

# Lesbian, Gay, Bisexual, and Transgender Issues in Philosophy



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APA NEWSLETTER ON

# Lesbian, Gay, Bisexual, and Transgender Issues in Philosophy

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KORY SCHAFF, EDITOR

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## FROM THE EDITOR

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In 2003, I was a graduate student at the University of California, San Diego, taking a seminar on jurisprudence from the eminent moral philosopher David Brink. In that seminar, we read and discussed a variety of arguments by scholars ranging from Justice Antonin Scalia on “originalism” to Joel Feinberg on “offensive nuisances” vs. free expression. We also read and discussed seminal Supreme Court cases relating to these issues and more. I had long been interested in issues concerning law by that time, having taken up policy debate as a religion in high school before turning to Mock Trial and Model U.N. in college. Moreover, I was “out” as a gay man. I had already concluded with some confidence that legal discrimination on the basis of sexual orientation had no place in a constitutional democracy that depends, in its very meaning, on the motto “equal protection under the law.” In other words, I was a “second-class” citizen with a “gay agenda.”

It was in that seminar that a close reading of constitutional principles and SCOTUS decisions on both due process and equal protection convinced me there was a direct line of argument leading from the Fourteenth Amendment to the legal validity of same-sex couples seeking equal marriage rights. I wrote my seminar paper on this topic, revised it during the summer, and sent it out for review. The paper was titled “Equal Protection and Same-Sex Marriage” and it was published in the *Journal of Social Philosophy* volume 35, issue 1 in February 2004. (The paper was already submitted for press when the Court’s decision overturning all state sodomy laws came down in *Lawrence v. Texas*.) In the paper, I argued that the proper constitutional argument for reaching a decision in favor of equal marriage rights, and invalidating both federal (DOMA) and state laws defining “marriage” as a union of a man and woman, can be found in equal protection doctrine and precedent.

Unfortunately, there is still too much semantic confusion about the word “marriage” and its proper referent in the case of marriage equality, not to mention a lot of vaguely historical yet empirically inaccurate arguments about its universal definition. (The reality is that before the emergence of the modern democratic state in Western societies recently, and in much of the world still, “marriage” really refers to men owning and treating women, even multiple women, like property.) However,

there is a precise legal meaning to the word “marriage” in this constitutional debate, and it exclusively concerns so-called “civil” marriage, or the state’s legal recognition of a union between two persons that includes all the benefits and burdens that such recognition entails. Insofar as the state recognizes such unions from a legal standpoint, it cannot exclude some citizens from participating in it but not others. To do so is to violate both the letter and the spirit of the equal protection clause of the Fourteenth Amendment, which can be found at the end Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

For the past two decades, the inane and inaccurate terms of the debate sponsored by American-style conservatism about re-defining the word “marriage” have simply muddied the water to what is otherwise a crystal-clear expression of the obvious: the decision that the Supreme Court reached in *Obergefell v. Hodges* doesn’t redefine “marriage” at all, doesn’t substitute the judgment of “five lawyers” on the bench for the “will of the people,” and doesn’t even invent a new “gay” right about anything. Rather, the landmark ruling does nothing more and nothing less than enforce the equal protection clause of the Fourteenth Amendment against states that refuse to enforce “civil” marriage laws with equal regard to all citizens. In short, there already are “marriage” laws on the books, and since the Fourteenth Amendment states to the letter, “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,” it follows without remainder that the majority decision of this civil rights case is exactly right. States and local governments do not get to pick and choose who is covered and who is excluded; everyone gets included under the law or it is, to paraphrase Augustine, not a law.

For those unfamiliar with its history, the Fourteenth Amendment to the U.S. Constitution was adopted on July 9, 1868, as one of several Reconstruction Amendments drafted in response to the intransigence of southern states to accept the rule of law. In short, the amendment was created as a means of strengthening our constitutional

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system against detractors and scofflaws following the Civil War. There are parallels today with the issue of marriage equality for same-sex couples. The debate about marriage equality is not, on the contrary, a states' rights issue. We fought the southern states in the war because they refused the rule of law, we fought them again during Jim Crow, and we fought them to desegregate. We are still fighting them—witness the debate in South Carolina to remove the Confederate flag from the statehouse grounds after the tragic, racist shooting in Charleston. It is important to remember that the basis of the landmark decision in *Obergefell*—that civil rights are for *all*, not just for some—is rooted in this country's long and painful history to overcome, confront, overcome again, and confront yet again the legacy of slavery, segregation, and anti-constitutional attitudes that are still pervasive in many states today.

The present issue of the *APA Newsletter on LGBT Issues in Philosophy* is therefore dedicated to reflections on *Obergefell v. Hodges* by two LGBT philosophers, Loren Cannon and Richard Nunan, who provide some interesting analysis of the arguments and criticisms found in this landmark civil rights decision.

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## CALL FOR PAPERS

The *APA Newsletter on LGBT Issues in Philosophy* invites members to submit papers, book reviews, or professional notes for publication in the spring 2016 edition. Submissions may examine issues in the areas of lesbian, gay, bisexual, trans, gender, and sexuality studies, or address issues of concern for LGBT people in the profession. The newsletter seeks quality paper submissions for anonymous review by committee members. Reviews and notes should address recent books, current events, or emerging trends. Members who give papers at APA divisional meetings are encouraged to submit their work by the deadline below.

**DEADLINE:** January 15, 2016. This deadline is based on the deadline set by the APA national office for submitting materials for publication. Decisions will be made within 30 days of the deadline, and authors will be notified shortly thereafter.

**FORMAT:** Papers should be no more than 7,500 words. Reviews and notes should be limited to 3,000 words. Submissions should use endnotes rather than footnotes or parenthetical citations. All papers must be prepared for anonymous review.

**CONTACT:** Submit all manuscripts electronically (in .doc, .docx, or .rtf format) and direct questions to the editor, Kory Schaff, at [kschaff@calstatela.edu](mailto:kschaff@calstatela.edu) or [koryschaff@gmail.com](mailto:koryschaff@gmail.com)

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## ARTICLES

### *Privileges, Priorities, and Possibilities After Marriage Equality*

Loren L. Cannon

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Following the Supreme Court decision that was announced on June 26 of this year, the nation's capital (and many other government buildings) glowed in shades of rainbow. This was an unprecedented show of support for LGBTQ communities and the Supreme Court's decision in *Obergefell v. Hodges*. Marriage is now accessible to those who had been previously denied this right throughout the history of the United States. The Supreme Court ruling that same-sex couples have the civil right to state-sanctioned marriage and its myriad of benefits is truly a turning point in our nation's history and its recognition of the value of lesbian and gay identities and relationships. The favorable decision was the result of years of political planning, protesting, and fundraising by persons all across the nation. For those that were engaged in this debate, from the grassroots level to those listening to the oral arguments at the Supreme Court, it was an unequivocal *victory*.

