, of all human institutions, confines the man exclusively to one woman. This is one of the most excellent purifications of the law of nature, by the precepts of Christianity . . .⁸⁸

Further, to defend matrimony, we must candidly confess that even traditional Christian marriage can only treat, but not cure, the natural inequality.

Moreover, *permanence*, even if acceptable, introduces further confusion. The authors thereby suggest that marriage is not just terrestrial but celestial, or even eternal. To make “permanence” definitional to marriage confuses a society where, as I’ll discuss below, the romantic tradition has so captured the word “marriage” that many view its permanence, its celestial “transcendence,” as definitional.

Such romance-induced confusion played a central role in the radical redefinition manifested in *Obergefell* and largely accepted by the people at large. In other words, calling marriage “permanent” fosters precisely the redefinition that the conservative authors oppose.

To recapitulate, matrimony is the free association, between two persons, male and female, for the joint conception, reception, and care of offspring. By its nature, matrimony involves a joint *mōnium*, a terrestrial work of indefinite duration. Matrimony is properly called *natural* marriage. But matrimony need not involve reciprocal exclusivity or permanence.

B. American Traditional Marriage: The “Holy Estate of Matrimony”

Such natural marriage should not be called “traditional marriage.”⁸⁹ The term erroneously suggests that marriage was made by our tradition. Rather, natural marriage is what primarily makes traditions. A tradition, as the word indicates, is something handed down from generation to generation.⁹⁰ Matrimony fosters tradition by multiplying the intergenerational bonds necessary to this handing down. A

88 JOHN QUINCY ADAMS, THE SOCIAL COMPACT, EXEMPLIFIED IN THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 7 (Providence, Knowles & Vose 1842).

89 See, e.g., Jason Dulle, *Why I Am Opposed to “Traditional” Marriage*, THINKING TO BELIEVE (Sep. 23, 2013, at 10:25 ET), <https://thinkingtobelieve.com/2013/09/23/why-i-am-opposed-to-traditional-marriage/> [<https://perma.cc/4GD9-KKXW>] (supporting “natural marriage” not “traditional marriage”); cf. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 593–94 (1999) (attributing to Christianity the recognition that “[t]he primary social function of marriage is rearing children”).

90 *Tradition*, ETYMONLINE, <https://www.etymonline.com/word/tradition> [<https://perma.cc/4APQ-2YS5>] (last visited Sep. 30, 2025).

matrimonial culture gives the child four grandparents instead of just one (the maternal grandmother) and otherwise multiplies his kinfolk. Matrimony, then, is not our peculiar folkway, but a crucial means of making *any* folkway.

But we Americans did have, and perhaps still have, our “traditional marriage,” our peculiar folkways as to how we engage in natural marriage. As Adam MacLeod has noted, this “entire scheme of norms attaching to marriage *presupposes* natural marriage.”⁹¹

The American matrimonial tradition is mostly a participation in the broader Judeo-Christian tradition. That tradition refined natural marriage in various ways, five of which are relevant here. First, marriage is said to have a divine origin. The widespread phenomenon of matrimony is not a mere accident or a result of human sin or invention, but was instituted by God as part of His created order.⁹² Second, matrimony is not just the *preferred*, but the *exclusive* locus for sexual congress of any kind; concubinage, fornication, prostitution, and the like are not simply disfavored or marginal, but emphatically forbidden.⁹³ Third, monogamy, in turn, is not only the preferred but the exclusive form of matrimony; concurrent marriages (polygamy) are not just disfavored but forbidden, as the sexes now have a mutual duty of exclusivity.⁹⁴ Fourth, not only marriage in general, but every individual marriage, is established by God, and hence marriage is indissoluble by any mere human authority (except under very narrow circumstances);

91 Adam J. MacLeod, *Rights, Privileges, and the Future of Marriage Law*, 28 REGENT U. L. REV. 71, 73 (2015) (emphasis added).

92 *Genesis* reads:

So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth . . . And God saw every thing that he had made, and, behold, it was very good.

Genesis 1:27–28, 31 (King James Version). *Genesis* provides—not as a prescription but as an explanation—that “a man [shall] leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.” *Genesis* 2:24 (King James Version).

93 See *1 Corinthians* 6:9–10 (King James Version) (“Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind . . . shall inherit the kingdom of God.”); see also Pius XI, *supra* note 86, at 27. On the general disapproval in Rabbinic Judaism, see *Fornication*, 5 THE JEWISH ENCYCLOPEDIA 437 (1904).

94 See *Matthew* 19:3–19 (King James Version); *Mark* 10:2–12 (King James Version); see also *On the Sacrament of Matrimony*, *supra* note 81, at 194 (“If anyone saith that it is lawful for Christians to have several wives at the same time, and that this is not prohibited by any divine law; let him be anathema.”); Pius XI, *supra* note 86, at 27 (“Christ Our Lord [condemned] any form of polygamy or polyandry, as they are called, whether successive or simultaneous, and every other external dishonorable act . . .”). On the traditional Jewish aversion to polygamy, despite the polygamy of honored patriarchs and kings, see *Polygamy*, 10 THE JEWISH ENCYCLOPEDIA, *supra* note 93, at 120–22.

Jesus said, what “God hath joined together, let not man put asunder.”⁹⁵ Fifth, marriage between Christians is a symbol of the supernatural love between Christ and His Church—a sacrament of sorts.⁹⁶

American law once reflected this stern and reverent morality. Acknowledging the divine origin and sacramental significance of matrimony, American lawmakers deputized religious ministers to witness and even solemnize matrimony.⁹⁷ Further, reflecting biblical prohibitions, the criminal law formally prohibited consensual, nonmarital sexual acts like fornication, sodomy, and adultery.⁹⁸ As for monogamy, Mormon polygamy provoked fierce and even violent religious intolerance.⁹⁹ And, devoted to “holy” indissolubility, lawmakers begrudgingly permitted divorce only upon showing a grave violation of the matrimonial agreement—chiefly abuse, abandonment, or adultery.¹⁰⁰

These laws, however, did not fully enforce these norms.¹⁰¹ Ministerial solemnization was unnecessary. The common law required no

95 *Matthew* 19:6 (King James Version). The aversion is not unique to Christianity. Though permitted in the Torah, the Jewish tradition developed such that the right could be exercised only for “good cause.” See *Divorce*, 4 THE JEWISH ENCYCLOPEDIA, *supra* note 93, at 624–26.

96 See *Ephesians* 5:22–33 (King James Version).

97 See, e.g., 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 285, at 244 (Boston, Little, Brown & Co. 6th ed. 1881) (discussing a statute authorizing solemnization of a marriage by “justices of the peace and ministers of the gospel”).

98 See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (addressing a Texas statute “making it a crime for two persons of the same sex to engage in certain intimate sexual conduct”); *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) (contending that “laws forbidding adultery, fornication and homosexual practices” are part of “a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis”).

99 See RELIGIOUS INTOLERANCE IN AMERICA: A DOCUMENTARY HISTORY 77–79 (John Corrigan & Lynn S. Neal eds., 2010).

100 See BISHOP, *supra* note 97, § 33, at 25–26 (noting that “nearly all” states allow divorce for adultery, and “a considerable number of them” allow divorce or separation for cruelty or desertion); 2 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 485 (Bird Wilson ed., Philadelphia, Bronson & Chauncey 1804) (“But of causes which are slight or trivial, a divorce should, by no means, be permitted to be the effect. When divorces can be summoned to the aid of levity, of vanity, or of avarice, a state of marriage becomes frequently a state of war or stratagem; still more frequently, a state of premeditated and active preparation for successful stratagems and war.”).

101 As James Wilson wrote:

But, as has before been intimated, whenever urgent emergencies arise; whenever any outrage is threatened or committed against the peace or safety of society, as well as against the refined rules of the conjugal union; the law will interpose its authority, and, though it will not order, because it cannot enforce its orders for observing the latter, it will order, because it can enforce its orders for preserving the former.

officiant, and even under statutes requiring such formalities, mere civil officials sufficed.¹⁰² Further, laws against fornication and other non-marital sexual activity usually applied only in cases of public and notorious violation.¹⁰³ Finally, none of the states limited divorce on strictly biblical grounds.¹⁰⁴

Within this general consensus—a stern morality, lightly enforced—there were several disputes. Many of these resulted in substantial regulatory change.¹⁰⁵ One point of dispute involved whether the parties' freedom to enter matrimony required not only their own consent but also the consent of their parents or some other authority.¹⁰⁶

Another disagreement concerned the definition of prohibited forms of *endogamy*. At the Founding, American states were generally

... The rights, the enjoyments, the obligations, and the infelicities of the matrimonial state are so far removed from her protection or redress, that she will not appear as an arbitress; but, like a candid and benevolent neighbour, will presume, for she wishes, all to be well.

2 WILSON, *supra* note 100, at 484.

102 2 BLACKSTONE, *supra* note 44, at *440 nn.15–16 (noting the validity of marriages solemnized by a magistrate as well as a minister of the Gospel or the congregation as in a Quaker or Mennonite community); *see, e.g.*, BISHOP, *supra* note 97, § 285, at 244 (discussing a statute authorizing solemnization of a marriage by “justices of the peace and ministers of the gospel”).

103 *See Lawrence*, 539 U.S. at 569 (noting that early “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private”); *Carotti v. State*, 42 Miss. 334, 346 (1868) (“In the absence of statutory provisions, the common law, as the guardian of the morals of the people, and their protection against offences notoriously against public decency and good manners, will take cognizance of, and punish as misdemeanors, acts of adultery or fornication, when committed openly and publicly. An act of incontinency becomes an offence, punishable at common law, only when it is combined with circumstances which, beyond the mere criminality of the simple fact, were calculated to make it injurious to society, as in case of incontinency in a street or highway.”); *State v. Moore*, 31 Tenn. (1 Swan) 136, 136 (1851) (noting that “‘open and notorious lewdness’ is an indictable offence at common law—as by frequenting houses of ill-fame, or by some grossly scandalous and public indecency,” so if “the act or conduct is of such character as necessarily to be or become public, or be generally known—that is, such notoriety as will constitute the offence” but “a secret and single act of adultery or fornication does not constitute the indictable offence of lewdness”); *Anderson v. Commonwealth*, 26 Va. (5 Rand.) 627, 632 (1826) (“[T]he Common Law Courts have never taken jurisdiction of the mere offence of incontinence, nor of any offence of incontinence combined with other reprehensible circumstances, not in themselves importing a common law misdemeanor [sic]”); *see also* JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 140–48 (2014).

104 *See* BISHOP, *supra* note 97, § 33, at 26.

105 *Cf.* W. Bradford Wilcox, *The Evolution of Divorce*, NAT’L AFFS., Fall 2009, at 81, 81 (discussing how strong social pressures led to no-fault divorce laws sweeping across the United States from 1960 to 1980).

106 2 BLACKSTONE, *supra* note 44, at *437 (noting that at common law, “if the parties, themselves, were of the age of consent, there wanted no other concurrence to make the marriage valid,” but noting civil and statutory laws requiring parental notice or consent).

averse to any limits other than those specified in *Leviticus*, as such standards had been imposed by the Catholic Church in the Middle Ages, and still bore the association with “popery.”¹⁰⁷ But in the nineteenth century, more states readopted some of those medieval prohibitions—most notably barring marriages between first cousins.¹⁰⁸

Conversely, and most infamously, exogamy was forbidden. Many (sometimes most) American states, along with some American Indian tribes, prohibited marriage across racial lines—and chiefly the intermarriage of blacks with whites.¹⁰⁹ But these laws were always controversial; many claimed that these statutes represented unjust interference with personal liberty and civil rights, if not the equal citizenship vindicated by the Fourteenth Amendment.¹¹⁰

Perhaps most notably, throughout the nineteenth century and into the twentieth, Americans endorsed greater formal equality of husband and wife, especially as to property and political rights. The states increasingly set aside that marital “coverture” by which the husband was the matrimony’s sole public spokesman, the sole managing partner with authority to make binding contracts concerning the property of the spouses.¹¹¹ And by extension of the suffrage to women, the husband was no longer the matrimony’s sole spokesman at the ballot box.

107 See generally, *On the Sacrament of Matrimony*, *supra* note 81, at 194–201 (listing additional restrictions and affirming the right of the Church to add invalidating impediments); 2 BLACKSTONE, *supra* note 44, at *435 (noting English and Virginian statutes that set aside the stricter rules adopted “in the times of popery” and prohibiting marriages only “within the Levitical degrees”). But see 2 WILSON, *supra* note 100, at 481 (noting by “a law of Pennsylvania, certain degrees of consanguinity and affinity” are specified by statute, and “all marriages within those degrees are declared to be void”).

108 Diane B. Paul & Hamish G. Spencer, “It’s Ok, We’re Not Cousins by Blood”: The Cousin Marriage Controversy in Historical Perspective, 6 PLOS BIOLOGY 2627, 2627 (2008), cited in, *DeBoer v. Snyder*, 772 F.3d 388, 413 (6th Cir. 2014); MARTIN OTTENHEIMER, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE 19–60 (1996) (extensively detailing the legal history of prohibitions on cousin marriage), cited in, Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 59 n.326 (2018).

109 See PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 20–22 (2009).

110 See generally *id.*; PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY (2002); David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213 (2015).

111 For a brief defense of coverture by which the husband is the marriage’s public representative, see ADAMS, *supra* note 88, at 6–9. For a discussion of this work, see Justin Dyer, *John Quincy Adams Contra Patrick Deneen: Marriage, Family, and the Story of the American Founding*, PUB. DISCOURSE (Feb. 28, 2019), <https://www.thepublicdiscourse.com/2019/02/48330/> [https://perma.cc/X98R-HB5F]. On the reform of coverture, see, for example, Richard H. Chused, *Married Women’s Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1385–1445 (1983).

Justice Kennedy cited the resolution of some of these disputes to argue that “the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential.”¹¹² The suggestion here was that these changes effectively changed marriage no less than the endorsement of “same-sex marriage.”¹¹³ To the contrary, as the lead dissent pointed out, in *none* of these cases, was there any challenge to “the core structure of marriage as the union between a man and a woman.”¹¹⁴ All these disputes were *regulatory*, not *definitional*. “If 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.’”¹¹⁵ Indeed, in his jurisprudential introduction, Blackstone used coverture as his chief exemplar of a merely “municipal” regulation, created by positive law and therefore *not* essential: “[O]ur own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband . . . yet that right [and similar rules] have *no foundation in nature*; but are merely *created by the law*.”¹¹⁶

To further illustrate alleged “essential” changes, Justice Kennedy contended that marriage once was about property, but then, in sharp contrast, was about love.¹¹⁷ This contrast is overstated. Given the nature of matrimony, both property and affection have *always* been important and necessary auxiliaries. The joint care and education of human offspring is an enormously expensive and arduous enterprise. Property, real and personal, is always necessary. Marriage is still “about” property—as Justice Kennedy must have known as the author of the *Windsor* decision.¹¹⁸ And mutual affection, or at least collegiality, is helpful, if not indispensable, to this difficult work.

To be sure, across time and cultures, and across marriages within a culture, there may be great differences in emphasis on the relative importance of these auxiliaries. Those with inherited wealth may pine mostly for love, and those without such wealth may be preoccupied

112 *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015).

113 *See id.* at 671.

114 *Id.* at 692 (Roberts, C.J., dissenting).

115 *Id.* at 693.

116 1 BLACKSTONE, *supra* note 44, at *55 (emphasis added).

117 “For example, marriage was once viewed as an arrangement by the couple’s parents based on political, religious, and financial concerns; but by the time of the Nation’s founding it was understood to be a voluntary contract between a man and a woman.” *Obergefell*, 576 U.S. at 659–60. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9–17 (2000); STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 15–16 (2005).

118 *See* *United States v. Windsor*, 570 U.S. 744, 749 (2013). *Windsor* concerned a certain marital exemption from the federal estate tax. *Id.*

with property. Still, a difference of emphasis does not indicate a difference of definition.

In truth, despite all these disagreements and developments, the American people generally adhered to a rather robust consensus, endorsing not only natural marriage, but also the marital norms of the Judeo-Christian tradition. For our purposes, the most salient evidence of this consensus can be found in a series of judicial decisions, over three decades, where the Supreme Court unanimously affirmed and thrice reaffirmed the maxim first declared in *Murphy v. Ramsey* (1885):

For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.¹¹⁹

By my count, between 1885 and 1917, twenty-four members of the Court endorsed the maxim, and none even hinted at a dissent.¹²⁰

The maxim reflected not only the unanimous opinion of the Justices, but also the nearly unanimous opinion of the American people. As Justice Harlan noted in 1908, these views “are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse,” and by this general opinion, nonmarital sex was

119 *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (unanimous opinion). This maxim was quoted with approval in *Davis v. Beason*, 133 U.S. 333, 344–45 (1890), *abrogated by*, *Romer v. Evans*, 517 U.S. 620 (1996); *United States v. Bitty*, 208 U.S. 393, 401 (1908); and *Caminetti v. United States*, 242 U.S. 470, 486–87 (1917). In this last case, Justice McKenna filed a dissent, not from the proposition that concubinage was “immoral,” but that the broad text should be construed narrowly in accord with the legislature’s purpose of prohibiting prostitution and not “the occasional immoralities of men and women.” *Id.* at 502, 496–502 (McKenna, J., dissenting); *see also* *In re de Laveaga’s Est.*, 75 P. 790, 795 (Cal. 1904) (The court cites *Murphy* in support of the following proposition: “With lax laws on the subject of divorce, and the lax administration of such laws, it only requires that all distinction between legitimates and illegitimates be abolished, to practically abolish also the marital relation, and thus destroy the home, with all its hallowed associations. Society itself is but the aggregation of families, and to the extent that we weaken the family tie we sap the foundation of society. The history of mankind fortunately illustrates that no laws of any people have ever attempted to abolish all distinctions between legitimate and illegitimate children.”).

120 *See* *Murphy*, 114 U.S. at 45; *Davis*, 133 U.S. at 344–45; *Bitty*, 208 U.S. at 401; *Caminetti*, 242 U.S. at 486–87.

decidedly “immoral.”¹²¹ This opinion still prevailed on the eve of America’s entry into World War I.¹²²

Most important for our purposes, this “reverent morality” and this “holy estate” presupposed a decidedly terrestrial association. Directly ordered to offspring, the union was called “matrimony” and was thus a union “for life.”¹²³ Further, matrimony was pre-political, foundational to the commonwealth, and especially “necessary in the founding of a free, self-governing commonwealth.”¹²⁴ To adapt the words of President George Washington in his Farewell Address, traditional matrimony was so vital to our “political prosperity,” that the “mere politician, equally with the pious man, ought to respect and to cherish” it.¹²⁵

C. *Liberty, Equality, Romance: Griswoldian “Marriage”*

But after World War I, the courts virtually abandoned this celebration of the “holy estate of matrimony.” The *Murphy* maxim disappeared entirely from the federal and state judicial reports for three-quarters of a century. No one mentioned it until Justice Scalia’s dissent in *Romer v. Evans*, and he did so mainly to criticize his judicial predecessors for broadcasting their policy preferences—for “*indulg[ing]*” in such official praise for heterosexual monogamy.”¹²⁶

Parenthetically, this very phrase, “heterosexual monogamy,” as adopted by the most conservative member of the Court, indicates how far the judiciary had abandoned the old understanding, even two decades before *Obergefell*. A generation earlier, all would have found the phrase an absurd redundancy; mono-gamy means “one marriage” and any marriage, by nature, was necessarily heterosexual (male-female).¹²⁷

121 *Bitty*, 208 U.S. at 402.

122 *Caminetti*, 242 U.S. at 470, 486–87 (decided January 15, 1917).

123 See, e.g., *Baker v. Baker*, 13 Cal. 87, 103 (1859) (affirming that “the first purpose of matrimony, by the laws of nature and society, is procreation”); *Sissung v. Sissung*, 31 N.W. 770, 772 (Mich. 1887) (similarly announcing that “the first purpose of matrimony, by the laws of nature and society, is procreation”); *Lyon v. Barney*, 132 Ill. App. 45, 50 (1907) (stating that “the procreating of the human species is regarded, at least theoretically, as the primary purpose of marriage”).

124 *Murphy*, 114 U.S. at 45.

125 President George Washington, Farewell Address (Sep. 17, 1796), *reprinted in* THE BEST PRESIDENTIAL WRITING: FROM 1789 TO THE PRESENT 7, 15 (Craig Fehrman, ed., 2020).

126 *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (emphasis added).

127 See *Monogamy*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/monogamy_n?tab=etymology&tl=true [<https://perma.cc/27SE-TFN6>] (last visited Oct. 1, 2025); Winch, *supra* note 60, at 2 (defining marriage as “a culturally approved relationship of one man and one woman (monogamy), of one man and two or more women (polygyny), or of one woman and two or more men (polyandry), in which there is cultural endorsement of sexual intercourse between the marital partners of opposite sex”).

Meanwhile, the Supreme Court had already expressly endorsed a new meaning of marriage. In *Griswold v. Connecticut* (1965), the Court provided a new authoritative definition: “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred[,] . . . a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”¹²⁸

In the following decades, both the Supreme Court and various lower courts reiterated this definition, until it took center stage in the Court’s opinion in *Obergefell*.¹²⁹

Despite the pious-sounding words like “sacred” and “noble,” *Griswoldian* “marriage” is entirely irreconcilable with the “holy estate of matrimony” celebrated in *Murphy*. The new marriage was plainly unmatrimonial in at least three respects. First, while matrimony is the foundation of society, *Griswoldian* marriage is decidedly *not* a “social project[.]” Second, while matrimony is an agreement to accept inalienable obligations to a third person (a child), and thus a *trilateral loyalty*, the new marriage involves a loyalty that is *only* “bilateral.”¹³⁰ Third, matrimony is *by nature* indefinite and thus “enduring,” but *Griswoldian* marriage is only “hopefully” or aspirationally so.

At the same time, under *Griswoldian* marriage, the twosome is still engaged in something “noble” and even “sacred,” but without further specification. One gets the distinct sense that this marriage is more ethereal than earth-bound. If so, offspring are incidental, disposable, and even unwelcome. A romantic magic carpet ride is no place to raise children. They tend to fall off. The impression is confirmed by recalling that the context is the Court’s activist opinion that the Fourteenth Amendment, fairly interpreted, prohibits the states from making and enforcing contraception laws. *Griswoldian* marriage, then, represents a break not only with the Judeo-Christian tradition, but also natural matrimony.

How did our Supreme Court, a half-century ago, and much of society, come to accept a wholly non-matrimonial definition of “marriage”? I think the answer is a convergence of three factors: liberty, equality, and romance. We’ll take these in chronological order.

128 *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

129 See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 70 n.10 (1976); *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 843–44 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

130 Thus, contrary to some scholars, it was not so much *Obergefell* but *Griswold* that “removed the primary function of marriage to support and protect children and replaced it with a function to support and protect adults in their personal relationships[,] . . . a remarkable turn of events.” *Contra* Makdisi & Makdisi, *supra* note 46, at 386.

Romance, as the word indicates, arose in a particular place, among the speakers of romance languages, especially Old French, and more specifically southern France—at the very heart of western Christianity. But from its beginning in the twelfth century,¹³¹ the romance was indifferent, if not hostile, to Christian matrimony. As Denis de Rougemont highlighted in his landmark study, as a literary form (e.g., *Tristan and Iseult*), romance is a terrestrial tragedy suggesting celestial transcendence: an adulterous union ordered to death.¹³² At the risk of oversimplification, we might say romance is ordered to adultery and death, matrimony to fidelity and life.

Indeed, according to de Rougemont, there is substantial evidence that romance began as an intentional adversary to Christianity, and especially Christian marriage. He writes persuasively that romantic literature was arguably a veiled form of an anti-Christian (and anti-marital) movement—the Albigensians or Cathar heresy that once prevailed but was suppressed in the very region where romance then arose.¹³³

As de Rougemont points out, only after centuries was there a rapprochement between marriage and romance, whereby romance appeared domesticated.¹³⁴ But in truth, romance actually appropriated marriage for its own anti-matrimonial purposes.¹³⁵ The “romantic comedy” was born, where the plot culminated not in adultery and death but with a happy ending, involving not earthly children, but a quasi-celestial transcendent “happily-ever-after,”¹³⁶ a promise that would always make nearly every earthly marriage seem a failure.

In the decades after World War I, precisely when the “holy estate of matrimony” was displaced by *Griswoldian* “marriage,” the romance, whether comedy or tragedy, became a dominant, even ubiquitous, form in mass entertainment. “The climax of a plot should be the marriage knot,” according to Ira Gershwin’s lyric.¹³⁷ The romantic

131 See Clemency Pleming, *Did Love Begin in the Middle Ages?*, UNIV. OF OXFORD: NEWS BLOG (Aug. 14, 2014), <https://www.ox.ac.uk/news/arts-blog/did-love-begin-middle-ages> [<https://perma.cc/94TU-6ACA>].

132 DENIS DE ROUGEMONT, *LOVE IN THE WESTERN WORLD* 143 (Montgomery Beligion trans., rev. and augmented ed. 1956) (1939).

133 *Id.* at 67–140.

134 *Id.* at 270–79.

135 *Id.* at 194 (“The happy ending was first introduced in the allegorical novel of the seventeenth century. The genuine courtly romance culminated in death; it dissolved into an elevation outside the world. Now there was a general desire that everything should be tidied up; society had to be in the right, and hence the endings of novels became a return to something essentially alien to romance—happiness.”).

136 *Id.* at 234 (describing the “happy ending” of the “sentimental films” that came to dominate in the 1920s).

137 PHILIP FURIA, IRA GERSHWIN: THE ART OF THE LYRICIST 9 (1996).

marriage, once a contradiction in terms, became the dominant model. As de Rougemont observed in visiting America after World War II:

No other known civilization, in the 7,000 years that one civilization has been succeeding another, has bestowed on the love known as *romance* anything like the same amount of daily publicity by means of the screen, the hoarding, the letter-press and advertisements in magazines, by means of songs and pictures, and of current morals and of whatever defies them. No other civilization has embarked with anything like the same ingenuous assurance upon the perilous enterprise of making marriage coincide with love thus understood, and of making the first depend upon the second.¹³⁸

Romance had special charms to the American heart, with our passionate love of equality and attachment to personal liberty.¹³⁹ Relative to matrimony, it seemed far more equal and free. Romeo and Juliet were more equal and free in death than they would ever have been as a married couple. Imagine a Mrs. Montague with two bambini and one more on the way, and Mr. Montague, the schlub with a diaper bag, sulking behind her through the streets of Padua.¹⁴⁰ Or as de Rougemont remarks, “Just think of a Mme Tristan!”¹⁴¹

Accordingly, in the interest of liberty, equality, and romance, our culture elevated as ideal “marriage” something that was decidedly non-matrimonial, the deliberately sterile, “companionate marriage.” As de Rougemont observed in the 1950s, romance, as popularized in America, thus revealed itself the adversary of traditional marriage:

To try to base marriage on a form of love which is unstable by definition is really to benefit the State of Nevada [then known as the “divorce mill”]. To insist that no matter what film, even one about the atomic bomb, shall contain a certain amount of the romantic drug—and romantic more than erotic—known as ‘love interest’, is to give publicity to the germs that are making marriage ill, not to a cure.

... Romance calls for ‘the faraway love’ of the troubadours; marriage, for love of ‘one’s neighbour’. Where, then, a couple have married in obedience to a romance, it is natural that the first time a conflict of temperament or of taste becomes manifest the parties should each ask themselves: ‘Why did I marry?’ And it is no less

138 DE ROUGEMONT, *supra* note 132, at 291–92.

139 DE TOCQUEVILLE, *supra* note 85, at 408 (“The passion to which equality gives birth [is] both energetic and general.”).

140 Cf. RICHARD RODGERS & LORENZ HART, *Isn’t It Romantic?*, in RODGERS AND HART: A MUSICAL ANTHOLOGY 92, 94–95 (1995) (“Isn’t it romantic? / On a moonlight night she’ll cook me onion soup. / Kiddies are romantic, / And if we don’t fight, we soon will have a troupe! / We’ll help the population, / It’s a duty that we owe to dear old France. / Isn’t it romance?”).

141 DE ROUGEMONT, *supra* note 132, at 45.

natural that, obsessed by the universal propaganda in favour of romance, each should seize the first occasion to fall in love with somebody else.¹⁴²

A decade later, our laws followed suit. Most important, soon after *Griswold*, the several states all adopted “no-fault divorce,” whereby any party to a marriage, even if children were at home, could obtain an affirmative license to desert the home, without a showing or even allegation of any cause whatsoever.¹⁴³ Thus reconstituted, the governmental program of divorce came to serve the right of the disaffected to seek more fruitful experiences. Vis-à-vis his wife and offspring, every man became as Caesar: “The cause is in my will”¹⁴⁴ And, of course, each woman enjoyed equally this imperious liberty.

It was *only* at this time, with *Griswoldian* marriage triumphant, that anyone could even conceive of “same-sex marriage,” let alone insist that it was a constitutional right.¹⁴⁵ To be sure, our judicial authorities took a while to see the point. Their initial reaction to such claims was uniformly incredulous. In *Baker v. Nelson* (1972), the Supreme Court dismissed the claims for lack of a “substantial federal question”¹⁴⁶—in layman’s terms, “you can’t be serious.” This dismissive response, though incoherent, was understandable. In 1972, every member of the Court (save Rehnquist) had been born before 1920, when “matrimony” still prevailed.¹⁴⁷ Even though endorsing the post-matrimonial *Griswoldian* definition, the judges no doubt retained a deep but vestigial understanding of marriage as matrimonial, and thus obviously male-female.

According to so many commentators, the revolution had thus “secularized” marriage.¹⁴⁸ The truth is almost precisely the opposite. Marriage was de-Christianized, to be sure, but *not* secularized. *Griswoldian* marriage was *less secular* than traditional marriage. Matrimony concerns, first and foremost, babies and motherhood, to be conceived and received on earth in this *saeculum* (age). But the new marriage

142 *Id.* at 292–93.

143 Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. RELS. 317, 323 (2002).

144 WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc. 2, l. 71 (William & Barbara Rosen eds., 1963).

145 The first recorded claim was filed in 1970 by Richard John Baker and James Michael McConnell, two men seeking a marriage license. *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

146 *Baker*, 409 U.S. at 810.

147 *See* BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES 23, 57, 92, 167, 334, 402, 418, 486, 594 (Melvin I. Urofsky ed., 2006).

148 *See, e.g.,* Parkinson, *supra* note 28.

seems celestial and ethereal. Marriage has been de-Christianized, to be sure, but also de-natured.

This “transcendence” of “marriage” was axiomatic to the discussion in *Obergefell* and formed a virtual consensus among the Justices. The majority claimed, “the annals of human history reveal the *transcendent* importance of marriage.”¹⁴⁹ And now, the Court suggested, the next installment of these annals will feature new arrivals at the heavenly gates, where same-sex couples might “aspire to the *transcendent* purposes of marriage and seek *fulfillment* in its *highest* meaning.”¹⁵⁰ On this transcendence, the dissenters agreed: “Nobody disputes those points.”¹⁵¹

The consensus was wrong. Conservatives should have fiercely disputed the point. They should have remembered that matrimony is primarily matrimonial and therefore secular and *not* transcendent. Our traditional notion of matrimony’s transcendence (both its divine origin and sacramental importance) depends on peculiar, putative Jewish-Christian revelation, which ennobles, but does not unsecularize that “holy estate.”

The greatest error in *Obergefell* was, I believe, this unexamined consensus. It was the new transcendence that obscured the meaning of natural marriage, thus making its matrimonial character unintelligible. Given the biographies of the Justices, the error was understandable if not inevitable. By 2015, all the Justices had been born between 1933 and 1960 and thus reached maturity precisely as *Griswoldian* marriage was reaching its cultural and legal apogee.¹⁵² To cite but one example, as Justice Sonia Sotomayor noted in her autobiography, the film *Love Story* (1970) “succeeded in sucking me in, along with every other high school girl in America.”¹⁵³

II. EGREGIOUSLY WRONG

Therefore, what had been unthinkable in 1915, became intelligible around 1965, and then constitutionally compulsory in 2015. “[W]hat a revolution!”¹⁵⁴

For a majority of the Court (and seemingly a majority of Americans), the extension of *Griswoldian* marriage to same-sex couples seemed a matter of self-evident justice. As conservative scholar Gerald

149 *Obergefell v. Hodges*, 576 U.S. 644, 656 (2015) (emphasis added).

150 *Id.* at 670 (emphasis added).

151 *Id.* at 699 (Roberts, C.J., dissenting).

152 THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–2012, at 468, 472, 482, 486, 492, 496, 499, 503, 507 (Clare Cushman, ed., 3d ed. 2013).

153 SONIA SOTOMAYOR, MY BELOVED WORLD 116 (2013).

154 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 77 (London, Apollo Press, new ed., 1814) (1790).

Bradley writes, “Excluding same-sex couples from state marital regimes *so described* is arbitrary.”¹⁵⁵ The issue could be summed up in a slogan, the simple utterance of which compelled assent: “Marriage Equality!”