We are now living in the infancy of the post-Marriage Equality Era. As the memory photo books are being compiled, awash with smiling faces and rainbow-illuminated government buildings, and as the masses finally change their Facebook profile picture from smiling rainbow faces, it is time to review what has occurred and how those of us who were in general favor of expanding marriage rights envision the future. This is a particularly important time of reflection because the demands of everyday life will quickly dim the feelings and visions arising from the Court's decision; the right to civil marriage will soon become an accepted fact rather than a shiny new political right. In what follows, my intent is to consider carefully the judgment of the Court. As I will explain, the Court does explicitly value gay and lesbian couples as important members of society and as potential parents and caregivers. This is, indeed, revolutionary. Secondly and relatedly, the Court is explicit in characterizing traditional marriage as a moral ideal on which the health of our society, even *civilization* itself, relies. While the first result is quite positive, the second is a worrisome foundation upon which to extend marriage rights. The conditional statement, *If* opposite-sex couples are eligible for civil marriage and its benefits, *then* same-sex couples should be eligible for the same, is quite different from claiming that traditional marriage is of greater moral value, that it is somehow more able to produce flourishing individuals and compassionate societies, than alternative care-taking configurations of consenting persons. Indeed, given the multitude of options, there seems to be little reason to believe that traditional marriage is superior to all other arrangements. The result is that those individuals who participate in marriage are now considered new members of an expanded, privileged class. For some, it is one privilege among many others; for others, it is one social privilege among relatively few.

Furthermore, it is important to recognize the differences between this new era and that of earlier civil rights legislations and rulings. Social and mainstream media have been awash with the names, faces, and tragic stories of individuals who have recently and needlessly lost their lives, not because of the lack of civil rights laws supposedly protecting their interests but because those in power (either empowered by government or simply because of bias) ignored their rights. Regardless of the powerful legacy of the Civil Rights Era, we now need to face the impotence of “rights” to produce flourishing and safe communities. What is needed is a paradigm shift away from discussing rights, which are thought to be baseline conditions for all persons based on citizenship or humanity, and collections of privileges and burdens that determine one’s life conditions and one’s ability to thrive. It broadens the discussion to be about not only what rights one has but also what treatment one receives. What is crucial is to recognize that the post-marriage-equality world is also the post-Ferguson world. As such, earning civil rights (especially those that value only rigid characterizations of family and marriage) does not occur in a time to simply enjoy those enhanced privileges but to make coalitions with those that are differently vulnerable and newly vulnerable for whom rights are ineffectual in supporting human flourishing.

### THE COURT’S RULING

There is much to celebrate about the ruling in *Obergefell*, but other aspects of it should instill our caution. As noted, the *kind* of marriage characterized in the sections devoted to the institution’s history is both traditional and quite rosy. Marriage is not simply a choice among different lifestyle choices, or a choice among many that might serve to fulfill human aspirations and needs. Instead, for Kennedy and the majority of justices, marriage is “transcendently important,” it is “essential,” and it rises “from our most profound needs and aspirations.”<sup>1</sup> The Court takes the petitioners not to seek to change the meaning or status of traditional marriage, but simply to make it inclusive of same-sex couples.

it is the enduring importance of marriage that underlies the petitioner’s contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.<sup>2</sup>

Beyond the sections on the history of marriage, the Court argues that same-sex couples have a right to this traditionally characterized union on the basis of these four premises:

(P1) Marriage is a choice “inherent in the concept of individual autonomy.”<sup>3</sup>

(P2) The right to marry is fundamental in its importance to its participants.<sup>4</sup>

(P3) Marriage as an institution that protects and supports families and children.

(P4) Marriage is the “keystone to our social order.”<sup>5</sup>

As I will explain, (P1) and (P3) are historically significant in the sense that same-sex couples are judged to be as equally competent and capable as heterosexual couples. This is indeed a step forward in recognizing the value and equal citizenship of lesbian and gay individuals. An analysis of the remaining premises (P2 and P4) point to a less supportable conclusion, however, that traditional marriage is not just a lifestyle choice among many but one that is normatively ideal and foundational to society.

First, consider (P1) and (P3). With regard to autonomy (P1), the desire to marry one’s same-sex partner is not judged, as it has been historically, a function of psychological illness or immorality, but as a legitimate and even laudable choice. The notion that lesbian women and gay men are equal citizens is light years away from their classification as mentally ill in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) from 1952 to 1973, as well as the criminalization of intimate sexual activities until *Lawrence v. Texas* (2003) overturned *Bowers v. Hardwick* (1986). The third premise (P3) offered by the Court is similarly historic in the sense that gay and lesbian parents are judged to be no less competent and nurturing caregivers to their children than would be heterosexual parents. “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.”<sup>6</sup> The Court recognized the stigma that may exist for children of same-sex parents whose unions are deemed not suited to civil marriage. At the same time, the Court makes clear that while having children is sometimes a component to marriage, it is not a necessary ingredient.

It is the inclusion of (P2) and (P4) which problematically ties the identified historical meaning of marriage in the earlier portion of the document to the decision’s main argument. The second premise (P2) identifies the right to marry as fundamental “because it supports a two-person union unlike any other in its importance to the committed individuals.”<sup>7</sup> While it might be interpreted in numerous ways, the meaning is clarified by reference to *Griswold v. Connecticut* (1965), which asserts that the right to marriage is “older than the Bill of Rights.”<sup>8</sup> This supports the reading of this premise that an individual’s desire to become traditionally married does not primarily involve civil contracts, but is pre-political instead. Relatedly, the Court’s fourth premise that marriage is the “keystone of our social order” makes clear that traditionally characterized marriage is a normative ideal, and those who participate in it hold a special place in our society. Echoing the colonial belief system at the time, the Court in 1888 declared that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>9</sup> It is less shocking that such views would be offered as part of sound reasoning in 1888 than they would be in 2015. Thus, both (P2) and (P4) regard marriage as *the* social institution that is deemed valuable enough to the state’s interests to support with the myriad of benefits that are awarded through state-sanctioned marriage. It

is this assumption of the importance of marriage that provides reason to celebrate the Court's decision that gay and lesbian couples can serve this extraordinary role in society, but its exclusivity provides reasons to shrink from its ramifications.

### RECOGNITION AND PRIVILEGE

In "Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement," Cheshire Calhoun presents a sophisticated analysis of the question of LGBTQ participation in civil marriage that is particularly relevant today when considering the reasoning of the Supreme Court and what this decision means going forward. For Calhoun, it is not simply the issue of same-sex inclusion in the institution of marriage that is the issue, but the *kind* of reasoning that is offered for this inclusion.

In her analysis, Calhoun considers three types of arguments for same-sex marriage, but only one of them debates the inclusion of gay men and lesbian women as individuals who are fully valued participants of society. She reasons that if one were to accept that marriage itself is a pre-political institution that holds a foundational social role, then curtailing same-sex couples from participating in these kinds of unions implies that one regards heterosexuals, on the one hand, and non-heterosexuals, on the other, as essentially *different kinds of people*.

This conception of marriage as the pre-political foundation of society has an important implication: It means that if a social group can lay claim to being inherently qualified or fit to enter into marriage and found a family, it can also claim a distinctive political status. Members of the group can claim that they play an essential role in sustaining the very foundation of civil society. Conversely, if a particular social group is deemed unfit to enter marriage and found a family, that group can then be denied this distinctive political status.<sup>10</sup>

In this way, Calhoun sought to force the discussion regarding what are thought to be the differences between heterosexual and non-heterosexual persons. If one accepts the pre-political status of marriage and its foundational role, then the meaning of marriage itself falls into the background and the table is cleared to discuss equal status of lesbians and gay men relative to heterosexuals. A review of the ruling itself supports the conclusion that the kind of argument that the majority engaged in does consider marriage to be a pre-political institution. Both (P2) and (P4) (and other parts of the Court's opinion not mentioned here) *do* consider the institution of traditional marriage as pre-political. It is not just an option among many, but of particular social importance. In other words, if it is accepted that those who would form same-sex couples are shown to be capable of this special status, of upholding the very foundation of society, then the gold standard of acceptance and political equality has been achieved. As the song goes, "If we can make it here, we can make it anywhere."

Recall, however, that the Court's opinion also regarded marriage as superior to other familial organizations. That,

in the words of the Court, "no union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."<sup>11</sup> Interestingly, Calhoun explicitly rejects this kind of argument. The socially conservative argument that marriage is a "committed, monogamous, sexually faithful relationship" that "contributes to personal and social flourishing"<sup>12</sup> is, for her, one that is "fundamentally anti-liberal."<sup>13</sup> Like many who have criticized the prioritization of the Marriage Equality movement within the most powerful LGBTQ rights organizations, Calhoun accepts that there are a plurality of family forms, and that valuing of traditional marriage (complete with the notions of romantic love, monogamy, and the assumption of till-death-do-us-partners) unnecessarily privileges one form of relationship. In her words, "marriage rights, so construed, ought not to have priority in a gay/lesbian political agenda."<sup>14</sup>

### DISSENT FROM WITHIN: CRITICISMS OF SAME-SEX MARRIAGE PRIORITIZATION

Calhoun is not alone in her concerns that prioritizing one form of familial organization above others is problematic. The vision of "Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships," signed by such academic and political leaders as Susie Bright, Charlotte Bunch, Judith Butler, Paisley Currah, Ann Fausto-Sterling, Leslie Feinberg, Judith Halberstam, Yasmin Nair, Dean Spade, Gloria Steinem, and Cornel West, concurs with Calhoun's view.<sup>15</sup> The authors include a long list of other relationship-types, including senior citizens living together, extended families, close friends and siblings who care for each other on a long-term basis, two or more queer couples who jointly raise a child but who live in separate households, and others. If one accepts that marriage is a civil right of heterosexual couples, then there are numerous persuasive ways of arguing why this is also a right of same-sex couples. However, this does not imply that the material benefits of marriage are *only* a right of those forming these traditional conjugal pairs, or that other relationships of care might not produce the same benefits of society, and perhaps even without the well-documented abuses and historical injustices of traditional marriage itself. Indeed, outside of tradition, there seems no reason that a civil institution like marriage that exists to support well-lived lives and economic and personal security need have anything to do with assumptions of romantic love and sexuality. Seniors living together and caring for each other have no less "right" to visit each other in the hospital than I have to visit my wife, nor, if they so choose, a right to their friend's inheritance to support their continued economic security, nor the right to be listed as surviving family members on death certificates. If the aim is to produce flourishing individuals and caring collectives, then the value of any social institution is based on its potential to improve the lives of its members. I agree that expanding marriage rights is going to mean a great deal to couples throughout the nation who will benefit from the newly acquired rights and social status, but going from a rights-view to one that is broadly inclusive of human flourishing makes obvious that it is just these kinds of benefits that many marriage-inequitable-others need.

Among the dominant voices critical of the marriage equality campaign has been scholar and activist Dean Spade. For Spade, marriage is far from being an ideal relationship but is “a tool of social control used by governments to regulate sexuality and family formation by establishing a favored form and rewarding it” with certain benefits.<sup>16</sup> For this reason, the material consequences of civil marriage include an unequal distribution of resources that unnecessarily and unjustly privilege one kind of relationship over others for the benefit of the mostly privileged and to the detriment of the most vulnerable. Furthermore, LGBTQ inclusion in marriage serves to “valorize” marriage, and its prioritization is unethical for the movement in that it uses this unjust institution to benefit the relatively privileged of our communities at the expense of the more vulnerable.

For Spade, a focus on gaining the recognition of civil rights is a key part of neoliberal strategies that do not benefit the vulnerable as much as we’d like to think they do. This point is, I believe, especially poignant now, when the stories of police brutality against persons of color provide content for distressing and frequent news reports. Even explicit equality under the law does not prevent the worst kinds of imaginable atrocities. Already this year, eleven trans women have been targeted and murdered in the United States, which is just short of the number of such acts of violence in the whole of last year. These kinds of outrages persist despite explicit hate-crime laws in some of the locales. Income inequality causes real hardship, which adversely affects those with combinations of identities that include being a person of color, being LGBT, trans, queer, gender non-conforming, being poor, being differently-abled, living in an area that is over-policed, or having family members in prison. It is not that civil rights legislation (including the right to state-sanctioned marriage) may not be part of the answer to building a more compassionate and just community, but for too long it has been seen as the only answer, when other much more detrimental policies have persisted with the implied consent of those privileged enough not to feel their effects. I agree with Spade and Gayle S. Rubin that while the recent ruling did affirm the equality of lesbian women and gay men for recognition and its corollary benefits, the game, as constructed, is one of arguing who is special enough for particular state recognition, who is worthy enough to be deemed the foundation of society. In Rubin’s characterization, gay and lesbian relationships are now deemed part of the “charmed circle” of relationship types.<sup>17</sup> Again, this is best understood as the privileging capacity of privileging systems, not a court’s recognition of an inherent need or desire based on one’s human nature.