Nonetheless, as a matter of constitutional law, the decision was egregiously wrong. The decision violated the reserved rights of the states, was wholly unsupported by the Fourteenth Amendment, and has proven a threat to the personal rights secured by that very Amendment.

A. *Contrary to the States’ Reserved Rights*

First and foremost, as critics have alleged, the Supreme Court, by the *Obergefell* decision, violated the reserved constitutional rights of the several states. The Tenth Amendment to our Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁵⁶ The power to preserve the matrimonial understanding of marriage is one of these reserved powers. Neither the “judicial power of the United States”¹⁵⁷ nor any other power delegated to the central government, nor any prohibition on the states, authorizes the federal court to compel the states to set aside the matrimonial definition of “marriage,” adopt a radically new definition, and distribute its benefits and burdens accordingly.

By issuing this decision, the Court not only violated the states’ rights under the Tenth Amendment but grossly neglected the Court’s own duty under the Republican Guarantee Clause. By that provision, the whole United States, including those vested with the “judicial power” thereof, have the duty to guarantee to each state a republican form of government.¹⁵⁸ By judicial activism, the *Obergefell* Court substituted each state’s popular government for a judicial oligarchy.¹⁵⁹ To be

155 Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1352 (2021).

156 U.S. CONST. amend. X.

157 *Id.* art. III, § 1.

158 *See id.* art. IV, § 4.

159 According to the Framers of the Constitution, a “republican” government was one where all powers were exercised by persons chosen directly or indirectly by the people. THE FEDERALIST NO. 39 (James Madison). The members of the Supreme Court are chosen indirectly (through the President and Senate) by the national people, but *not* the people of each state. And it is the people of each state that are to enjoy republican government. Of relevance here, two members in the majority, Justices Sotomayor and Kagan, were appointed *against* the will of both senatorial representatives from roughly a dozen states. *See Roll Call Vote 111th Congress—1st Session*, U.S. SENATE (Aug. 6, 2009, at 15:03 ET), https://www.senate.gov/legislative/LIS/roll_call_votes/vote111/vote_111_1_00262.htm [<https://perma.cc/NF8T-B2A6>] (confirming the nomination of Sonia Sotomayor, 68–31); *Roll Call Vote 111th Congress—2nd Session*, U.S. SENATE (Aug. 5, 2010, at 15:30 ET), https://www.senate.gov/legislative/LIS/roll_call_votes/vote111/vote_111_2_00262.htm.

sure, the Clause does not *enhance* the federal judicial power, for Congress has the political authority to decide whether a state's government is sufficiently republican.¹⁶⁰ But the Clause, by its naked terms, requires each branch of the federal government to use its limited delegated powers to preserve, and not usurp, each state's popular government.

In one respect, *Obergefell* represented a more egregious instance of judicial usurpation than even *Roe*. In *Roe*, the Court barred the states from enforcing their respective criminal laws.¹⁶¹ But in *Obergefell*, the Court compelled the states to speak. As such, the Court violated not only the Tenth but also the First Amendment, by which Congress may make no law whatsoever abridging the freedom of speech.¹⁶² Such "laws" include any law passed by Congress to define the membership of the Supreme Court, regulate its jurisdiction, and subsidize its activities by funds collected from compulsory taxation.¹⁶³ And such "freedom" belongs not only to individuals but also to free associations, including the fifty free political associations that compose our Union.¹⁶⁴

The states' constitutional freedom of speech was vindicated just a week before the *Obergefell* decision. In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Justices, though sharply divided, agreed on one central issue: whether a license plate issued by the state of Texas was the state's own "*speech*."¹⁶⁵ Writing for a majority that included four

www.senate.gov/legislative/LIS/roll_call_votes/vote1112/vote_111_2_00229.htm [https://perma.cc/8AUy-U7Q9] (confirming the nomination of Elena Kagan, 63–37) (showing the negative confirmation votes cast by both senators from AL, AZ, GA, ID, KS, KY, MS, OK, TX, UT, WY, and in Kagan's case, also NE and TN). None of these states cast their electoral votes for the President who nominated and appointed these members. FEC, OFFICIAL GENERAL ELECTION RESULTS FOR UNITED STATES PRESIDENT (2008).

160 See, e.g., *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912).

161 John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 920 (1973).

162 U.S. CONST. amend. I.

163 See, e.g., 28 U.S.C. § 1 (2018) (defining the number of Justices of the Supreme Court); *id.* § 1254 (regulating the Court's appellate jurisdiction).

164 But see *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (stating that the First Amendment protects the freedoms of individuals and "confers no analogous protection on the Government" (emphasis omitted) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 728–29 (1971) (Stewart, J., concurring)), cited in, Sarah Kramer, *Not Your Mouthpiece: Abortion, Ideology, and Compelled Speech in Physician-Patient Relationships*, 21 U. PA. J.L. & SOC. CHANGE 1, 14 n.98 (2018); cf. *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1207 (D.N.M. 2020) (noting the "open question whether States and municipalities have First Amendment rights against the United States" and discussing authorities); *United States v. Am. Libr. Ass'n*, 539 U.S. 194, 211 (2003) (plurality opinion) (noting that the Court "need not decide" the question of whether municipalities have free speech rights against the United States).

165 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (emphasis added) (distinguishing the plates as "government speech" that the state is "free

of the five members of the *Obergefell* majority, Justice Breyer concluded that “Texas’ specialty license plate designs constitute government speech and that Texas was consequently *entitled* to refuse to issue plates” bearing pro-Confederacy messages, for a state is “free” to control its own message.¹⁶⁶ As Eugene Volokh pointed out at the time, the decision seemed “to point in favor of such a First Amendment right possessed by state and local governments, with respect to federal regulations.”¹⁶⁷

Now to issue a marriage license is no less state speech than to issue a license plate. But just one week later, Justice Breyer and four of his colleagues forced Texas and a majority of states to speak against their own viewpoint, as manifest in the state constitutional provisions they adopted.

Of the abridgements of free speech, compulsions are worse than proscriptions. As Theodore Dalrymple has recently noted,

Prescriptive censorship—the demand not only that some things must not be said, but that some things must be said—is the worst kind of censorship known. It leads not only to tedium, but to a sense of violence being done to one’s mind, because the things that must be said, and cannot be denied, are usually gross and obvious falsehoods. To be forced to accept and repeat falsehoods is worse than being merely prohibited from saying something.¹⁶⁸

For those individuals and communities that still endorsed matrimonial marriage, *Obergefell* was such violence.

The principal reply to this objection is a denial: *viz.*, that the Court did not compel the states to adopt any new definition but merely required the states to extend the new “marriage” that the states had already endorsed. By this account, the states had already accepted *Griswoldian* marriage—that bilateral, transcendent loyalty—but had arbitrarily or capriciously withheld its benefits from same-sex couples. As William Eskridge has argued, after a “century of liberalization” the states had permitted individuals to manage their relations with an eye

to control”); *id.* at 221 (Alito, J., dissenting) (agreeing that the critical distinction is between “government speech and private speech”).

166 *Id.* at 207, 219 (emphasis added).

167 Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, WASH. POST: THE VOLOKH CONSPIRACY (June 24, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/> [<https://perma.cc/R2NU-QBZN>].

168 Theodore Dalrymple, *Wokeism’s Deeper Roots*, LAW & LIBERTY (July 18, 2025), <https://lawliberty.org/book-review/wokeisms-deeper-roots/> [<https://perma.cc/B5TV-RQ8Q>] (reviewing ANDREW DOYLE, *THE END OF WOKE: HOW THE CULTURE WAR WENT TOO FAR AND WHAT TO EXPECT FROM THE COUNTER-REVOLUTION* (2025)).

to “relational happiness” even “at the expense of children.”¹⁶⁹ By 2015, by withholding “marriage” from same-sex couples, the states were drawing an “irrational” line of exclusion.¹⁷⁰

But *pace* Professor Eskridge, I think it’s inaccurate to say that conservative states and citizens had generally endorsed the *Griswoldian* revolution. The most obvious evidence is found in the express words of the federal and state laws defining marriage, and not, as critics never tire of alleging, “banning” same-sex couples from marriage. For conservatives, the issue was never regulatory but definitional. In this respect, the federal Defense of Marriage Act (DOMA) provided a particularly descriptive account: “a legal union between one man and one woman *as husband and wife*.”¹⁷¹ The very term “hus-band” gestured to a common dwelling and hence the decidedly terrestrial, matrimonial nature of the relation.¹⁷²

Therefore, as Justice Alito contended, many Americans simply had “not yet given up on the traditional understanding.”¹⁷³ Nor was their opposition limited to the exclusion of same-sex couples. As late as 2012, a year before the Supreme Court invalidated DOMA in *United States v. Windsor* (2013),¹⁷⁴ a large and stable minority of the people continued to report their stubborn adherence to the old Christian approach to the “holy estate of matrimony.”¹⁷⁵ One quarter of Americans still called divorce “morally wrong,” and nearly two-fifths (thirty-eight percent) still said the same of nonmarital sex.¹⁷⁶ Meanwhile, nearly ninety percent still condemned polygamy as well as adultery.¹⁷⁷

This minority remained politically relevant in at least some states. They no doubt constituted (1) a majority in some especially conservative states,¹⁷⁸ and (2) a supermajority among the strongest opponents

169 William N. Eskridge, Jr., *Eskridge, J., Concurring in the Judgment, in WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID*, *supra* note 27, at 168, 186.

170 *Id.* at 187.

171 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022) (emphasis added).

172 See *supra* note 45 and accompanying text.

173 *Obergefell v. Hodges*, 576 U.S. 644, 739 (2015) (Alito, J., dissenting).

174 See *United States v. Windsor*, 570 U.S. 744, 774 (2013).

175 See generally *Moral Issues*, GALLUP, <https://news.gallup.com/poll/1681/moral-issues.aspx> [<https://perma.cc/KF6X-KVW2>] (last visited Sep. 7, 2025).

176 *Id.*

177 *Id.*

178 Social conservatives were not evenly distributed across the country. In November 2014, exit polls showed that voters were evenly divided on the legal recognition of same-sex marriage, forty-eight percent to forty-eight percent. U.S. House 2014 Midterms Exit Polls, NBC NEWS, <https://www.nbcnews.com/politics/elections/2014/us/house/exitpoll/> [<https://perma.cc/AH6Z-2VEZ>] (last visited Sep. 8, 2025). In a socially liberal state like Colorado and Oregon, support was at sixty-four percent, but in Arkansas and Louisiana only about twenty-five percent supported the change. Colorado Governor 2014 Exit Polls, NBC

of same-sex “marriage.” Moreover, their political resistance was not limited to that issue. The very states where opposition to same-sex marriage was the strongest had also tended to limit no-fault divorce by imposing waiting periods, prohibiting unilateral terminations, and adopting so-called “covenant marriage.”¹⁷⁹

The Court’s members were probably unfamiliar with such citizens and their sincere (though politically marginal) opposition to the whole *Griswoldian* marriage revolution.¹⁸⁰ None of the members of the *Windsor* majority had ever lived in any one of these states.¹⁸¹ Indeed, every member of the majority was born either in New York City or the San Francisco Bay area, and had lived their entire lives in the most socially liberal regions of the country.¹⁸² These men and women were unlikely to have encountered marriage-conservatives in any political capacity except as noisy opponents to same-sex marriage. It was thus understandable that the progressives might have attributed conservative opposition to same-sex marriage to some peculiar, anomalous, and even arbitrary discrimination.

NEWS, <https://www.nbcnews.com/politics/elections/2014/co/governor/exitpoll/> [<https://perma.cc/DNT3-WKXF>] (last visited Sep. 8, 2025); Oregon Governor 2014 Exit Polls, NBC NEWS, <https://www.nbcnews.com/politics/elections/2014/or/governor/exitpoll/> [<https://perma.cc/T9D9-3FSN>] (last visited Sep. 8, 2025); Arkansas Governor 2014 Exit Polls, NBC NEWS, <https://www.nbcnews.com/politics/elections/2014/ar/governor/exitpoll/> [<https://perma.cc/C3JQ-WPS8>] (last visited Sep. 8, 2025); Louisiana U.S. Senate 2014 Exit Polls, NBC NEWS, <https://www.nbcnews.com/politics/elections/2014/la/senate/exitpoll/> [<https://perma.cc/3EL8-4ZB8>] (last visited Sep. 8, 2025).

179 See Jane J. Felton & Barbara A. Schweiger, *Toward a More Perfect Dissolution: The History of American Divorce Law and Its Ghosts in Contemporary Practice*, 37 J. AM. ACAD. MATRIM. LAWS. 501, 535–36 (2025) (discussing statutes adopted in Mississippi, Tennessee, West Virginia, Louisiana, Arkansas, and Arizona). In all of these states, save perhaps Arizona, opposition to same-sex marriage probably exceeded seventy-five percent before 2008. See *History of Same-Sex Marriage Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/History_of_same-sex_marriage_ballot_measures [<https://perma.cc/3TJV-JJPL>] (last visited Sep. 8, 2025); ANDREW R. FLORES & SCOTT BARCLAY, THE WILLIAMS INST., PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE 6 (2013).

180 For one example of this unawareness by a conservative, see Mark Pulliam, *No-Fault Divorce and Its Discontents*, MISRULE OF L. (July 12, 2021), <https://misruleoflaw.com/2021/07/12/no-fault-divorce-and-its-discontents/> [<https://perma.cc/L4K2-JP49>] (noting his own surprise that anyone is still opposed no-fault divorce, as he had “long assumed that a . . . consensus obtained with respect to the availability of no-fault divorce, a feature of modern life,” for the “existence of no-fault divorce is so ubiquitous and widely-accepted that I assumed it was noncontroversial”).

181 See THE SUPREME COURT JUSTICES, *supra* note 152, at 468–71, 472–76, 482–85, 486–91, 492–95, 496–98, 499–502, 503–06, 507–09; Richard Florida, *The Conservative States of America*, THE ATL. (Mar. 29, 2011), <https://www.theatlantic.com/politics/archive/2011/03/the-conservative-states-of-america/71827/> [<https://perma.cc/T6YA-P5AV>].

182 See THE SUPREME COURT JUSTICES, *supra* note 151, at 468–71, 472–76, 482–85, 486–91, 492–95, 496–98, 499–502, 503–06, 507–09; *cf.* *Obergefell v. Hodges*, 576 U.S. 644, 717–18 (2015) (Scalia, J., dissenting).

In the decade after *Windsor* (2013–2023), dramatic changes in popular opinion and practice further indicate that the decision (supplemented by *Obergefell* two years later) did far more than simply welcome a small minority into the completed revolution. To the contrary, at the very time that public opinion came to endorse legal recognition of same-sex marriage, the public grew markedly even more alienated from traditional matrimony. By 2022, when Americans' support for legal recognition of same-sex marriage reached its peak (seventy-one percent)¹⁸³ and Congress passed the bipartisan “Respect for Marriage Act,”¹⁸⁴ Americans' respect for the “holy estate of matrimony” reached a nadir.¹⁸⁵ Since 2012, opposition to nonmarital sex had fallen from thirty-eight percent to twenty-three percent, and opposition to divorce from twenty-five percent to thirteen percent.¹⁸⁶ Meanwhile, endorsement of polygamy, once in the single digits, had skyrocketed to twenty-three percent.¹⁸⁷ More Americans called polygamy moral than divorce immoral.¹⁸⁸ Moreover, the number of Americans who identified familial disintegration as the principal moral challenge dropped in half.¹⁸⁹

Further, Americans practiced what they preached. After 2013, despite the nationwide expansion of legal “marriage” and all the attendant public celebrations, the percentage of Americans who were legally “married” continued its decades-long decline; indeed, the trend seemed to *accelerate*.¹⁹⁰ By 2024, according to exit polls, the number of unmarried women outnumbered married women at the polls, for the first time ever.¹⁹¹ Since *Windsor*, it seems, America has grown not only more post-matrimonial *but also* post-marital.¹⁹² The aftermath

183 See Brenan, *supra* note 10.

184 See *Roll Call Vote 117th Congress—2nd Session*, U.S. SENATE (Nov. 29, 2022, at 17:52 ET), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00362.htm [<https://perma.cc/6TDR-VW9H>] (showing a vote of 61–36 yeas to nays with twelve Republicans voting with the majority).

185 *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

186 See GALLUP, *supra* note 175.

187 *Id.*

188 *Id.*

189 From ten percent to five percent. *Id.* Incidentally, the public also grew increasingly indifferent to the central good of traditional matrimony: The reception of a new human life as an inalienable gift. Over half of Americans called abortion morally acceptable, and one-fifth likewise endorsed suicide. *Id.*

190 See, e.g., NAT'L CTR. FOR HEALTH STAT., CDC, PROVISIONAL NUMBER OF MARRIAGES AND MARRIAGE RATE: UNITED STATES, 2000–2023 (2024) (showing accelerated decline between 2016 and 2019).