What has complicated the marriage debate, for so many, is that nearly all of us have at least some personal experiences and strong feelings about the institution itself. Whether our parents were never married (and then unjustly seen as lesser than others), commune dwellers, divorced, those affected by imprisonment, or qualifiers for a Norman Rockwell portrait of the often touted virtues of love and commitment, we all have been affected by this institution and its various legacies. My own experience with marriage is relevant to my views here. When my soon-to-be-wife and I applied for a marriage license while on a road-trip stop in Las Vegas in the summer of 2006, we did

so as a heterosexual couple. I was one year into my gender transition and had gained the designation of “M” on my driver’s license where there had been an “F” just some months before. As a trans person, even one with racial and educational privilege (among others), I was ready to be harassed by the Las Vegas court employees and denied the license. To my surprise, the license to legally marry in Clark County was in our hands in minutes. This experience made undeniably clear to me that the marriage restrictions in place at the time were unarguably asinine. The state deemed my relationship with my dyke-identified wife as wholly acceptable that day whereas just months before we would have been judged unfit for this special union. My own argument against same-sex marriage in “Trans-Marriage and the Unacceptability of Same-Sex Marriage Restrictions” focused not on the status of gay men and lesbian women in society (which is undeniably a very important focus) but on the institution’s reliance on the sex/gender binary, which is itself bankrupt and leaves scores of human beings not just ineligible for certain privileges but unable to participate in society at even the most basic levels.<sup>18</sup> Not surprisingly, the Court’s decision in *Obergefell* is written assuming that humans only and always come in two and only two unambiguous varieties. This is evidence that the sex/gender binary is even more fully instantiated in our nation’s collective psyche and institutions than belief in the special status of heterosexual marriage. Trans persons have also been vulnerable to same-sex marriage restrictions, not because of the assumed depravity of our relationships themselves but because our claims of being women, men, or gender-free/fluid/neutral/non-binary individuals are not always respected by the courts. Additionally, there are sometimes barriers to receive identification documents that support these identity claims. Past Court decisions are varied with regards to their treatment of trans persons and marriage rights. Granted, marriages like my own are now more secure with this Supreme Court ruling. In general, if one partner’s gender was challenged, the union could simply be seen, instead, as a same-sex marriage, or an opposite-sex marriage, depending on gender assignment at birth. Obviously, though, this is unacceptable, for it would mean summarily denying an individual’s identity.

My partner and I have benefited materially and socially from the institution of marriage. This is true even though our original desire to marry involved the very traditional values of love and commitment. Our ability to get married at the Elvis Chapel that day was a function of privilege in that my gender transition was expensive and, at that time, necessarily personally funded through credit cards and a second mortgage.<sup>19</sup> As a relatively privileged trans person, marriage made me more so. The social and material benefits for those of us whose relationships are deemed worthy for this state support need to be understood as comparable to other privileges that result in our flourishing. Vice President Joe Biden was right when discussing the need to prohibit discrimination on the basis of sexual orientation: “There are still 32 states where marriage can be recognized in the morning, and you can be fired in the afternoon.”<sup>20</sup> Similarly, there are many instances where one can become married in the morning and be burdened by a variety of institutionalized biases and injustices in that same day. Some of these injustices may have to do with being

perceived as gay, lesbian, bisexual, or trans, but those that are not tied to these identities are no less significant.

The world post-Ferguson is far different from the one that existed when our more treasured civil rights legislation was first enacted. We live in a society in which the gap between legally recognized rights and a flourishing life is massive for many. In his speech at the NAACP conference in July of this year, President Obama discussed alternative uses of the \$80 billion that we now spend on imprisoning people. We could, for instance, have free preschool for every child; we could double the salary of every high school teacher in the country; we could invest it in our nation's infrastructure or job training programs.<sup>21</sup> It is estimated that the cost of the Marriage Equality campaign was in the tens of millions.<sup>22</sup> I cannot help but imagine what the effects of even half of that sum would be if it was directed to the support of queer homeless youth, queer inclusive after-school programs, attempting to capitalize on the president's efforts at prison reform, or making alliances with other social justice organizations such as Black Lives Matter. Is there the collective will to fundraise for these causes?

The story of what the most powerful of LGBTQ organizations and donors do with this victory is just beginning to be written. It is a triumphant victory, but one that supports these new privileges on the assumption of relationship ideals whose value, at the very least, does not seem unique. Ten years from now, young scholars will recount LGBTQ mobilization for marriage equality and what occurred after that goal was achieved. One possible future involves individuals with less social support, security, and privilege distancing themselves from the LGBTQ collective in hopes of finding campaigns devoted to their well-being elsewhere. Another scenario involves privilege-acknowledging, safety-enhancing, coalition-building campaigns to assist all of us. If the first option obtains, I fear the movement itself will be less about social justice and more about tacitly supporting the status quo. If the second obtains, then we will know that the Marriage Equality movement was much more significant than its detractors believed.

**NOTES**

1. *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.* June 26, 2015, [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf), p. 3.
2. *Ibid.*, 4.
3. *Ibid.*, 12.
4. *Ibid.*, 13.
5. *Ibid.*, 16.
6. *Ibid.*, 15.
7. *Ibid.*, 13.
8. *Ibid.*, 13.
9. *Ibid.*, 16.
10. Cheshire Calhoun, "In Defense of Same-Sex Marriage," in *The Philosophy of Sex: Contemporary Readings*, ed. Alan Soble and Nicholas Power (Lanham MD: Rowman & Littlefield, 2008), 206.

11. *Obergefell*, 28.
12. Calhoun, "In Defense of Same-Sex Marriage," 199.
13. *Ibid.*, 200.
14. *Ibid.*, 200.
15. See <http://www.beyondmarriage.org/BeyondMarriage.pdf>
16. Dean Spade and Craig Willse, "Marriage Will Never Set Us Free," *Organizing Upgrade: Engaging Left Organizers in Strategic Dialogue*, September 6, 2013, <http://www.organizingupgrade.com/index.php/modules-menu/beyond-capitalism/item/1002-marriage-will-never-set-us-free>
17. Gayle S. Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," 1984, <http://www.feminish.com/wp-content/uploads/2012/08/Rubin1984.pdf>
18. Loren Cannon, "Trans-Marriage and the Unacceptability of Same-Sex Marriage Restrictions," in *Social Philosophy Today* (Bowling Green, OH: PDRC, 2009), 75–89.
19. For an interesting article of the costs of being trans, see <http://www.cnn.com/2015/07/31/health/transgender-costs-irpt/index.html>
20. See <http://www.businessinsider.com/joe-biden-just-gave-arousing-gay-rights-address-that-sounded-a-lot-like-a-campaign-speech-2015-7#ixzz3hdGSgFXV>
21. Comments of President Barak Obama, July 14, 2015. <https://www.whitehouse.gov/the-pressoffice/2015/07/14/remarks-president-naacp-conference>
22. As estimated by Juliet Eilperin of *The Washington Post*. <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/01/how-much-will-the-gay-marriage-fight-cost-over-the-next-three-years-tens-of-millions/>

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## TWO POEMS

Felicia Nimue Ackerman  
BROWN UNIVERSITY

### *Too Much in Common*

Originally published in *The Providence Journal*, April 6, 2015, and reprinted with permission.

We are such a compatible pair,  
We suppose that we shouldn't complain,  
But there's one thing too many we share,  
And it's getting to be quite a pain.  
Who can doubt that we're now in a fix?  
And we know that we're in it for life,  
Since my name is Victoria Hicks,  
And that's also the name of my wife.

### *Supreme Irony*

Originally published in *The Providence Journal*, July 6, 2015, and reprinted with permission.

So now we all can marry.  
I'm as thrilled as I can be,  
Except for one small problem—  
No one wants to marry me.

## *Obergefell v. Hodges: Some Reflections on Constitutional Adjudication*

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The Supreme Court's 5-4 decision on June 26, 2015, requiring states to legalize and honor marriage between persons of the same sex raises serious questions about the expanding scope of judicial powers. It also reflects a profound shift in public opinion, which now clearly favors legalizing gay marriage. However, it matters how the decision to approve gay marriage is reached, and today's decision wrongly forecloses debate in the jurisdictions where the public is still divided on the question.

– *Charleston Post and Courier* editorial,  
June 27, 2015<sup>1</sup>

Though rejection of state laws that prohibit racially mixed marriages was virtually a foregone conclusion, the U.S. Supreme Court in a unanimous decision nevertheless again has chipped away at the fabric of the Republic. . . . While many persons will agree that marriage should be based on personal choice, nevertheless the concern of the state with marriage, divorce, and protection of offspring remains. In the past, some of the states have held that mixed marriages were not in the public interest. The Constitution heretofore left the states discretion in this field.

– *Charleston News and Courier* editorial,  
June 14, 1967<sup>2</sup>

Even though the sentiments expressed in these passages devised by the editorial staff of my local paper are almost a half century apart, the parallelism in the paper's comment on last June's U.S. Supreme Court *Obergefell v. Hodges*<sup>3</sup> repudiation of same-sex marriage prohibitions, and the paper's earlier reaction to *Loving v. Virginia*'s<sup>4</sup> invalidation of anti-miscegenation laws, is striking. Both responses were somewhat muted critiques of what each editorial staff regarded as the Court's anti-democratic tendencies—muted because each staff recognized the shifting tide in social attitudes. In 1967, for example, a *News and Courier* article the previous day reported that the South Carolina Attorney General of that era was quite pragmatic about the decision:

He said that the ruling would help South Carolina in a way.

"We always had to make decisions about what races could intermarry and which couldn't," McLeod said. "We've ruled, for instance, that a Filipino is a Caucasian."

We had an Eskimo once who wanted to get married in South Carolina," he said. "Never could get that straightened out. This will eliminate all that, apparently."<sup>5</sup>

These passages provoke a question: Would today's *Post and Courier* editorial staff be as comfortable with their predecessors' assessment of *Loving v. Virginia* as they are with their own reaction to *Obergefell*?<sup>6</sup> If not, is it because there is some profound legal distinction between the two cases that was lost on the earlier editorial board? Or has the passage of time simply crafted the social perspective of today's editorial board differently, enabling it to recognize the inherent viciousness of anti-miscegenation laws sufficiently to concede that the *Loving* Court was right not to wait on reform by more democratic means? If so, will the passage of a little more time bring tomorrow's editorial board to the same conclusion about *Obergefell*?

There is, of course, the third alternative: the authors of the *Obergefell* editorial might insist that the 1967 editorial was right: under our federalist system of divided authority, the *Loving* Court had no business intruding on the democratic processes of individual states in this manner. It seems an unlikely response, if only because we now know that such reform was a long time coming in South Carolina. Perhaps partly because the Court's action invalidated the state's constitutional anti-miscegenation provision in 1967, it took over three decades to offer the electorate an amendment referendum to eliminate the language. But even in 1998, nearly two-fifths of the voters expressed a preference to keep the language, in a state where nearly 30 percent of the population identifies as black.

In light of that social history, together with currently prevailing national social sentiment, my guess is that today's *Post and Courier* editorial staff would agree that the Court was right to interject itself in *Loving*, just as it was right to interject itself, in 1954, into *Briggs v. Elliott*, the SC case consolidated with *Brown v. Board of Education I*. Perhaps as soon as a decade from now, and certainly another half century out, the local editorial staff will be equally ready to repudiate the paper's 2015 editorializing about judicial overreach in *Obergefell* as a historically contingent embarrassment.

Members of the U.S. Supreme Court have, at different times, also reflected this trio of views. In *Obergefell* in particular, the first view, that *Loving* was a profoundly different kind of case, is represented chiefly in Thomas's dissent, when coupled with an earlier Thomas opinion in *Missouri v. Jenkins* (discussed below).<sup>7</sup> The *Obergefell* majority represents the second view, that the issues about same-sex marriage closely parallel those about interracial marriage in *Loving*. For the third, least socially attractive view, that *Loving* was wrongly decided in the first place, we have to go back to William Rehnquist's days serving as a law clerk to Supreme Court Justice Robert Jackson, and draw an inference from his infamous assertion, back in 1952 during the Court's initial preparation for *Brown v. Board of Education I*, that: "I realize it is an unpopular and un-humanitarian position, for which I have been excoriated

by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed."<sup>8</sup>

*Plessy* was the 1896 case in which the judicial invention of the "separate but equal" exception to the Fourteenth Amendment's Equal Protection Clause was first articulated by the U.S. Supreme Court in the context of rejecting an equal protection challenge to a Louisiana statute requiring that railway passenger carriages be racially segregated within the confines of the state's boundaries. *Plessy* governed race discrimination cases until it was reversed over half a century later in *Brown I*.

There is some dispute, offered by Rehnquist himself, as to whether he ever actually endorsed the view expressed here.<sup>9</sup> But it's pretty clear that he did, at least back in 1952,<sup>10</sup> and the assertion is quite consistent with his philosophy of Constitutional adjudication, a point to which I will return later, in the context of Clarence Thomas's *Obergefell* dissent.

There are two points about Rehnquist's early take on *Plessy* worthy of note for the moment. First, if *Plessy* was rightly decided, then not only *Brown*, but also *Loving*, was wrongly decided. If "separate but equal" is a judicially sound defense against equal protection attacks on state-enforced racial segregation, then the only strategy available to complaining parties is to persuade the courts that the actual form of separation is demonstrably *unequal*—a strategy which should have been sufficient, in 1954, to eliminate school segregation in Clarendon County, SC,<sup>11</sup> the school system under scrutiny in *Briggs v. Stratton*, but which would not have sufficed in Topeka, KS (the system challenged in *Brown*), where black and white schools were arguably (roughly) comparable in terms of physical plant investment, instructional resources, and staff qualifications.