191 Conn Carroll, *This Was a Marriage Gap Election, Not a Gender Gap Election*, WASH. EXAM'R, (Nov. 7, 2024, at 10:33 ET), <https://www.washingtonexaminer.com/opinion/3222232/marriage-gap-election-not-gender-gap/> [<https://perma.cc/ME4U-3LSY>].

192 Cf. Bryan Dumont, *What Happened to Same-Sex Marriage?*, THE DISPATCH (June 10, 2025), <https://thedispatch.com/article/obergefell-anniversary-dearth-gay-marriage/>

of *Windsor* and *Obergefell* confirmed what many opponents had predicted: that the policy of same-sex marriage would “confirm and exacerbate” America’s abandonment of the matrimonial family.¹⁹³

B. Inconsistent with the Meaning and Purpose of the Fourteenth Amendment

But the states’ freedom of speech, of course, is not absolute. Nor is the states’ reserved authority under the Republican Guarantee Clause and the Tenth Amendment. As that Amendment indicates, the states are still subject to the express prohibitions of the federal Constitution (“nor prohibited by it to the States”).¹⁹⁴ The states, for instance, are forbidden to speak so as to grant any title of nobility.¹⁹⁵

And of course, the states have no authority to act in any way forbidden by Section 1 of the Fourteenth Amendment—the very provision at issue in *Obergefell*. That Amendment’s first section includes the following prohibitory sentence:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁹⁶

The Amendment, therefore, prohibits the states from (1) legislatively abridging the privileges or immunities of citizens of the United States, (2) depriving any person of life, liberty, or property without due legal process, or (3) denying equal legal protection to any person within the state’s borders.

The legal question at issue in *Obergefell* was simple: Do any of these three prohibitions, fairly interpreted, bar the states from making and enforcing laws that reserve the status, privileges, and duties of

[<https://perma.cc/26XV-22E2>] (lamenting the relative disinterest of “LGBTQ” Americans in getting married or celebrating *Obergefell*, and concluding that “in a moment when marriage is increasingly seen as optional, outdated, or oppressive,” same-sex couples must defend marriage “not just for us, but for our culture, our communities, and our common life,” for if “marriage is to remain a vital institution, it will be because we, who asked for the right to join it, are willing to defend it”).

193 Maggie Gallagher & William C. Duncan, *The Kennedy Doctrine: Moral Disagreement and the “Bare Desire to Harm,”* 64 CASE W. RES. L. REV. 949, 958 (2014) (quoting Brief of Amicus Curiae Helen M. Alvaré in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 23, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144); *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307)).

194 U.S. CONST. amend. X.

195 *Id.* art. I, § 10, cl. 1.

196 *Id.* amend. XIV, § 1.

“marriage” to opposite-sex couples, or must the states extend “marriage” equally to all couples, regardless of sex diversity?

The answer is obviously “no” if one takes the words of the prohibitory sentence in their ordinary sense. By reserving “marriage” to male-female couples, the states do not thereby deny to anyone the protection of “the laws,” for matrimonial laws are part of “the laws” defining the guaranteed “protection.” Still less do the states thereby strip anyone of life, liberty, or property without legal process, for withholding something (e.g., a name or rights of “marriage”) is not deprivation (that is, dispossession).¹⁹⁷ Nor does the making and enforcing of such marriage laws abridge anyone’s rights of citizenship, for marriage (whether *Griswoldian* or matrimonial) is prior to citizenship and thus not a privilege thereof.¹⁹⁸

Moreover, the negative answer seems compelled by precedent. For 100 years after its ratification (1868–1968), no one ever said or suggested that these prohibitions invalidate state laws recognizing marriage as male-female. Indeed, no jurisdiction in the world recognized same-sex marriage until the last quarter century.¹⁹⁹

Nonetheless, in his majority opinion, Justice Kennedy dismissed the once-universal opinion on originalist grounds:

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.²⁰⁰

And like “liberty,” equality acquires new meaning as “new insights and societal understandings . . . reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”²⁰¹

Supervising all this evolution, he claimed, was the judiciary. The Supreme Court has supreme authority to identify and implement each generation’s new ideas of “liberty” and “equality,” as “we learn [their] meaning.”²⁰²

Justice Kennedy cited no evidence to support his originalist claims as to either the evolutionary meaning of liberty or equality, or the judicial role as evolution supervisor. Nor did he cite any precedent in

197 See *Prīuō*, OXFORD LATIN DICTIONARY (1968).

198 See *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1856).

199 See Rachel Savage, *Same-Sex Marriage Around the World, 20 Years After Dutch First*, REUTERS (Apr. 1, 2021, at 14:00 ET), <https://www.reuters.com/world/same-sex-marriage-around-world-20-years-after-dutch-first-trfn-2021-04-01/> [<https://perma.cc/8REM-6NQ7>].

200 *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

201 *Id.* at 673.

202 See *id.* at 664.

which the Court had said so.²⁰³ To be sure, he mentioned a number of cases where the Court had declared unconstitutional certain historically accepted forms of sex inequality.²⁰⁴ But in none of these had the Court claimed a power to implement evolutionary meanings.

Justice Kennedy could have cited a few cases where the Court had indicated some judicial role in discerning evolving meanings of constitutional liberty and equality. But each of these featured fierce dissents.²⁰⁵ And in most of these cases, the Court upheld the authority of the states, as “laborator[ies]” of democracy, to impose innovative regulations on historic liberties.²⁰⁶

To my knowledge, there have been only two instances where the Court asserted authority to impose evolution against the will of the states. The first was *Harper v. Virginia Board of Elections*, where the Court struck down a state poll tax.²⁰⁷ Writing for the majority (as he had done a year earlier in *Griswold*), Justice Douglas declared that “the Equal Protection Clause is not shackled . . . to historic notions of equality, any more than we have restricted [liberty] to a fixed catalogue of what was at a given time,” for like meanings of liberty, notions of “equal

203 See *id.* at 663–76.

204 *Id.* at 674 (first citing *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); then citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); then citing *Califano v. Westcott*, 443 U.S. 76 (1979); then citing *Orr v. Orr*, 440 U.S. 268 (1979); then citing *Califano v. Goldfarb*, 430 U.S. 199 (1977) (plurality opinion); then citing *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); and then citing *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion)).

205 See, e.g., *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442–43 (1934) (upholding, by a 5–4 vote, a state law denying “that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time,” *id.* at 442, and that “the great clauses of the Constitution must [not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them,” *id.* at 443); *id.* at 449 (Sutherland, J., dissenting) (insisting that a constitutional provision “does not mean one thing at one time and an entirely different thing at another time”); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (upholding, by a 5–4 vote, a state minimum-wage law and declaring cryptically, “Liberty in each of its phases has its history and connotation”); *id.* at 403 (Sutherland, J., dissenting) (denying “that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then”); cf. *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), and citing *Buck v. Bell*, 274 U.S. 200 (1927), for the proposition that lawmakers, consistent with the Fourteenth Amendment, may adopt as necessary today what “probably would have been rejected as arbitrary and oppressive” fifty years earlier).

206 See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 292 (O’Connor, J., concurring) (quoting *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting)).

207 See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

treatment for purposes of the Equal Protection Clause *do change*.”²⁰⁸ The second case was Justice Kennedy’s own opinion in *Planned Parenthood v. Casey*, where the Court announced that history cannot define “the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects,” but these limits must be expanded from time to time by the Court’s “reasoned judgment.”²⁰⁹ And in neither of these cases did the majority make an *originalist* assertion as to either evolution or judicial power.

We may wonder why Justice Kennedy declined to cite either *Harper* or *Casey*, as these provided the strongest authorities for the alleged “establishment” of the tenets he relied on.²¹⁰ The probable explanation for his silence is that these precedents featured fierce dissents,²¹¹ remained controversial, and had not really “established” anything other than fostering division on the courts.²¹²

Moreover, these precedents were manifestly erroneous. These “tenets” were utterly untenable in light of the original meaning and purpose of the Fourteenth Amendment.²¹³

The *original meaning* of Section 1 was not evolutionary but fundamentalist. The Privileges or Immunities and Due Process Clauses incorporated substantive and procedural rights that were as old as the Republic. According to the most authoritative definition of the “privileges and immunities of citizens,” these rights were “in their nature *fundamental*,” belonged “of right to the citizens of all free Governments,” and had “been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free,

208 *Id.* at 669; *id.* at 678 (Black, J., dissenting) (calling the majority’s opinion an “attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written”).

209 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848–49 (1992); *id.* at 981 (Scalia, J., concurring in judgment in part and dissenting in part) (charging that the majority, by rejecting historical definitions of liberty, “does not wish to be fettered by any such limitations on its preferences”).

210 *Cf. Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (asserting that the need to continually investigate the meaning of “liberty” and the Court’s obligation to rule on such developments are “established tenets”).

211 *See Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part); *Harper*, 383 U.S. at 670 (Black, J., dissenting).

212 *Casey* remained fiercely contested, and we know, was overturned seven years later in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022). And *Harper* had been the chief precedent relied on in the bitterly contested decision in *Bush v. Gore*, 531 U.S. 98, 105 (2000) (per curiam).

213 The argument in this Section is an adumbration of the third chapter of my forthcoming book, DAVID R. UPHAM, TAKING AMERICAN CITIZENSHIP SERIOUSLY: THE RECOVERY OF THE FOURTEENTH AMENDMENT (forthcoming May 2026).

independent, and sovereign.”²¹⁴ And according to the most authoritative definition of “due process of law,” the guarantee surrounded human rights of life, liberty, and property with certain old Anglo-American procedural rights:

[T]hose settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.²¹⁵

By its express terms, the Equal Protection Clause was likewise fundamentalist. It secured the human person’s natural rights of person and property, and *only* against one injustice: a state’s refusal (“deny”) to enforce equally its own protective laws. According to the Joint Committee that drafted the measure, the evil to be redressed was widespread, selective nonenforcement of the laws.²¹⁶ In much of the South, a certain class of persons, namely, “people friendly to the Union, be they white or black,” were subject to “acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish.”²¹⁷ According to Indiana’s Governor Morton, southern states had also “discriminated against the citizens of other States by withholding the protection of laws for life and liberty.”²¹⁸

The prohibition on unequal enforcement did not establish a federal standard of “equal laws.”²¹⁹ In fact, Bingham and the Joint Committee had added the expression “of the laws” almost certainly to redress the primary objection that Republicans made to an earlier draft²²⁰: *viz.*, that by empowering Congress to secure “equal protection” without further qualification, the measure would imply federal power to revise any and all protective laws that federal authorities

214 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Howard) (emphasis added) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230)).

215 *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856).

216 H.R. REP. NO. 39-30, at XVII (1866).

217 *Id.*; see also Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1807 (2010) (noting that the “failure of state and local governments to guarantee equal protection of the laws was a central focus of the Report”).

218 *Governor Morton’s Speech*, RICHMOND PALLADIUM, Aug. 2, 1866, at 1 (on file with Libr. of Cong., Chronicling America, <https://chroniclingamerica.loc.gov/lccn/sn86058250/1866-08-02/ed-1/seq-1/> [<https://perma.cc/35XV-BSM6>]).

219 Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 74 (2008) (emphasis omitted).

220 CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (proposing to empower Congress to secure “to all persons in the several States equal protection in the rights of life, liberty, and property”).

might deem improperly “unequal.”²²¹ The new language, with the qualification “of the laws,” seemed to satisfy everyone in Congress, as the objection vanished from the record.²²² Instead, as supporters affirmed, the Clause (and Congress’s corresponding enforcement power) would have no application to any state misconduct except the *refusal* to equally provide the protection.²²³

Accordingly, the primary drafters of Section 1’s prohibitory sentence, the Joint Committee on Reconstruction, certified that it was a *determinate* measure. According to their formal report, the three prohibitions would serve to “*determine* the civil rights and privileges of all citizens in all parts of the republic.”²²⁴ By this official certification, Section 1, then, secured a *determinate* set of rights, of both liberty and equality.

The *original purpose* of Section 1 was not only fundamentalist and thus determinate, but decidedly hostile to judicial activism. It was the judiciary whose slavery-induced novelties had made so much of Section 1 necessary. As several supporters indicated, the Privileges or Immunities Clause was necessary because the courts had so mangled Article IV’s Privileges and Immunities Clause that it no longer secured the

221 In the House, New York’s Robert Hale said that under the proposal, Congress might override “all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen”—a redistribution of power that would be “an utter departure from every principle ever dreamed of by the men who framed our Constitution.” *Id.* at 1063 (statement of Rep. Robert Hale); *see also id.* at 1082 (statement of Sen. William Stewart) (remarking that the proposed equal protection delegation was so broad that it could “hardly have been intended by its framers”). The *Obergefell* Court could have cited Senator Howard’s statement that Section 1’s prohibitions would “abolish[] all class legislation in the States.” *Id.* at 2766 (statement of Sen. Jacob Howard). Several scholars—most notably Jack Balkin, Steven Calabresi, and even the Court itself—have relied on this comment for general federal judicial power to invalidate unfair laws. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 496 (2007); Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 953 (2013); *Plyler v. Doe*, 457 U.S. 202, 213 (1982). For reasons I will elaborate in my forthcoming book, *see* UPHAM *supra* note 213, Howard’s statement cannot be read as a restatement of the legal meaning of Section 1, but only a hyperbolic prediction as to its practical effects.

222 Earl M. Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 HASTINGS CONST. L.Q. 287, 317 (2015). But in the states, some opponents renewed the charge quite vociferously. David R. Upham, *A Coherent Measure*, 48 PERSPS. ON POL. SCI. 234, 240–41 (2019).

223 *The Campaign in Wisconsin: Speech of Senator T.O. Howe at Madison, Wisconsin, Aug. 10*, CHI. TRIB., Aug. 14, 1866, at 2 (on file with Libr. of Cong., Chronicling America, <https://chroniclingamerica.loc.gov/lccn/sn82014064/1866-08-14/ed-1/seq-2/> [https://perma.cc/B5W8-TCPG]) (“The *only* effect of the amendment if it is adopted is to enable the National Legislature, representing the people of the United States, to enforce equal justice when the several States *refuse* to enforce it.” (emphasis added)).

224 H.R. REP. NO. 39-30, at XXI (1866) (emphasis added).

citizen against abridgement of his rights by his own state.²²⁵ Even worse, in defiance of our common law, the courts had subjected a whole class of person, native to our soil, to permanent, hereditary alienage.²²⁶

The Supreme Court had been the leading culprit in what Republicans called “judicial tyranny.”²²⁷ In Pennsylvania, the governor explained that Section 1 concerned “vital principles” that “were never seriously doubted anywhere,” but that constitutional reaffirmation was necessary because the “insane crusade in favor of slavery” had led to confusion, obscurity, and error, culminating in what was merely “called the decision . . . in the Dred Scott case.”²²⁸

And the judiciary was *still* a menace. As Vermont Senator Luke Poland informed the Vermont legislature, four of the nine members of the Court had “concurred in that terrible Dred Scott decision,” and they would need just one more vote to invalidate the Civil Rights Act.²²⁹ Section 1 was thus necessary to keep civil rights “above all courts, Supreme or otherwise.”²³⁰ Or as Galusha Grow (former Republican Speaker of the House) told voters, Section 1 would secure “the rights and immunities of citizenship” by a provision “so plain that no judicial blindness henceforth shall fail to read and understand it.”²³¹ The supporters of the Amendment had reason to fear judicial activism and judicial blindness and placed no faith whatsoever in the judiciary’s peculiar “vision.”²³²

225 CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (statement of Sen. Luke Poland) (“But the radical difference in the social systems of the several States, and the great extent to which the doctrine of State rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, led to a practical repudiation of the existing provision on this subject”); *American Citizenship*, CHI. TRIB., Oct. 10, 1866, at 2 (on file with Libr. of Cong., Chronicling America, <https://chroniclingamerica.loc.gov/lccn/sn82014064/1866-10-10/ed-1/seq-2/>) [<https://perma.cc/FQK9-UWL2>].

226 See, e.g., *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 337–38 (1822) (Mills, J., dissenting).

227 See CONG. GLOBE, 39th Cong., 1st Sess. 3038 (1866) (statement of Sen. Richard Yates).

228 Governor Andrew G. Curtin, Message to the Legislature 5 (Jan. 2, 1867) (transcript available in the Harvard College Library) (emphasis added).

229 *Speech of Hon. Luke P. Poland*, GREEN-MOUNTAIN FREEMAN (Montpelier), Nov. 7, 1866, at 2 (on file with Libr. of Cong., Chronicling America, <https://chroniclingamerica.loc.gov/lccn/sn84023209/1866-11-07/ed-1/seq-2/>) [<https://perma.cc/N3EV-HVKJ>].

230 *Id.*

231 *Speech of the Hon. Galusha A. Grow Recently at Poughkeepsie*, ASHTABULA WKLY. TEL., Dec. 7, 1867, at 1 (on file with Libr. of Cong., Chronicling America, <https://www.loc.gov/item/sn83035216/1867-12-07/ed-1/>) [<https://perma.cc/J4QA-Y3NE>].

232 See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442 (1934) (“It is no answer . . . to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time.”).

As applied in *Obergefell*, to repudiate traditional marriage, Justice Kennedy's "tenets" did violence not only to the original purpose of the Amendment, but to the broader project of Reconstruction of which the Amendment was only a part. The authors of the Reconstruction understood that the project required, in part, the *reconstruction of matrimony*.

Slavery does grave harm to the matrimonial relation. Under chattel bondage, the male cannot be a "hus-band" because he is bound, instead, to another human being's portfolio of alienable assets. The man is thus not free to bind himself to the *hus* of the prospective or current mother of his children. Their joint offspring, in turn, lack a stable relation with their parents, and especially the father. For anti-slavery Americans, this violence to the matrimonial family was one of the chief crimes of slavery.²³³

With emancipation from the bonds of slavery, the bonds of matrimony did not simply reappear. Booker Washington, born "a slave among slaves," explained the situation nearly four decades later:

Of my ancestry I know almost nothing. . . . I have been unsuccessful in securing any information that would throw any accurate light upon the history of my family beyond my mother. She, I remember, had a half-brother and a half-sister. In the days of slavery not very much attention was given to family history and family records—that is, black family records. My mother, I suppose, attracted the attention of a purchaser who was afterward my owner and hers. Her addition to the slave family attracted about as much attention as the purchase of a new horse or cow. Of my father I know even less than of my mother. I do not even know his name. . . . I have no idea . . . who my grandmother was. I have, or have had, uncles and aunts and cousins, but I have no knowledge as to where most of them are.²³⁴

His experience, he said, was typical, illustrative of "hundreds of thousands of black people in every part of our country."²³⁵

The reintegration of the black family was an urgent necessity. The proponents of Reconstruction believed that the freedmen must enjoy not only personal liberty, civil equality, and political rights (established by the Thirteenth, Fourteenth, and Fifteenth Amendments, respectively), but also the benefits of matrimony.²³⁶

233 See Joseph K. Griffith II, "Tender and Sacred Ties": *The Abolitionist Defense of Parental Rights and the Thirteenth and Fourteenth Amendments*, in CONSTITUTIONALISM AND LIBERTY: ESSAYS IN HONOR OF DAVID K. NICHOLS 216, 218–27 (Anthony D. Bartl & Jordan T. Cash eds., 2025).

234 BOOKER T. WASHINGTON, UP FROM SLAVERY: AN AUTOBIOGRAPHY 1–2, 36 (1907).

235 *Id.* at 36.

236 Cf. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 84–85 (HarperCollins updated ed. 2014) (1988) ("Strong family ties, it is clear, had

Accordingly, the Reconstructionist legislators adopted a number of policies designed to promote matrimony among the freedmen. For our purposes, the most significant reforms were state laws that facilitated such matrimony, and even retroactively imputed matrimonial intent to all those living in what had been haphazard concubinage: those persons who, by the “law of bondage,” had been excluded from the “rites of matrimony.”²³⁷

These policies appeared in statutes,²³⁸ as well as a few state constitutions adopted by the biracial loyalist conventions that met pursuant to the Reconstruction Acts.²³⁹ Most notably, Mississippi’s new constitution provided:

All persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held for all purposes in law, as married, and their children, whether born before or after the ratification of this Constitution, shall be legitimate, and the Legislature may, by law, punish adultery and concubinage.²⁴⁰

This sweeping provision, according to Mississippi’s Supreme Court a few years later, served “the well recognized maxim, *semper praesumitur pro matrimonio* (the presumption is always in favor of marriage).”²⁴¹

The officials that adopted these aggressive matrimonial policies clearly believed they were consistent with the Fourteenth Amendment. No one suggested any constitutional objection. In fact, the officials approving these constitutions affirmatively certified the reforms’

existed under slavery, but had always been vulnerable to disruption. Emancipation allowed blacks to reaffirm and solidify their family connections, and most freedmen seized the opportunity with alacrity” to “legalize[] their marriage bonds.” *Id.* at 84.).

237 TEX. CONST. of 1869, art. XII, § XXVII.

238 DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA’S MOST PROGRESSIVE ERA* 78 (2014) (discussing the laws of Tennessee and West Virginia).

239 See Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429; Act of Mar. 23, 1867, ch. 6, § 2, 15 Stat. 2, 2–3. On these conventions, see David R. Upham, *The “Black and Tan Conventions,” Diverse Originalism, and the Fourteenth Amendment*, 94 MISS. L.J. 1403 (2025).

240 MISS. CONST. of 1868, art. XII, § 22; accord TEX. CONST. of 1869, art. XII, § XXVII (“All persons who, at any time heretofore, lived together as husband and wife, and both of whom, by the law of bondage, were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married; and the issue of such cohabitation shall be deemed legitimate. And all such persons as may be now living together, in such relation, shall be considered as having been legally married; and the children heretofore, or hereafter, born of such cohabitations, shall be deemed legitimate.”).

241 *Dickerson v. Brown*, 49 Miss. 357, 372 (1873). The presumption was “a well-established and closely followed tenet of late nineteenth-century domestic relations law.” Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2166 & n.123 (2014) (citing BISHOP, *supra* note 97, § 457, at 374 (“Every intendment of the law is in favor of matrimony.”)).

conformity with the Amendment.²⁴² Congress had required the former Confederate states, as a condition for congressional readmission, to establish a multiracial loyalist electorate, to approve the pending Fourteenth Amendment, and to adopt new state constitutions that conformed, “*in all respects*,” with the Constitution (including, presumably, that same Amendment).²⁴³ Congress then proceeded to review these constitutions and accepted each one for readmission.²⁴⁴

Therefore, contemporaneous with the adoption of the Fourteenth Amendment, both the national Congress and these state legislators affirmatively certified these pro-matrimony, anti-concubinage laws as fully constitutional.²⁴⁵ As to the scope of the Amendment’s prohibitions, this evidence shows not merely some “original expected application,”²⁴⁶ but rather an *originally certified non-application*.

By expressly approving laws prohibiting concubinage and imputing a presumption of matrimony to a cohabiting freedwoman and freedman (even without their specific express consent), these lawmakers seemed wholly unaware of any “liberty,” constitutional or otherwise, to make “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”²⁴⁷ Their notion of “dignity” was not a right to “define personal identity” but rather to *recover* their natural *identity* as mothers, fathers, sons, daughters, etc.—an identity violated by the monstrous injustice of slavery.

C. *A Menace to the Rights of Speech and Parenthood Encompassed by the Amendment*

Obergefell was thus utterly inconsistent with the original meaning and understanding of the Fourteenth Amendment. Moreover, the

242 Cf. Upham, *supra* note 239, at 1415 (“By officially endorsing the constitutions containing these provisions, Congress and the Black and Tan Conventions officially declared that such regulations . . . did *not* violate the prohibitions of the Fourteenth Amendment’s first section.”).

243 Act of Mar. 2, 1867 § 5 (emphasis added); *see also* Act of Mar. 23, 1867 § 2.

244 *See, e.g.*, Act of Feb. 28, 1870, ch. 19, 16 Stat. 67 (admitting the State of Mississippi to representation in Congress); Act of Mar. 30, 1870, ch. 39, 16 Stat. 80 (admitting the State of Texas to representation in Congress). For this history and its significance to the original meaning of the Amendment, *see* Upham, *supra* note 239, at 1410–15.

245 These constitutions, then, provide dispositive evidence as to the original and authoritative meaning of the Amendment. Cf. *Richardson v. Ramirez*, 418 U.S. 24, 48–50 (1974) (using content of readmitted states’ constitutions to determine the meaning of the Fourteenth Amendment).

246 JACK M. BALKIN, *LIVING ORIGINALISM* 7 (2011).

247 *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015); cf. NORALEE FRANKEL, *FREEDOM’S WOMEN: BLACK WOMEN AND FAMILIES IN CIVIL WAR ERA MISSISSIPPI* 83 (1999) (stating that “control of sexuality” was a primary goal of the policy).

decision has proven a menace to two fundamental rights secured by the same: the citizen's freedom of (sacred) speech, and the human person's presumptive right to the custody of his or her bodily offspring.

Among the fundamental "privileges and immunities" that "belong[ed] of right to the citizens of all free Governments"²⁴⁸ and had been recognized in all the states since Independence was the freedom of speech.²⁴⁹ Accordingly, both before and during the adoption of the Amendment, authorities identified this freedom as among the constitutional "privileges and immunities of citizens."²⁵⁰ Of special importance was the freedom of *sacred* speech, which antislavery Americans alleged had been abridged by southern anti-abolitionist laws.²⁵¹ According to John Bingham, the chief drafter of the Amendment's Privileges or Immunities Clause, the provision would nullify any law suppressing religious speech that pointed to universal human dignity, e.g., by identifying slavery as a form of violent theft, in violation of the Decalogue.²⁵² As he told voters, by the Amendment, no longer will men "be put to the torture, sent to the dungeon, or made to walk the narrow

248 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Howard) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230)).

249 2 WILSON, *supra* note 100, at 443 ("The citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning publick men, publick bodies, and publick measures."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 14 (New York, O. Halsted 1827) (noting that because the "free people of these United States" have "control over their rulers," it has "become a constitutional principle in this country, that '[e]very citizen may freely speak, write[,] and publish his sentiments, on all subjects, being responsible for the abuse of that right[,] and [that] no law [can rightfully] be passed to restrain or abridge the [freedom] of speech'" (quoting N.Y. CONST. of 1821, art. VII, § 8) (quote corrected)); see also JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 263 (New York, Am. Book Co. 1840) (referencing Blackstone to the effect "that the liberty of the press, properly understood, is essential to the nature of a free state").

250 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Howard) (quoting *Corfield*, 6 F. Cas. at 551). For antebellum authorities, see, most notably, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857). For antislavery authorities concurring, see generally David R. Upham, *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117, 1153–54, 1157 (2016). For authorities during the adoption of the Amendment, see, most notably, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (speech of Sen. Jacob Howard inaugurating the Senate debate and listing "freedom of speech" among the privileges and immunities of citizens).

251 Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. STATE L.J. 1085, 1139 (1995) (discussing prosecutions of antislavery Christian speech).

252 "The Last Hour of the Great Conflict.": Eloquent Speech of Hon. John A. Bingham on the Great Issues of the Hour, EBENBURG ALLEGHANIAN, Aug. 23, 1866, at 1 (on file with Libr. of Cong., Chronicling America, <https://chroniclingamerica.loc.gov/lccn/sn85054846/1866-08-23/ed-1/seq-1/> [https://perma.cc/D4T4-J75Z]); compare Exodus 20:15 (King James Version) ("Thou shalt not steal."), with Exodus 21:16 (King James Version) ("And he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death.").

steps of the scaffold, for teaching their children the holy precepts of our Lord and Master.”²⁵³

Further, among the procedural rights guaranteed by the Amendment’s Due Process Clause was the presumption favoring the person’s custody of his or her own offspring. It was an established maxim that a parent could not be deprived of the custody of his child except by a judicial determination that the deprivation was justified. As future Justice Nelson said thirty years before the Amendment, the parent is “the natural guardian of his infant children, and in the absence of good and sufficient reasons shown to the court, such as ill usage, grossly immoral principles or habits, want of ability, &c. is entitled to their custody, care and education. All the authorities concur on this point.”²⁵⁴ Further, within two years of the Amendment’s ratification, the highest courts of Indiana and Illinois concluded that this presumption was essential to constitutional due process.²⁵⁵

Consistent with this original understanding, for one hundred years, the Supreme Court has held, unanimously, that the Amendment prohibits the states from making or enforcing laws abridging the freedom of speech.²⁵⁶ And for one hundred years, the Court has also held, almost unanimously, that the Amendment requires that the states honor the presumptive right of natural parents to the custody, care, and education of their offspring.²⁵⁷

253 EBENBURG ALLEGHANIAN, *supra* note 252, at 1.

254 *People ex rel. Nickerson v. _____*, 19 Wend. 16, 16 (N.Y. Sup. Ct. 1837).

255 *Lee v. Back*, 30 Ind. 148, 152–53 (1868); *People ex rel. O’Connell v. Turner*, 55 Ill. 280, 287–88 (1870).

256 *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *id.* at 672 (Holmes, J., dissenting) (accepting majority’s opinion that “free speech . . . must be taken to be included in the Fourteenth Amendment”); *Fiske v. Kansas*, 274 U.S. 380, 386 (1927); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (observing that it is “no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action”); *id.* at 723–24 (Butler, J., dissenting) (remarking that as to “whether the ‘liberty’ protected by the Fourteenth Amendment includes the right of free speech and press,” “[t]hat question has been finally answered in the affirmative”).

257 *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (affirming, as constitutionally protected, the parent’s “natural duty” to educate his offspring and thus the natural custodial right of the parent); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (reaffirming *Meyer* in a unanimous opinion); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing “fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Parham v. J.R.*, 442 U.S. 584, 602 (1979), *discussed in*, Louis W. Hensler III, *The Legal Significance of the Natural Affection of Charlie Gard’s Parents*, 17 CONN. PUB. INT. L.J. 59, 68–70 (2017)); *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (citing other cases). *But see id.* at 92 (Scalia, J., dissenting) (questioning the validity of this line of cases for their origin in “an era rich in substantive due process holdings that have since been repudiated”); *id.* at 98 (Kennedy, J., dissenting) (resisting the strong parental presumption and identifying as his

Nonetheless, in the wake of *Obergefell*, state officials have employed antidiscrimination laws to abridge the freedom of (sacred) speech, at least in commercial contexts. They have sought to compel certain religious merchants to provide wedding services to same-sex couples equally with opposite-sex couples, in violation of what the merchants believe to be the “holy precepts of our Lord and Master.”²⁵⁸ The logic of this extension of *Obergefell* seems persuasive: What the Constitution compels the states to do, the states may compel the citizens to do.

Further, many state and federal officials, legislative and judicial, have imputed the presumption of paternity to a mother’s same-sex spouse, to the detriment of the mother’s custodial rights, and the utter destruction of the natural father’s rights. According to proponents, this new presumption conforms with *Obergefell*’s requirement that same-sex couples enjoy “the constellation of benefits that the States have linked to marriage.”²⁵⁹ The new definition of “marriage,” it seems, implies a new definition of “parent.”²⁶⁰

The Supreme Court appears sharply divided on both these developments from *Obergefell*. A coalition of six Justices still favors robust protection for the free-speech rights of marriage conservatives.²⁶¹ But a different (partly overlapping) majority seems favorable to a rule compelling the states to impute a presumption of parentage to a mother’s female spouse.²⁶²

Now the strict *letter* of the *Obergefell* opinion compels neither such abridgement of free speech, nor such impairment of parental rights. There are real distinctions between (1) the freedom of state speech and the freedom of individual speech, and (2) the redefinition of

“principal concern” the influence of “the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case”).

258 EBENBURG ALLEGHANIAN, *supra* note 252; *see, e.g.*, 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2313 (2023) (Colorado attempting to compel religious website designer to provide wedding services to same-sex couples).

259 *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015); *see also* UNIF. PARENTAGE ACT § 204 cmt. at 9 (UNIF. L. COMM’N 2023) (establishing such a presumption as an implementation of *Obergefell*).

260 Jeffrey A. Shafer, *The Forbidden While Inescapable Law-Morality Relation*, J. RELIGION, CULTURE & DEMOCRACY art. no. 129353, at 15–17.

261 *Cf.* 303 Creative, 143 S. Ct. at 2321 (holding that a merchant had a constitutional right to refrain from expressly or even tacitly endorsing any same-sex union as “marriage”).

262 Pavan v. Smith, 582 U.S. 563, 564 (2017) (*per curiam*) (affirming that the “constellation of benefits” promised in *Obergefell* must include the automatic identification of a mother’s female spouse as “parent” on a birth certificate (quoting *Obergefell*, 576 U.S. at 670)).

marriage and the redefinition of parenthood. Both these distinctions can be gleaned from the original text of Justice Kennedy's opinion.²⁶³

Obergefell, strictly construed, required only that states grant to same-sex couples the "constellation of benefits" conferred by state law. The citizens' free speech is not a state benefit. Nor is the presumption of paternity.²⁶⁴ Unlike intestacy priorities or fiscal benefits (subsidies, tax exemptions, etc.), this presumption is not a governmental "benefit." Rather, like the presumption of innocence, the rule is merely a way of identifying and securing a preexisting natural right—whether one's bodily liberty or bodily offspring. Moreover, as extended to a woman's same-sex spouse, the presumption of paternity is a naked falsehood.