Similarly, *Loving* would have fallen prey to the pre-*Plessy* ruling in *Pace v. Alabama*, in which Stephen Field, writing for a unanimous Supreme Court, reasoned that the more severe penalty attached to a statutory prohibition against interracial fornication (a minimum sentence of two years imprisonment, or hard labor, compared with a \$100 fine for same-race fornication) does not violate the Equal Protection Clause because

There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. . . . Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated, and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.<sup>12</sup>

If the Court thought, in 1883, that Section 4189 of the Alabama code violated the Equal Protection Clause by punishing some sexual liaisons more severely than others on account of the racial identities of the participants, it

could have said so. It could have chosen also to strike down Alabama's parallel statute against interracial marriage, which also punished both participants equally.<sup>13</sup> But it did neither. What, we might reasonably ask law clerk Rehnquist, would be the difference between that decision and *Plessy*, as binding precedent in *Loving* and *Brown*, respectively? There was no proscription against "people of color" marrying each other, any more than there was for whites marrying other whites—separate but equal treatment under the law. What could be clearer?<sup>14</sup>

## 1. KENNEDY'S OBERGEFELL OPINION

The second point worth noting about Rehnquist's assessment of *Plessy* is just how far removed his view is from contemporary mainstream culture. Presumptive wisdom today dictates that *de jure* segregated schools, and *de jure* barriers to interracial marriage are *of course* unconstitutional violations of the Equal Protection Clause. *De facto* geographic school segregation, with us still, is bad enough. But as we know, from *Pace*, *Plessy*, and American social and political history, prevailing attitudes about the Equal Protection Clause's significance were not always so. In his *Obergefell* majority opinion, Anthony Kennedy relies heavily on this transience:

The nature of injustice is that we may not always see it in our own times. 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. . . . Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>15</sup>

Similarly, it will not be long before the Equal Protection Clause will be almost universally regarded as requiring, on its own, that state sanction for two-party marriages, once granted to *some* couples, cannot discriminate among couples on grounds of the sex or gender of the partners, just as it is now so regarded with respect to their racial identities. To the extent that Constitutional language informs popular consciousness, that transformation in social attitudes is already virtually complete among Americans under thirty, and spreading rapidly among their elders.

Of course, in saying this, I am also suggesting that our understanding of the Equal Protection Clause, and for that matter the Fourteenth Amendment's Due Process and Privileges and Immunities clauses, are, *and should be*, historically contingent. This is "living constitutionalism" about which the Court's conservatives have been so derisive ever since William Rehnquist first assigned the phrase its pejorative contemporary connotation.<sup>16</sup> *Obergefell* is just the latest incarnation of this dispute, as reflected in Anthony Kennedy's majority opinion and Clarence Thomas's dissent. In this case at least, Kennedy unapologetically embraces Rehnquist's "living Constitution

with a vengeance . . . the substitution of some other set of values for those which may be derived from the language and intent of the framers":<sup>17</sup>

It cannot be denied that this Court's [previous] cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.<sup>18</sup>

Historically grounded sensibilities do not, however, settle the matter for Kennedy. The privacy holdings in *Griswold v. Connecticut*, *Loving*, and *Eisenstadt v. Baird* in particular have, in Kennedy's view, extended substantive due process rights against deprivation of liberty to include "fundamental liberties" to pursue "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."<sup>19</sup> In *Loving* more specifically, the Court held that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>20</sup> It is a sufficiently robust fundamental right that it cannot be withheld from fathers behind in child support, or from prisoners.<sup>21</sup> These subsequent undue burden affirmations of the marriage right articulated in *Loving* have cemented its status as an un-enumerated fundamental right.

Kennedy goes on to list four distinct reasons why marriage deserves constitutional protection as a fundamental right. First, it is inherent in the concept of individual autonomy, since "choices about marriage shape an individual's destiny" and "there is dignity in the bond between two men or two women or two women who seek to marry and in their autonomy to make such profound choices."<sup>22</sup> Second, long-term monogamous pair-bonding is of central importance to its participants: "it supports a two-person union unlike any other in its importance to the committed individuals."<sup>23</sup> Third, it is important to creating a stable environment for child-rearing,<sup>24</sup> for which Kennedy cites the early proto-privacy educational rights of parents' cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.<sup>25</sup> Fourth, marriage has social utility as a "keystone of social order,"<sup>26</sup> in the sense that it functions as a stabilizing influence in society, and there is no reason to think that would be any less true of same-sex marriages.

These are all substantive due process arguments in the sense that they offer reasons for thinking the liberty right to marry is of fundamental importance. Kennedy could have settled for considerably less, making the case exclusively on equal protection grounds, in which case his job would have been much simpler—to address Roberts's assertion, in his *Obergefell* dissent (p. 24), that: "the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'preserving the traditional institution of marriage'." It would have been easy enough to respond to Roberts's assertion by pointing out, as many others have

already done, that there is no rational basis for asserting a legitimate state interest in preserving marriage as exclusively hetero-normative. In fact, all four of the above claims could be enlisted in the service of that less stringent argument, along with the fact that hetero-normative marriages are clearly not threatened by the expansion of participation to same-sex couples. It has at this point become apparent to most people that such fears amount to little more than superstition, coupled sometimes with homophobia, sometimes with a misplaced sense of religious mandate.

But it is only late in his opinion (page 19 out of 28) that Kennedy turns to the Equal Protection Clause, pointing out that *Loving* also invoked both equal protection and due process violations, although Kennedy actually pursues only a "fundamental right" argument throughout, the language of substantive due process doctrine. The question is, Why the harder road?

## 2. KENNEDY'S SUBSTANTIVE DUE PROCESS ARGUMENT

Historically, when the Fifth Amendment promised that the new federal government may not deprive any person of life, liberty, or property without due process of law, and the Fourteenth Amendment promised the same about state and local government action, the focus was undoubtedly on ensuring that adequate safeguards would be secured through proper application of the relevant legal procedures. But something rather unfortunate happened in 1873: the evisceration of the Fourteenth Amendment's Privileges and Immunities Clause in the *Slaughterhouse Cases*, 83 U.S. 36 (1873).

The Clause reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In the *Slaughterhouse Cases*, the issue was whether the State of Louisiana could grant a monopoly in the New Orleans slaughterhouse industry, to which litigants objected because it interfered with their common law right as citizens to exercise their trade, a right to labor freely, in order to make a living. To this, the Court responded that the protected privileges and immunities were only those secured by federal citizenship, not citizenship in any of the several states, and it would be the latter which would guarantee (or not) any alleged right to exercise a trade.

Stephen Field wrote a dissent, joined by three others, arguing that the Privileges and Immunities Clause should be construed more broadly to encompass citizens' rights which had enjoyed some recognition in the common law tradition, and it's clear that the language was so intended by the framers and advocates of the Fourteenth Amendment. But the net effect of the decision was to eliminate the Privileges and Immunities Clause from subsequent Fourteenth Amendment jurisprudence. Subsequently the Equal Protection Clause, and especially the Due Process Clause, now understood substantively as well as procedurally, were called upon to take up the slack.<sup>27</sup>

John Marshall Harlan III has framed the substantive Due Process interpretation as succinctly as anyone:

[Were] due process merely a procedural safeguard, it would fail to reach those situations where the deprivation of life, liberty, or property was accomplished by legislation which . . . could, even given the fairest possible procedure in applications to individuals, nevertheless destroy the enjoyment of all three. It is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather [those concepts embracing] “rights which are fundamental; which belong . . . to the citizens of all free governments.”<sup>28</sup>

The last passage is itself a quotation from *Corfield v. Coryell*, an 1823 case in which Supreme Court Justice Bushrod Washington was laying out the meaning of the original Privileges and Immunities Clause of Article IV of the U.S. Constitution, which illustrates how closely the substantive interpretation of the Due Process clause has been linked with the task of replacing the largely discarded Fourteenth Amendment Privileges and Immunities Clause.

The problem, of course, is the task of figuring out just which rights are sufficiently “fundamental” to warrant constitutional protection. The Court’s current crop of conservatives, other than Kennedy, are generally disposed to argue “none, unless they are already in some way enumerated in the Constitution.” They are in varying degrees reluctant to admit this too freely, because some rights now entrenched as fundamental—though not enumerated—would be impolitic to repudiate at this stage in judicial history. But they do occasionally complain that the substantive interpretation of due process is pure judicial invention, initiated primarily in the *Lochner* era’s titular case,<sup>29</sup> in which the Supreme Court declared that labor protection legislation enacted in New York State was unconstitutional because it ran afoul of an alleged, but unenumerated, fundamental right of free contract (between New York bakers and their employers, so that the bakers could “freely” work in excess of sixty hours a week).

Substantive due process is also occasionally alleged (somewhat ahistorically) to be at work in *Scott v. Sandford*, in the argument that “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.”<sup>30</sup>

Roberts, in his *Obergefell* dissent, attempts to smear Kennedy’s substantive due process argument for an expansive fundamental right to marry by linking it (quite implausibly) with these two judicial albatrosses, even though the harms caused by the rights asserted in *Lochner* and *Scott* were both real and substantial, and the harms associated with the fundamental right to marry in *Obergefell* are, as best we can tell at present, entirely imaginary. Still, the question remains: Given the checkered history of substantive due process jurisprudence, why should Kennedy expose his opinion to such criticism, when

a rational basis equal protection argument was ready to hand?

In one sense, it really is true that substantive due process is the product of judicial invention. On the other hand, were it not for the Court’s own obtuseness in the *Slaughterhouse Cases*, much the same set of judicial disputes would have played out in the context of the meaning of the enumerated Privileges and Immunities Clause. So this is an interpretive defect entirely of the Court’s own making. Even then, however, the Court faces the problem of ascertaining just what rights count as fundamental. There have been attempts to summarize the constraints, including Harlan’s contribution on this point:

I . . . agree that judicial “self-restraint” is an indispensable ingredient of sound constitutional adjudication, . . . Judicial self-restraint will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, [and] solid recognition of the basic values that underlie our society.<sup>31</sup>

And Felix Frankfurter’s endorsement of Benjamin Cardozo’s earlier attempt:

Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental” or are “implicit in the concept of ordered liberty.”<sup>32</sup>

Of course, neither of these constrain the content of the language of fundamental rights very much, even though both Frankfurter and especially Harlan were relatively conservative voices about the proper scope of judicial discretion. That’s why an appeal to a vague “right of dignity” in the civil recognition of same-sex marriage in Kennedy’s *Obergefell* ruling so infuriates his fellow conservatives on the bench. Kennedy does it anyway because he is concerned to establish the right to same-sex marriage on the same constitutional plane as interracial marriage. Indeed, his entire argument is heavily tied to the constitutional significance of *Loving*. Equal protection arguments alone won’t get him the kind of robust expansive conception of the fundamental right to marry that he wants to achieve. He wants to withdraw the subject of same-sex marriage:

“from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” . . . This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”<sup>33</sup>

### 3. FRACTURED FAIRYTALES: ROBERTS AND ALITO ON THE HISTORY OF MARRIAGE

Much of the rhetoric in the dissents, from Roberts and Alito in particular, is little more than the old argument that there

can't be a fundamental right to same-sex marriage because that's not what marriage *is*:

The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. . . . [M]arriage "has existed for millennia and across civilizations." For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman.<sup>34</sup>

For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.<sup>35</sup>

These "millennialist" declarations are reminiscent of nothing so much as Warren Burger's bombastic declarations in his *Bowers v. Hardwick* concurrence: "the proscriptions against sodomy have very 'ancient roots.'" Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."<sup>36</sup> They are also false. There have been socially recognized formal same-sex unions in Western culture in the past—*affrèment* in sixteenth-century France, for example (although like heterosexual marriages of the period, these seem to have been primarily long-term economic and estate commitments).<sup>37</sup> And there have certainly been numerous examples of formally recognized same-sex unions in non-Western cultures.

Alito's suggestion that marriage is inextricably linked to procreation is nonsense upon stilts. That's an extremely modern notion, as illustrated rather nicely by the following passage from George Bernard Shaw's early twentieth-century play *Pygmalion*:

*Alfred Doolittle*: I'm feeling uncommon nervous about the ceremony, guv'nor. Wish you'd come and put me through it.

*Colonel Pickering*: You've been through it before. You were married to Eliza's mother.

*Doolittle*: Who told you that, guv'nor?

*Colonel Pickering*: Nobody told me, but I concluded naturally.

*Doolittle*: No, no. That ain't the natural way, guv'nor. That's only the middle-class way . . .

*Mrs. Higgins*: I've ordered the car, dear. Wait for me. Colonel Pickering can go with the bridegroom.

*Doolittle*: "Bridegroom." What a word. Makes a man realize his position somehow.

*Colonel Pickering*: So long. See you at the church.

*Doolittle*: Middle-class morality claims its victim.

Alfred Doolittle, the father of Covent Gardens flower seller Eliza Doolittle (whose social class Henry Higgins has undertaken to transform), is a "common garbage man" who has come into some money (thanks to Higgins), and now finds himself obliged to marry—precisely because he is a man of substance. He must now take action to properly secure and dispose of his assets, when in the past he did not suffer the weight of economic responsibilities (there is more to this dialogue).