Nonetheless, the *spirit* of *Obergefell* plainly threatens any rights adjacent to that marriage that the Court has redefined. By endorsing endless evolution, to be implemented by a sheer majority of the Supreme Court, *Obergefell* provides a template for endless redefinition (if not abolition) of the freedom of speech, the rights of natural parents, the reserved rights of the states, and any other constitutional rights. The *Obergefell* opinion preeminently illustrates what Justice Brennan called "the most important rule in constitutional law": "Five votes can do anything around here."²⁶⁵

III. HARMFUL TO MATRIMONY

The four Republican dissenters in *Obergefell* zealously opposed this activism and defended the reserved authority of the states. But they lodged no objection to the majority's chosen policy. Justice Scalia (joined by Justice Thomas) declared his indifference: The subject was not of "immense personal importance to [him]," for "[t]he law can recognize as marriage whatever sexual attachments and living arrangements it wishes," even if those choices might "perhaps have adverse social effects."²⁶⁶ And in the main dissent, the four conservatives went

263 *Obergefell*, 576 U.S. at 679 (expressly affirming that "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned"); *id.* at 668–69 (affirming that procreation is not essential to "marriage," but noting, as an "aspect[]," the important but indirect benefits to a child where a "biological" or "adopt[ive]" parent or parents are in stable marital relations, and distinguishing adoption as something that the states "allow[]").

264 *Pavan*, 582 U.S. at 566.

265 Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 & n.80 (1995) (quoting JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 54 (1995)).

266 *Obergefell*, 576 U.S. at 713 (Scalia, J., dissenting).

further, conceding that “the policy arguments for extending marriage to same-sex couples may be compelling.”²⁶⁷

But if the *Murphy* maxim was correct—that “no legislation [is] . . . more . . . necessary” to the Founding of our Republic than that establishing it on the “holy estate of matrimony”²⁶⁸—then the conservatives conceded far too much. The federal judge, like other federal officials, takes an oath to “support and defend the Constitution” and to “bear true faith and allegiance” to the Republic.²⁶⁹ The duty of fidelity to our Republic prohibits indifference; to adapt Lincoln’s words, the judge may not adopt “a policy of ‘don’t care’ on a question about which all true men do care.”²⁷⁰ The judge may well have a duty, within his or her defined office, to be emphatically pro-matrimony, as the Court once was.

In this section, I will sketch a defense of that old conservative maxim: The legislation promoting matrimony, especially the traditional “holy estate” thereof, is necessary to our free Republic. Accordingly, I will argue that by harming the law of matrimony, *Obergefell* not only violated the Federal Constitution itself, but did grave harm to the whole Republic by and for which the Constitution was made.

A. *What Matrimony Has Done for Our Republic*

So what has matrimony ever done for our Republic? The question is enormous. Here I will only briefly sketch just four vital contributions. Matrimony has served the American Republic by (1) protecting our citizens’ very lives, (2) promoting the citizens’ pursuit of happiness, (3) providing the Republic with more citizens, and (4) mitigating racial injustice.

1. Life

The security of the individual’s right to life is the first end of government.²⁷¹ Matrimony, given its natural end, is potently pro-life. Children conceived in marriage are far more likely to survive pregnancy;

267 *Id.* at 686 (Roberts, C.J., dissenting).

268 *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (emphasis added).

269 5 U.S.C. § 3331 (2018).

270 President Abraham Lincoln, Cooper Union Address (Feb. 27, 1860) (transcript available at <https://www.abrahamlincolnonline.org/lincoln/speeches/cooper.htm> [<https://perma.cc/K6LH-R4WT>]). I’m grateful to Professor James Stoner for indicating the relevance of this quote to Justice Scalia’s dissent.

271 See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring that the purpose for which government is instituted is to “secure these rights [of Life, Liberty, and the pursuit of Happiness],” listing “Life” as the first among these rights).

they are *much less* likely to die by abortion or miscarriage.²⁷² After birth, children received into matrimonial families suffer less abuse and neglect, and are more likely to reach healthy adulthood.²⁷³ To a significant but much lesser extent, matrimony provides the husband with enhanced health and longevity, and perhaps also the wife.²⁷⁴

Parenthetically, for our ancestors, matrimony, by facilitating motherhood, did little to improve women's health or longevity. Quite the contrary: Motherhood was peculiarly dangerous, even where the mother had the assistance of the father and a large clan fostered by matrimony. Men and childless women had significantly longer life expectancies.²⁷⁵

2. Pursuit of Happiness

But woman, like man, does not live by bread alone; nor does she live simply to maximize the number of her days on earth. Men and women count their happiness by other metrics. For this reason, our declaration declares that among the inalienable rights of each human being, the security of which is the purpose of government, is not only life but also “the pursuit of Happiness.”²⁷⁶

Not surprisingly, given our universal human heritage, this happiness usually involves interpersonal relations: chiefly our relation to our offspring, then to our parents, and then to our other more remote kinfolk. Matrimony is obviously helpful in establishing and preserving these relations. And relational happiness so often consists more in giving than receiving, as Aristotle and countless others have observed.²⁷⁷

272 Katherine Kortsmitt, Antoinette T. Nguyen, Michele G. Mandel, Lisa M. Hollier, Stephanie Ramer, Jessica Rodenhizer & Maura K. Whiteman, *Abortion Surveillance—United States, 2021*, MORBIDITY & MORALITY WKLY. REP., Nov. 24, 2023, at 1, 6 (“The abortion ratio was 41 abortions per 1,000 live births for married women and 404 abortions per 1,000 live births for unmarried women” in 2021.). One study found a much higher rate of miscarriage between single women than married or cohabitating women. Joshua R. Mann, Robert E. McKeown, Janice Bacon, Roumen Vesselinov & Freda Bush, *Are Married/Cohabiting Women Less Likely to Experience Pregnancy Loss?*, 103 J. S.C. MED. ASS'N 266, 266–67 (2007).

273 See AM. COLL. OF PEDIATRICIANS, MARRIAGE AND FAMILY (2014).

274 See *Marriage and Men's Health*, HARV. HEALTH PUBL'G (June 5, 2019), <https://www.health.harvard.edu/mens-health/marriage-and-mens-health> [<https://perma.cc/XM4S-AZWD>]; see also *Marriage Appears to Be Beneficial to Women's Health, but Only when Marital Satisfaction Is High, New Research Shows*, AM. PSYCH. ASS'N (Sep. 14, 2003), <https://www.apa.org/news/press/releases/2003/09/marital-benefit> [<https://perma.cc/568T-8RFQ>].

275 See, e.g., Div. of Reprod. Health, Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, CDC, *Achievements in Public Health, 1900–1999: Healthier Mothers and Babies*, MORBIDITY & MORTALITY WKLY. REP., Oct. 1, 1999, (showing a dramatic collapse in maternal mortality rates in the twentieth century).

276 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

277 Aristotle wrote:

Here again, candor requires us to acknowledge that these relations involve substantial inequality. The relational benefits of matrimony are unequal. While both men and women find matrimony very useful to the flourishing of their offspring, men, but not women, rely heavily on matrimony to establish that relation—and even just to know the identity of their offspring. Further, the participants in the household experience reciprocal but unequal attachments. As Aristotle observed, by nature mothers tend to have greater affection for their offspring than fathers do, and parents have greater affection for their offspring than the offspring reciprocate.²⁷⁸ The reason for this inequality, this hierarchy of affection—(1) maternal, (2) paternal, and (3) filial—arises from unequal knowledge. Mothers have the greatest knowledge, measured by duration and certainty, fathers less so, and children much less so.²⁷⁹

3. More Citizens

Matrimony not only serves the life and happiness of the existing citizens but produces so many more citizens. Children received and educated in matrimonial homes are not only likely to survive, but more likely to become socially engaged adults, if we consider such metrics as education, employment, and voting.²⁸⁰ The reason for this benefit seems obvious: Matrimony gives the child two parents, possibly four grandparents, and a potential multiplicity of kinfolk on which he might rely.²⁸¹ Moreover, such matrimony thus multiplies the lessons of cooperation, conflict, and compromise that will prove valuable in free society.²⁸²

But it seems to lie in loving rather than in being loved, as is indicated by the delight mothers take in loving; for some mothers hand over their children to be brought up, and so long as they know their fate they love them and do not seek to be loved in return (if they cannot have both), but seem to be satisfied if they see them prospering; and they themselves love their children even if these owing to their ignorance give them nothing of a mother's due.

ARISTOTLE, *NICOMACHEAN ETHICS* 1159a28–1159a34 (W.D. Ross trans.).

278 *Id.* at 1161b12–1162a4.

279 *See id.* Mothers know the child before the father does, and the parents know the children before the children know their parents. Mothers are sure of the identity of their offspring, but fathers sometimes wonder. Parents are usually sure their children were not adopted, but children very often wonder.

280 *See* MELISSA S. KEARNEY, *THE TWO-PARENT PRIVILEGE: HOW AMERICANS STOPPED GETTING MARRIED AND STARTED FALLING BEHIND* 168–69 (2023) (“Children who have the benefit of two parents . . . do better in school and have fewer behavioral challenges. These children go on to complete more years of education, earn more in the workforce, and have a greater likelihood of being married.”).

281 *See* Heath, *supra* note 59 and accompanying text.

282 *See id.*

Matrimony is particularly helpful where it's exogamous, monogamous, and stable. Exogamy—marriage outside of one's group—tends to strengthen the bonds of the citizenry.²⁸³ Intermarriage, whether interstate, interracial, or interfaith, no doubt has proved vital to our sense of national unity.²⁸⁴

Here I add something that has not been emphasized. By stable monogamy—that “union for life of one man and one woman”²⁸⁵—children learn something enormously valuable to the preservation of free government. Where children are conceived and received in matrimony's (imperfect) freedom and equality, the child will witness his parents' conflicts, disagreements, and imperfect compromises. The parents thus not only provide the child with an example of free society but convey to the child that he was made by and for such a community. After all, it was precisely that enduring community of freedom, mild conflict, and imperfect compromise that made the child, so of course he will feel at home in such a society. He was born that way.²⁸⁶

The late Justice Scalia seemed to overlook this vital connection between matrimony and democracy in his swaggering insouciance: “So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me.”²⁸⁷ But if in fact “marriage” determines whether babies grow up to active and democratic citizenship, “what the law says about marriage” may be very well what determines who “rules me.” Will such citizens even exist? Will they even show up to the meeting? Will they be disposed to preserve democratic self-government? Or will they instead accept government by judiciary—or something far worse?

4. Racial Justice

Matrimony has also somewhat mitigated our Republic's most infamous failure: racial injustice. As I noted, chattel slavery, by its nature, does violence to the matrimonial family. The absence of matrimony, in turn, as Booker Washington pointed out, had adverse effects that lasted generations.

283 PLUTARCH, *On the Fortune or the Virtue of Alexander*, in 4 MORALIA 379, 399 (Frank Cole Babbitt trans., Harv. Univ. Press 1962) (c. 100) (praising Alexander for using intermarriage to blend formerly distinct peoples “into one by ties of blood and children”).

284 See W.B. Allen, *Guinier's Poetry of Race or, When Accepting the Reality of Difference Means Conceding Different Realities*, GOOD SOC'Y, Spring 1995, at 32, 36 (favoring interracial marriage as the best means to foster interracial justice and solidarity).

285 *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

286 In addition, by adopting children, the matrimonial home can provide something of this lesson even to orphans.

287 *Obergefell v. Hodges*, 576 U.S. 644, 713 (2015) (Scalia, J., dissenting).

Writing forty years after emancipation, Washington addressed the objection that (in a somewhat different form) still very much troubles us: Why was it, decades after emancipation, that the sons and grandsons of the freedmen still did so poorly relative to white boys?²⁸⁸ Why did the sons of illiterate poor whites, relative to the illiterate sons of poor blacks, seem to perform better at farming, skilled trades, etc.?²⁸⁹ Many purported “experts” in his time pointed to genetic inferiority. But Washington did not truck with such “expertise,” nor did he point, as we might today, primarily to the effects of Jim Crow.²⁹⁰ Instead, he pointed to another factor—the matrimony privilege:

The world should not pass judgment upon the Negro, and especially the Negro youth, too quickly or too harshly. The Negro boy has *obstacles, discouragements, and temptations* to battle with that are little known to those not situated as he is. When a white boy undertakes a task, it is taken for granted that he will succeed. On the other hand, people are usually surprised if the Negro boy does not fail. In a word, the Negro youth starts out with the presumption against him.²⁹¹

Why was there such a presumption—and what were these temptations?

Those who constantly direct attention to the Negro youth’s moral weaknesses, and compare his advancement with that of white youths, do not consider the influence of the memories which cling about the old family homesteads. I have no idea, as I have stated elsewhere, [of the name or whereabouts of my father, and most of my extended family]. My case will illustrate that of hundreds of thousands of black people in every part of our country. The very fact that the white boy is conscious that, if he fails in life, he will disgrace the whole family record, extending back through *many generations*, is of *tremendous value* in helping him to resist temptations. The fact that the individual has behind and surrounding him proud family history and connection serves as a stimulus to help him to overcome obstacles when striving for success.²⁹²

That is to say, the white boy’s chief privilege was the matrimonial privilege.

The white boy’s “tremendous” advantage, I think, consisted in the twin motives of (1) confidence and (2) fear of culpable failure. As the son of a multigenerational matrimonial family, he knew who he was.

288 See WASHINGTON, *supra* note 234, at 36.

289 *Id.*

290 It was at least arguable that none of the exclusions of African Americans—from the ballot box, public education, the professions, or places of public accommodation—posed any direct challenges to the work of the farmer and tradesman.

291 WASHINGTON, *supra* note 234, at 35–36 (emphasis added).

292 *Id.* at 36–37 (emphasis added).

He came from a line of men—his father, two grandfathers, perhaps four great-grandfathers—whose achievements were substantial. Each of these men had proved capable of not only inseminating a woman, but much more—forming a durable relation with her, proving a tolerable housemate to her, and providing for their children so that they reached fertile adulthood.

These achievements may seem ordinary, but they are quite impressive. Armed (and burdened) with such memory, the son of matrimony tends to think he can do it, and everybody expects it of him. He can do it. And shame on him if he fails!

Washington's comments raise a related question of which we are painfully aware but seem incapable of answering. Why was (and is) this achievement gap particularly acute among boys, but not girls? Why does the absence of the matrimonial homestead adversely affect the boy more than the girl?

Washington's comments point to an answer. The girl, whatever her immediate parentage, knows something that gives her (but not her brother) a combination of confidence and fear. She knows that she comes from a very long, unbroken succession of women who bore children that became flourishing adults. That is no small achievement. She is the daughter of sweat, sacrifice, and success, and *of course* she should be able to do the same—and shame on her if she can't. That knowledge is likely to provide her with that potent combination of confidence and fear that the boy can attain usually only from the matrimonial household. For the same reason, the girl will be more likely to experience *anxiety* along with worldly success.²⁹³

For Washington, the establishment of this multigenerational homestead was essential to recovery from slavery. "Years ago I resolved that because I had no ancestry myself I would leave a record of which my children would be proud, and which might encourage them to still higher effort."²⁹⁴ Our records, though fragmentary, strongly indicate that he and his fellow freedmen succeeded in establishing this motivating record. Within a generation, the freedmen and their descendants established remarkably strong matrimonial ties. By 1890, census

293 *Women and Anxiety*, FDA: WOMEN'S HEALTH TOPICS (Jan. 30, 2025), <https://www.fda.gov/consumers/womens-health-topics/women-and-anxiety> [<https://perma.cc/LS5K-EEFL>] ("Women are more than twice as likely as men to develop an anxiety disorder in their lifetime."). And for much the same reason, we might add, she will suffer more from her own infertility. Cf. *1 Samuel* 1:10 (King James Version) ("And she was in bitterness of soul, and prayed unto the Lord, and wept sore.").

294 WASHINGTON, *supra* note 234, at 35.

numbers indicate that African Americans attained Victorian levels of matrimony (very high) and divorce (very low).²⁹⁵

Moreover, we have reason to believe that this matrimonial culture, over the next generation or two, helped to substantially mitigate America's racial injustice by reducing the racial-economic gap. The generations of African Americans born and raised when the post-slavery matrimonial family was strongest (1890–1950), managed, despite extraordinary racial discrimination, to steadily shrink the economic gap with whites.²⁹⁶ In particular, between 1920 and 1980, black Americans cut the overall racial wealth gap in half.²⁹⁷ Further, between 1940 and 1970 alone, black men succeeded in reducing their income disparity with white men by one third.²⁹⁸ All of that progress has stalled over the past forty years, despite the lifting of so many discriminatory barriers.²⁹⁹ One might reasonably speculate that the collapse of the black matrimonial family was a contributing factor.

5. Liberty? Equality? Romance?

The reader might object that in enumerating the benefits of matrimony, I omitted “liberty,” and likewise “equality” and “romance.” To a certain extent, the objection is unanswerable. Matrimony requires a sacrifice of a certain liberty, equality, and romance. *Mātrimōnium* is incompatible with licentious liberty. It is a burden, a *mōnium*: The husband is bound to the woman's house, the woman is consequently bound to him, and they are bound to their offspring. Further,

295 By 1890, roughly ninety-four percent of black women and ninety-two percent of white women had been married by age thirty-five. Diana B. Elliott, Kristy Krivickas, Matthew W. Brault & Rose M. Kreider, *Historical Marriage Trends from 1890–2010: A Focus on Race Differences* fig. 5 (U.S. Census Bureau, Soc., Econ., & Hous. Stat. Div., Working Paper No. 2012-12, 2012). African Americans' reported divorce rates (often merely informal separation) were higher (though still absurdly low, at nine per one thousand women vs. six per one thousand for whites), but their formal divorce rates were probably lower than whites. Douglas J. Besharov & Andrew West, *African American Marriage Patterns*, in *BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA* 95, 98 (Abigail Thernstrom & Stephan Thernstrom eds., 2002).

296 Lisa Camner McKay, *How the Racial Wealth Gap Has Evolved—and Why it Persists*, FED. RSRV. BANK OF MINNEAPOLIS fig. 1 (Oct. 3, 2022), <https://www.minneapolisfed.org/article/2022/how-the-racial-wealth-gap-has-evolved-and-why-it-persists> [<https://perma.cc/R32D-JSU8>].

297 *Id.*

298 Abigail Thernstrom & Stephan Thernstrom, *Black Progress: How Far We've Come, and How Far We Have to Go*, BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/articles/black-progress-how-far-weve-come-and-how-far-we-have-to-go/> [<https://perma.cc/92DD-YQDY>] (noting that “[f]rom 1940 to 1970, black men cut the income gap by about a third”).

299 See McKay, *supra* note 296 (“In the 40 years between 1980 and 2020, the racial wealth gap actually increased by the equivalent of 0.1 percent a year.”).

matrimony can never provide perfect sex equality, but only a certain mitigation of inequality. And finally, matrimony is simply not romantic. It is a terrestrial work, concerned first with the earthly good of the child and the broader family, and vital to the common good. It's good for kids, good for business, good for politics. Matrimony, of course, relies heavily on affection and fosters the same. And some religious people (like this author) might believe marriage to be divinely instituted and even a sacrament. But matrimony is no magic carpet ride, no happily-ever-after, no perpetual honeymoon, no flight to the moon (let alone back). Its "enjoyments," as Justice Wilson remarked, are decidedly "sublunary."³⁰⁰

All these problems, I think, must be conceded openly. Matrimony will always be irreconcilable with licentious liberty, perfect sex equality, and transcendent romance. As long as our Republic endures, these deeply rooted American passions will always be at odds with our deeply rooted tradition of matrimony.

B. *What the Republic Has Done For Matrimony*

Matrimony is thus necessary to the political order. But has the (ungrateful) political order ever done anything for matrimony? After all, if matrimony is pre-political, then it would seem that the Republic depends on matrimony, but not the other way around. But according to *Murphy v. Ramsey*, it is the *law* establishing the matrimonial family that is the *most* necessary for the foundations of our free society.³⁰¹

So what has our Republic, by its laws, done for matrimony? Here again, the question is enormous, and I provide only a rough sketch of an answer. Our laws have provided at least three benefits: protection, facilitation, and encouragement.

First, our laws have *protected* matrimony in the same way that they protect other free associations. The law protects life, liberty, and property against such interpersonal violence as homicide, maiming, kidnapping, arson, robbery, and other theft. Protection against such violence is vital to every free association.

Matrimony is in peculiar need of such protection. The members of an adult organization, like a gang, a corporate board, an orchestra, or other adult association—including a sterile *Griswoldian* marriage—have a capacity to jointly defend their members in a way that the

300 2 WILSON, *supra* note 100, at 485 ("By [death,] which closes the scene of all sublunary enjoyments, marriage is dissolved . . .").

301 *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

members of the matrimonial household, with many young children, may not.³⁰²

Second, our laws have *facilitated* marriage by reducing transaction costs. All agreements have such costs, but some are peculiarly acute to matrimony. The parties tend to be young, passionate, imprudent, and understandably afraid given the grave consequences of their decision.

For instance, even more than a real-estate transaction, the matrimonial transaction should be properly witnessed and publicly recorded. The laws have provided a witness, a recorder, if not a formal officiant.

The laws also relieve the (usually) young parties of the burden of negotiating the terms of dissolution. Such prenuptial negotiations may cripple the couple, for the conversation requires an open discussion of such ugly matters as abuse, abandonment, and adultery—the very discussion of which may foster that distrust that breeds mutual distrust.³⁰³ What James Madison says of the dangers of discussing disunion while trying to forge a union of states applies even more to the formation of a union between male and female: The dissolution question is “not less delicate; and the flattering prospect of its being merely hypothetical, forbids an overcurious discussion of it.”³⁰⁴ Instead, our divorce and intestacy laws may attend to these ugly hypotheticals, properly concealed within the statute books and judicial reports, to be consulted only when necessary.

Perhaps most important is the way in which the laws serve to confirm and protect the preexisting matrimonial inclinations between the sexes. While it may be true, as Aristotle observed, that male and female form their association far more easily than men form cities,³⁰⁵ still the union is not spontaneous nor inevitable. The young simply cannot make it up on their own. Pierre Manent deftly describes the difficulty to be addressed:

One of the most essential laws is that which, as it were, holds together the difference of the sexes with the difference[s] of generations. The other sex is the *strange proximity of that which is furthest away*; the other generation is the strange distance of what is nearest. No human being can by himself regulate this distance or this

302 Moreover, the dissolution of the matrimonial association, by death or divorce, involves peculiar risks of violence. People tend to devote more affection and property to the matrimonial enterprise than to other projects. The distribution of such property and the assignment of child custody often involve higher passions than the dissolution of a corporation.

303 See THE FEDERALIST NO. 5, at 25 (John Jay) (Jacob E. Cooke ed., 1961) (“Distrust naturally creates distrust . . .”).

304 See THE FEDERALIST NO. 43, at 298 (James Madison) (Jacob E. Cooke ed., 1961).

305 ARISTOTLE, *supra* note 277, at 1162a17–1162a18.

proximity. To try to do so is to enter into a vertigo, a loss of the self from which there is no return. This is why laws of marriage and of filiation in a way make up the original laws of the human world.³⁰⁶

The laws bridge this gap in at least two ways. On the one hand, the laws provide the couple with a ready-made model, a short-form contract, the terms of which are readily intelligible. The male and female agree to live together so as to jointly care for any offspring that might result from their mutual embrace, with the obvious corollaries that forbid abuse, abandonment, or adultery.

On the other hand, the law protects the sexes' mutual inclinations by forbidding the ignoble lies fostered by public obscenity. The general distribution of obscene materials can foster a destructive misunderstanding between the young man and woman. As some legal authorities recognized over a century ago, the consumption of obscenity increases the appetite for increasingly unnatural and vicious stimulations.³⁰⁷ As a result, the mass distribution of pornography has led to the mass distribution of the macabre and alien themes. In our time the most striking result of mass obscenity is the widespread assumption, among both young men and young women, that men like to choke, and women like to be choked. One educator shared this anecdote:

I was initially startled in early 2020 when, during a post-talk Q. and A. at an independent high school, a 16-year-old girl asked, "How come boys all want to choke you?" In a different class, a 15-year-old boy wanted to know, "Why do girls all want to be choked?" . . . A male freshman said "girls expected" to be choked and, even though he didn't want to do it, refusing would make him seem like a "simp." And a senior in high school was angry that her friends called her "vanilla" when she complained that her boyfriend had choked her.³⁰⁸

306 Shafer, *supra* note 260, at 13–14 (emphasis added) (quoting PIERRE MANENT, NATURAL LAW AND HUMAN RIGHTS: TOWARD A RECOVERY OF PRACTICAL REASON 122–23 (Ralph C. Hancock trans., 2020) (2020)) (quote corrected).

307 For example, one federal district court said in 1891:

[I]t does seem to me that it is not too much to say that no ordinary mind can subject itself to the repeated reading and contemplation of such subjects and language without the risk of becoming indurated to all sense of modesty in speech and chastity in thought. The appetite for such literature increases with the feeding. The more it is pandered to, the more insatiable its craving for something yet more vicious in taste.

United States v. Harmon, 45 F. 414, 418 (D. Kan. 1891), *rev'd on other grounds sub nom.*, Harman v. United States, 50 F. 921 (C.C.D. Kan. 1892).

308 Peggy Orenstein, *The Troubling Trend in Teenage Sex*, N.Y. TIMES (Apr. 12, 2024), <https://www.nytimes.com/2024/04/12/opinion/choking-teen-sex-brain-damage.html> [https://perma.cc/G66L-DN7Z].

Suffice it to say that such pornography-induced opinions are largely false and highly destructive to the matrimonial conversation. The public broadcast of a young man's message "I want to spoon" (a century ago)³⁰⁹ or "I want to hold your hand" (a half-century ago)³¹⁰ is generally true of the feelings of teenage boys, generally pleasing to teenage girls, and favorable to their natural matrimonial inclinations. The opposite is true of "I want to grab your throat."

For good reason, then, public authorities once endorsed the publication of the former as decent or at least harmless but criminalized the latter as harmful. The corruption of the young that was most to be feared was not the enhancement of youthful appetite (already quite strong), but the subversion of the youth's intellect, and the resulting mutual alienation of the sexes.

Third, our laws have *encouraged* matrimony in two distributive ways.³¹¹ On the one hand, our laws have promoted marriage by distributing resources in a multitude of ways, such as the Homestead Act, tax exemptions, and variety of other fiscal policies.³¹² On the other hand, our laws have encouraged matrimony by conveying on it a certain public honor. Our laws recognize "marriage" by licensing it and by other public speech and withhold such honors from other arrangements. Indeed, pursuant to the *Murphy* maxim, we once decried certain alternatives, like adultery, fornication, and concubinage, as "immoral" and even "criminal."³¹³

It was this distribution of public honor that was the principal target of the *Obergefell* majority. They claimed that by reserving the status of "marriage" to opposite-sex couples, the states denied same-sex couples "equal dignity in the eyes of the law";³¹⁴ the states treated them as "outcast[s]" who were "condemned to live in loneliness, excluded from one of civilization's oldest institutions."³¹⁵ Moreover, such laws also "harm and humiliate" children raised by such couples, by conveying the "the stigma" that "their families are somehow lesser."³¹⁶

309 ED MADDEN, *BY THE LIGHT OF THE SILVERY MOON* (1909).

310 THE BEATLES, *I Want to Hold Your Hand*, on *I Want to Hold Your Hand* [Single] (Vinyl Record, Capitol Records Dec. 1963).

311 See ARISTOTLE, *supra* note 277, at 1130b30–1130b33 (discussing how legal justice involves the "distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution").

312 See, e.g., Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976) (extending benefits to the "head of a family"); *United States v. Windsor*, 570 U.S. 744, 771 (2013) (mentioning social security benefits and tax exemption).

313 See *supra* note 119 and accompanying text, discussing *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

314 *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

315 *Id.* at 667, 681.

316 *Id.* at 668.

As many progressive critics of the *Obergefell* opinion have pointed out, Justice Kennedy's argument proves too much. If reserving the honor of "marriage" to opposite-sex couples harms adults and children in other homes, the solution cannot consist in merely extending "marriage" to same-sex couples. The states thus still treat as "outcast" millions of other Americans who live in other, far more common arrangements: e.g., single parents, mother-grandmother households, polyamorous relationships, etc.³¹⁷

To this challenge, the Court's conservatives responded that any such harm was inadvertent,³¹⁸ and in any case, the alleged harm must be redressed by democratic choice: "Whatever force that [dignitary] belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*."³¹⁹

The conservatives, here again, conceded far too much. There are, I believe, important dignitary reasons for reserving a certain status to matrimonial households, and by implication good reason to mark other households with a certain stigma.

Pace Justice Kennedy, the law of marriage is not concerned much with the purportedly "universal fear that a lonely person might call out only to find no one there."³²⁰ Rather, the law addresses a more universal and politically dangerous fear: that a human being might consider himself (or some other human being, or every human being) just a product of "accident and force."³²¹ The haunting question is, "Am I

317 See, e.g., Melissa Murray, *Murray, J., Concurring, in WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID*, *supra* note 27, at 202, 202 (contending that the Court had not "grappled with the way in which the normative and legal priority of marriage compels the second-class status of all other family forms"). Roughly 300,000 children today are raised by same-sex couples, but over 3,000,000 by a single parent and a grandparent, and over 23,000,000 by a single parent alone. BIANCA D.M. WILSON & LAUREN J.A. BOUTON, UCLA SCH. OF L., LGBTQ PARENTING IN THE US 2 (2024); *Children in Single-Parent Families by Race and Ethnicity in United States*, ANNIE E. CASEY FOUND. (Apr. 2026), <https://datacenter.aecf.org/data/tables/107-children-in-single-parent-families-by-race-and-ethnicity> [https://perma.cc/AZ72-PMDY]; cf. *POP1 Child Population : Number of Children (in Millions) Ages 0-17 in the United States by Age, 1950-2022 and Projected 2023-2050*, CHILDSTATS, <https://www.childstats.gov/americaschildren/tables/pop1.asp> [https://perma.cc/G5GT-KN3P] (last visited Apr. 17, 2026); Press Release, U.S. Census Bureau, Grandparents and Their Coresident Grandchildren: 2021 (Feb. 26, 2024), <https://www.census.gov/newsroom/press-releases/2024/grandparents-coresident-grandchildren.html> [https://perma.cc/EKX6-EARL].

318 See *Obergefell*, 576 U.S. at 689 (Roberts, C.J., dissenting) (noting that marriage did not come about "as a result of a prehistoric decision to exclude gays and lesbians").

319 *Id.* at 703 (citing *Lochner v. New York*, 198 U.S. 45, 61 (1905)).

320 *Id.* at 667 (majority opinion).

321 Cf. THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (distinguishing governments formed by "reflection and choice" from those formed by "accident and force").

just a piece of cosmic flotsam to which consciousness has been arbitrarily or capriciously attached?"

Matrimony makes imminent what is, for the most part, substantially true of everyone: that we are not children of accident or force, but of freedom and equality. To honor matrimony is to vindicate the honor of the human race.

The law honoring matrimony provides this lesson, chiefly to children, in two ways. First, the incentive makes it more likely that parents will get married and stay married. Their children will then see and feel, in a daily and immediate way, that they were conceived in liberty and received for equality.

Second, the public honoring of matrimony benefits children who are not so conceived and received. The law teaches these children a noble truth that is obscured by their immediate household: that they should *not* have been conceived and received that way.

As strange as it may seem, I submit that the illegitimate child has *a right to know* that he's illegitimate. The message, I submit, is not cruel but kind.

The point may be easier to see if we consider an extreme case. Consider a girl conceived and received into a brothel. If Justice Kennedy's opinion is correct, it would "harm and humiliate" the girl to suggest that her brothel family was somehow "lesser" than a home with married parents. But it would actually harm the child to celebrate the brothel as equal to matrimony; the message would be that she deserved to be so conceived and received; that some children are the fruit of matrimonial love, but that she is, by nature, the accidental byproduct of tawdry commerce.

The question is admittedly complex and difficult. My sole point here is that by honoring matrimony, our laws do not merely honor those who enter matrimony, and reassure children conceived and received in matrimony, but remind everyone of our universal dignity. Although we are all, in some sense, children of violence, fraud, accident, and exploitation, we are all mainly children of freedom and equality.³²² That's who we are, and that's the way it's supposed to be.

322 This story, of course, can be learned in other ways, such as refined philosophy, reflection on history, as well as putative revelation. *See, e.g., Genesis* 1:27–28 (King James Version) ("So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it . . ."); *Matthew* 1:1–25 (King James Version) (providing "the generation of Jesus Christ, the son of David, the son of Abraham" and listing mostly matrimonial generations, but specifying various other unions in the genealogy of the Son of Man).

C. *How Our Republic Has Harmed Matrimony*

Our Republic, however, has gravely harmed matrimony in various ways. And frequently our nation's Supreme Court has been the main culprit. *Obergefell* was just the latest chapter in this sad history.

First, slavery was our Republic's most anti-matrimony policy. By chattel slavery, we withheld from millions of persons the protection of the laws necessary for them to remain in stable matrimonial relations. These persons were subject to a sort of legalized kidnapping and robbery by which a man was separated from his wife, and offspring from their parents. The Supreme Court christened this injustice as not merely an unfortunate constitutional compromise, but as a fundamental constitutional right.³²³

Second, the laws of many states obstructed racial exogamy by laws that prohibited or invalidated interracial marriage.³²⁴ The Supreme Court blessed these laws as eminently reasonable, well "within the police power of the State."³²⁵

Third, by laws granting no-fault or low-fault divorce, the states have established powerful and noxious enticement to the destruction of matrimony,³²⁶ and thereby intentionally and tortiously interfered with the contract between husband and wife. A divorce, we must remember, is a governmental program, a government benefit. No-fault divorce is not a laissez-faire policy. Rather, with divorce, the parties receive a governmental honor, a license or warrant of sorts, to engage in what would otherwise be a breach of a solemn contract, a tort, and perhaps a crime: to abandon the household, to sever and liquidate its property, to separate children from one or both parents, and to engage in a new "marriage" that is bigamous if not adulterous. Moreover, the divorce gives the petitioner access to the state's coercive force to compel the redistribution of property and children.

To grant this honor and this power to one spouse, without any good cause shown, against the will and without the consent of the

323 See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857).

324 See Upham, *supra* note 110, at 284–85.

325 *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896), *overruled by*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

326 The enticement works in at least two ways. Primarily it gives an incentive to any dissatisfied spouse to desert the marriage and seek greener pastures. But more commonly, however, I think the enticement works in an indirect and more corrupting way. Matrimony is hard, and the spouses know it's hard, and know they can be hard to one another. The no-fault enticement does not so much entice the decent spouse but sows doubt, fear, distrust. She might think—"I wonder if he's tempted to abandon me," or even, "I wonder if he's worried that I'm tempted to abandon him," and so on. The public policy thus plants in the family the seeds of mutual distrust, and these can become a self-fulfilling prophesy, as distrust breeds distrust.

other, is simply unjust to the innocent spouse. And to grant this honor and this power to the parents jointly, even under the so-called amicable divorce, is a grave injustice to children—the primary (though third-party) beneficiaries of the matrimonial agreement. They have a right to their parents' matrimony.

Here again, the Supreme Court played a key role. No-fault divorce was not initially a national policy. When some states (most (in)famously, Nevada) adopted lax divorce laws,³²⁷ the policy became nationwide when the Supreme Court reversed its own precedents.³²⁸ In *Williams v. North Carolina*, the Court reversed a decades-old decision and held for the first time that the Full Faith and Credit Clause compelled a state, against its own laws, to dissolve a marriage formed in that state by enforcing an ex parte divorce granted to a spouse deserting to another state.³²⁹ That is to say, the full faith and credit owed to a progressive state's policies would trump any faith and credit owed to the promises of a husband and wife. As Katherine Shaw Spaht argued, the Court thereby engaged in “judicial social engineering,” by reducing “divorce laws in the states to the ‘lowest common denominator.’”³³⁰

When state legislatures subsequently adopted no-fault divorce, the “revolution”³³¹ was in part not really a revolution but acquiescence to a fait accompli, imposed by an activist Supreme Court. Incidentally, the author of the *Williams* decision would later be the author of *Griswold*: William Douglas.³³²

Fourth, our Republic has impeded the formation of matrimony by undermining the matrimonial conversation in two ways. First, by the nonenforcement or repeal of anti-obscenity laws, the state and federal governments have effectively pornified the conversation between male and female, leading to an alienation between the sexes. The Supreme Court played a major role in this anti-matrimony policy. The Court redefined the word obscenity so that much that was once obscene was

327 See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1504 (2000) (“Throughout much of the twentieth century, the divorce mill was Nevada.”).

328 *Williams v. North Carolina*, 317 U.S. 287, 303–04 (1942) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)).

329 *Id.*

330 Katherine Shaw Spaht, *The Modern American Covenant Marriage Movement: Its Origins and Its Future*, in COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE 239, 255 (John Witte, Jr. & Eliza Ellison eds., 2005).

331 William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1922 (2012) (noting that during the “no-fault divorce revolution” “[b]etween 1969 and 1985, every state adopted some kind of statutory regime allowing divorce without fault”).

332 *Williams*, 317 U.S. at 289; *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

now constitutionally protected.³³³ The result was a national policy that does not merely permit, but *honors* pornography as a fundamental constitutional liberty. The Court's current members, both conservatives and progressives, still bestow such respect on choking videos.³³⁴

But it is by the redefinition of marriage, from *Griswold* to *Obergefell*, that our Republic has dealt a more severe blow to matrimony. The revolution took from men and women the very word most commonly used in English to designate this association.

A couple wishing to enter matrimony can no longer intelligibly say, "let's get married." What is marriage—this "transcendent" "bilateral loyalty," that is "not [for] social projects," and hopefully enduring?³³⁵ What could this possibly mean in concrete terms?

To illustrate the corruption of the word, we may compare the definitions of "marriage" found in the old and new versions of the Oxford English Dictionary. A half century ago, the first definition of marriage was, as under the Defense of Marriage Act, "[t]he condition of being a husband or wife."³³⁶ The definition sketched an intelligible terrestrial relation: a house, a man bound to the house, and a woman. The new version reads as follows: "The legally or formally recognized union of two people as partners in a personal relationship."³³⁷ The new definition says nothing more than to identify it as an association between two persons that legal authorities choose to call "marriage." The new "marriage" is otherwise meaningless.

IV. PLOWING AROUND *OBERGEFELL*

If there is any substantial validity to the *Murphy* maxim, if indeed no law is more necessary to our Republic than the law of matrimony,

333 See *Miller v. California*, 413 U.S. 15, 24 (1973) (outlining a new test limiting states' ability to regulate obscenity). Obscenity was once defined as materials that tend "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *United States v. Harmon*, 45 F. 414, 417 (D. Kan. 1891) (quoting *The Queen v. Hicklin*, (1868) 3 L.R.Q.B. 360 (Eng.)), *rev'd on other grounds sub nom.*, *Harman v. United States*, 50 F. 921 (C.C.D. Kan. 1892). The standard was to be considered with reference to the "probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls,—the family, which is the common nursery of mankind, the foundation rock upon which the state reposes." *Id.* at 417–18.

334 See *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2309 (2025) (Thomas, J.) ("Adults have the right to access speech that is obscene only to minors.").

335 *Obergefell v. Hodges*, 576 U.S. 644, 667, 670 (2015) (quoting *Griswold*, 381 U.S. at 486).

336 *Marriage*, 6 THE OXFORD ENGLISH DICTIONARY 180 (1933); see *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022).

337 *Marriage*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/marriage_n?tab=meaning_and_use [<https://perma.cc/DZD8-EK4V>] (last visited Sep. 9, 2025).

then the reestablishment of that law is an urgent priority. If so, it would seem that reversing *Obergefell v. Hodges* must likewise be an urgent priority.

Nonetheless, I think such a reversal is neither possible, nor desirable, nor even necessary.

A. *Difficulty*

The reversal seems improbable because of the state of public opinion. Solid majorities of Americans have lost the meaning of “marriage” as “matrimonial,” and have adopted or accepted the *Griswoldian* definition. Most of these citizens reasonably believe that such marriage should be extended to same-sex couples and would view any reversal of “marriage equality” as an arbitrary effort to redefine marriage or take it away.

Conservatives will be unable to show that their intent is simply to restore the natural or traditional meaning of “marriage.” Progressives still have a virtual monopoly on the media and the universities. The conservative message simply will not get through.

Nor can conservatives rely on the Republican Party to champion their efforts. Any effort to overturn *Obergefell* will be a national effort. And as a *national* issue, same-sex marriage is a loser for the Party.³³⁸ The issue divides Republicans and unites Democrats. The basic rule of politics is to focus on the issues that unite your party and divide your opponents. It is Democrats who will welcome a national debate on *Obergefell*’s reversal.

Moreover, even in deeply conservative states, it will be difficult to mobilize support for the efforts. A vital demographic will hesitate. It turns out that romantic partnership, the very premise of same-sex marriage, retains its strongest allure precisely in conservative states. The Hallmark Channel, with its relentless production of romantic comedies, is most popular in “red states.”³³⁹ This is not surprising: Conservatives are conservatives by temperament, even if what they conserve is a recent innovation that is destructive to their deeper traditions. This audience will be most susceptible to the argument that it’s unkind, unfair, to withhold the transcendent soul-mate experience from same-sex couples.

338 See Brenan, *supra* note 10.

339 Stephen Battaglio, *Hallmark Channel Isn’t Winning Emmys, but Red States Love It*, L.A. TIMES (Sep. 14, 2017, at 06:00 PT), <https://www.latimes.com/business/hollywood/la-fi-ct-hallmark-red-state-20170914-story.html> [<https://perma.cc/Q26L-DB5Q>].

B. Injustice

Moreover, an effort to overturn *Obergefell*, even if successful, would seem unjust. Of course, it would seem unfair to same-sex couples who are, or hope to be, “married.” Like so many Americans, they accepted and did not invent the soul-mate definition of marriage. Their expectations, hopes, and demands have a substantial justice. Any effort to take away their “marriage,” will be understandably received as an offense, an arbitrary exclusion.

But the principal injustice would be suffered by the most important beneficiaries of matrimony: children. The effort would require an enormous expenditure of political capital to little effect. At best, the effort would result in the status quo ante, marriage circa 2005. But marriage conservatives generally would agree that the “status” was terrible. Matrimony was already in shambles, and children were suffering.

What is needed is a much more radical reform: a full restoration of matrimony in law. Those efforts must extend to a panoply of issues, especially no-fault divorce—and if marriage conservatives spend all their capital on a single Supreme Court precedent, there will be little left over for more important reforms.

To marriage conservatives (like this author), *Obergefell* was an insult, and it is understandable that they would like to undertake a frontal counterattack. But perhaps such an approach would ignore the principal purpose of lawmaking and politics more generally: to serve the common good, chiefly the most vulnerable. The main purpose is not to gratify any desire for symbolic or mere expressive victories. Any fight for matrimony must have, as its chief end, the benefit to children, to their right to be conceived and received by their mother and father. If, by some twist of fate, after an enormous campaign, five members of the Supreme Court should be willing to overturn *Obergefell*, would the young, the poor, be better off?

C. Plowing Around *Obergefell*

Moreover, in large part, the necessary work of restoring matrimony can be pursued without overturning *Obergefell*. Wherever they can, conservatives can undertake a substantial restoration of matrimony without disturbing this precedent.

First, conservatives must contain *Obergefell*. The decision must be strictly construed, according to the original meaning of its text. Whatever may have been the spirit or motives of the authors, the decision cannot be read to abridge the freedom of speech, or to strip natural parents of the right to the custody, care, and education of their children. Conservatives should fight on this front, with resolve and confidence. On their side is the Fourteenth Amendment’s original

meaning, longstanding precedent, current majorities on the Court, and large portions of the people.

Second, conservatives must restore matrimony. Any serious defense of the right of parents to their offspring, and offspring to their parents, immediately requires attention to matrimony. Each child has two natural parents, each with a duty and right to the care, custody, and education of the child. Justice requires that those two work together. And matrimony is the obvious resolution to this problem. Moreover, matrimony teaches a lesson vital to human flourishing and the flourishing of our Republic: Children, including American children, should be conceived in liberty and received for equality.

Third, this restoration must proceed in law. No legislation, as the Supreme Court once recognized, is more important to the foundation of our Republic. Wherever possible, the laws must not only protect but also facilitate and promote the union for life of male and female in matrimony.

In large measure, such legislation does not require any conflict with *Obergefell*. Conservatives can simply accept that the word “marriage” is lost, now officially defined as a bilateral relationship of transcendent and nebulous significance, a union that is merely aspirationally “enduring.” The states can and should fully comply with *Obergefell*. Insofar as they extend *Griswoldian* “marriage,” with its easy divorce, to opposite-sex couples, they must do the same for same-sex couples.

At the same time, the states must grant “matrimony” a no-fault divorce from “marriage.” The relationship isn’t working out. The couple has grown apart. Marriage has lost interest in matrimony and has moved on. Matrimony must accept the fact. For the good of the country, the divorce should be amicable. No fault required.

However lamentable, this divorce provides an opportunity. Rock bottom is a firm foundation. Leaving “marriage” alone, conservatives should undertake a policy of reconstruction—as resolute as the reconstruction of matrimony that occurred among the freedmen after emancipation.

CONCLUSION

It is far outside the scope of this Article to propose specific laws to effectuate this no-fault divorce and reconstruction. Nonetheless, such legislation, perhaps, should have the following features.

First, given the importance of matrimony to the whole Republic, the law should be nationwide in its aspiration. Matrimonial conservatives should draft a “uniform law” for the restoration of matrimony. Only a minority of states will adopt the law at first, but their example will, it is hoped, persuade others gradually to do the same.

Second, the uniform law will expressly acknowledge that the Supreme Court has officially defined “marriage” as a bilateral association, with no essential relation to offspring, which association is not definitionally enduring but merely aspirationally so. Moreover, the law will recognize that under no-fault divorce, the several states now grant “divorce” to couples in a manner that reflects this definition.

Third, this uniform law should declare that the state has a compelling interest in protecting, facilitating, and promoting matrimony. Moreover, in any state where the constitution still requires a matrimonial definition of “marriage,” the state legislature should authoritatively declare that the word “marriage” refers to matrimony.

Fourth, the uniform law will establish a strong presumption of matrimony. Under this presumption, the state will *first* offer “matrimony” to any man and woman who seek, for their domestic association, some state registration, license, or other recognition (unless the laws against incest or bigamy preclude such recognition). In an abundance of caution, the couple must be clearly informed, at the time of registration or licensure, that “matrimony” is both open to life and lasts for life—terminable only by one party’s death or grave breach, by adultery, abuse, or abandonment.

Further, to guard against confusion and to avoid the problem of migratory divorce, the law will sharply distinguish “divorce” from the dissolution of matrimony. Rather the law should call this dissolution by a word like “destruction” or some other appropriately pejorative term. Moreover, as further mitigation against the threat of other states’ hostility to matrimony, the law should clearly define the matrimonial domicile (e.g., as the last place the couple jointly agreed to live, and if not, where the children reside) and identify the courts of that place as the sole forum to adjudicate disputes arising from the matrimony.

In these respects, the uniform law to renew matrimony will contrast sharply from the laws establishing “covenant marriage.” Those laws were not aspirationally uniform, did not sufficiently distinguish matrimony from marriage, and did not foster a presumption of matrimony. Rather, the laws presented the “covenant” as a merely optional (and expensive) upgrade to “marriage.” Covenant marriage has proven unpopular and probably is vulnerable to invalidation under *Obergefell*.³⁴⁰

At the same time, the uniform law might still permit the couple to register or even license a domestic association, terminable by either party without the need to allege or prove any “fault.” To avoid confusion, the state should not affirmatively call this association “marriage,”

340 Jessica Pacwa, *Marriage and Divorce*, 24 GEO. J. GENDER & L. 671, 688–89 (2023).

but permit the couple to use that term, or any other appropriate word, to designate their domestic partnership.

Still under the uniform law, only “matrimony” should feature the following burdens (and any consequent rights): (1) the presumption of paternity as to the male partner, (2) the voidability for lack of consummation, (3) the invalidity for incest, and (4) indissolubility for any reason except death or grave breach of the agreement. Other associations have no necessary connection with paternity, sexual congress, or lifelong duties. Consequently, they should be free of such obligations and derivative rights.

Further, the uniform law should encourage matrimony. Public officials should be encouraged to honor matrimony. Financial incentive should be available to couples, especially those who have already jointly conceived a child. These might include prudently calculated and timed payments or tax incentives, e.g., at the time of registration or at key intervals, such as seven years (to encourage the couple to weather the “itch” that often occurs).

Finally, the law should not forget the orphan. Even under the best possible circumstances, many children will be conceived by persons who either cannot or will not care for their own children. To benefit these children, the law should establish matrimony as the preferred place, wherever possible, for their adoption. Every child has a right to be received in equality by his or her own mother and father, but if not, to be thus received by a mother and a father in a lifelong matrimonial union.³⁴¹

341 “Motherless baby and babyless mother, / Bring them together to love one another.” CHRISTINA G. ROSSETTI, *SING-SONG: A NURSERY RHYME BOOK* 130 (London, Macmillan & Co. 1893). “Defend the poor and fatherless . . .” *Psalms* 82:3 (King James Version).