The point here, for Doolittle and for us, is that marriage traditionally concerned itself with children only for purposes of dynastic succession and, as the practice percolated down to the middle classes, for establishing ownership claims over economic assets. The notion that marriage might be about love, or a more secure environment for child-rearing, is largely a twentieth- and twenty-first-century notion. When jurists serve up historical narratives, actual history may not be part of the fare.<sup>38</sup>

#### 4. DISSENTING THOMAS: INTERRACIAL MARRIAGE AS A TENUOUS FUNDAMENTAL RIGHT

The only really interesting objection to Kennedy's expanded account of the fundamental right to marry comes from Clarence Thomas. Echoing one brief element of Roberts's dissent, Thomas informs us that "the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity."<sup>39</sup> One reason is that dignity is too vague for judicial use. Two months before *Obergefell*, Jeffrey Rosen suggested that Kennedy's new synthesis of dignity with liberty (the Due Process Clause) and equality (the Equal Protection Clause) augured reduced judicial restraint in this case and others in the near future, because dignity, as Kennedy wields the term, is a novel open-ended concept, first developed by him just over a decade earlier, in *Lawrence v. Texas* (2003).<sup>40</sup> Another reason is because, on Thomas's account, human dignity is an innate, and thus inalienable quality:

Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits.<sup>41</sup>

In one sense, Thomas's reasoning is beyond reproach. There is certainly a longstanding philosophical tradition endorsing the concept of inalienable human dignity that can be traced back through Kant, Locke, even as far back as Augustinian Christian apologetics. And truly inalienable properties can neither be eliminated nor imbued by a government. But, of course, human dignity is not just an amorphous abstract inalienable concept. There is also the idea of socially executable respect for dignity and,

conversely, social practices which fail to respect dignity, and thereby undermine it, both practically and psychologically. Among all the current members of the Supreme Court, one might have thought that Clarence Thomas, at least, would have had the requisite personal experience to recognize that.

The truth is that judicial protection of human dignity extends back much further than Kennedy's use of the term in *Lawrence*, and focused sometimes on the practical aspects of securing a strong psychological sense of one's own dignity. It surfaced, rather famously, in the Supreme Court's reliance on Kenneth and Mamie Clark's doll studies in *Brown I*:

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.<sup>42</sup>

We might reasonably ask why Clarence Thomas does not remember this reasoning. But the truth is, he remembers it well enough, and offers an interesting reply in an earlier case, *Missouri v. Jenkins*:

*Brown I* did not say that "racially isolated" schools were inherently inferior; the harm that it identified was tied purely to *de jure* segregation, not *de facto* segregation. Indeed, *Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race. As the Court's unanimous opinion indicated: "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown I, supra*, at 495. At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. . . . Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause.<sup>43</sup>

What Thomas is asserting here is not what actually took place in *Brown I*, since the Court *did* rely on psychological/sociological research, precisely to argue that the *Plessy* "separate but equal" doctrine, in the face of *de jure* segregation, was a chimera, regardless of how "equal" the segregated facilities might be. The message that some were unworthy to mix with others was powerful regardless.

Thomas's position was that the *Brown* Court did not need to bother with this argument. It could have simply asserted, as Thomas himself does, that "the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups," because that is what the Equal Protection Doctrine required from its inception, regardless of the psychological effects of this or that social policy.

From the *Brown* Court's perspective, however, that proposition was not so clear. Yes, one could demonstrate that "separate but equal" failed as a doctrine whenever facilities were demonstrably unequal, but what if they *were* equal? Did the Equal Protection Clause really prohibit segregation in such cases? Thomas, as an originalist, ought to be more cautious.

When William Rehnquist wrote his infamous Jackson clerk memo about *Plessy* having been rightly decided, he included the following line: "If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma* [sic]." Rehnquist's literary references are first to Oliver Wendell Holmes *Lochner* dissent, in which Holmes asserted that the Constitution did not enshrine a *laissez faire* economic theory (as embodied in Spencer's Social Darwinism). Similarly, Rehnquist suggests, it does not enshrine Gunnar Myrdal's 1944 Carnegie Foundation study of U.S. race relations—*An American Dilemma: The Negro Problem and Modern Democracy*, in which Myrdal argues that a significant part of the problem was the psychologically damaging effects which white oppression was having on black Americans.

Why should we believe Rehnquist's assessment of the proper reach of the Fourteenth Amendment's Equal Protection and Due Process clauses, though? The answer is furnished, inadvertently, by John Roberts in his *Obergefell* dissent:

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court. . . . [These changes] did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. 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."<sup>44</sup>

The first thing to note about this passage is its concession to Kennedy: the legal structure of marriage *has* changed significantly just over the past two hundred years. But it is the coverture issue to which I want to draw particular attention—the nineteenth-century (and earlier) practice of transforming wives into economic vassals of their husbands, by transforming their paired assets into a

single economic unit under the charge of the husband. During the Congressional debate about the meaning of the text of Representative John Bingham's initial draft of the Equal Protection Clause, there was discussion between Bingham and Representative Robert Hale over just that question: Would the several states be able to retain their coverture laws—a matter on which Hale was assured that the proposed amendment would not threaten such laws, but only require that they be applied equally to all relevantly situated residents.<sup>45</sup> Senator Edgar Cowan asked, rhetorically, whether the states are “sovereign to determine . . . the question of polygamy, the question of incest, or any other question which . . . would materially affect the interests of the community constituting the State?” He then answered his own question in the affirmative.<sup>46</sup>

If during the Reconstruction era debates you asked members of Congress whether “marriage is the union of a man and a woman, where the woman is subject to coverture,” in a very real sense the answer would be “yes,” contrary to Roberts’s suggestion. And given the general nature of the discussion, it is not unreasonable to conclude that much the same view would have informed Congressional views about the validity of proscriptions against interracial marriage (certainly), and segregation of the races in contexts such as schools, public lodging houses, and public conveyances (probably). What local jurisdictions wanted, local jurisdictions should get, provided that the laws in question were applied “equally” (even if that last point were to be honored only in the breach).

In short, there is good reason to think Rehnquist might well have been right in his memo to Jackson. Of course, I would say, “so much the worse for originalism; the case is evidence of the folly of adhering blindly to outmoded social attitudes in our jurisprudence.”

But perhaps Thomas is instead a kind of textualist: the hypothesis that there is a “plain meaning” of the Equal Protection Clause, and that meaning prohibits both school segregation and anti-miscegenation laws. Or as Thomas phrased it in *Jenkins*, “the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.” But why should “plain meaning” stop there? If it’s the meaning of the concept of equal protection under the law, then shouldn’t citizens also be treated as individuals, and not as gendered, with respect to the institution of marriage? If it’s the *text* that’s authoritative, then it can only be authoritative in the manner we currently understand it. To delimit it to suit Justice Thomas’s particular idiosyncrasies seems at least as judicially high-handed as he accuses Kennedy of being. As Kennedy frames the point:

[R]espondents . . . assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” . . . *Loving* did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense,

asking if there was a sufficient justification for excluding the relevant class from the right. . . . If rights were defined [only] by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.<sup>47</sup>

In aspiring to sort textual meaning in the “right” way, Kennedy may be engaged in a quasi-natural law form of jurisprudential interpretation, but he is in this regard no different from his more conservative brethren on the Court. Thomas, for example, does the same in his *Jenkins* proposal to restrict equal protection coverage to racial, ethnic, and religious groups. Roberts does so when he insists on defining marriage in one exclusionary way rather than another. How should the Court negotiate among these competing interpretations? In the absence of obvious harms, breadth has the virtue of inclusiveness. And in the case of same-sex marriage, it has been a long time coming.

NOTES

1. “Ending Gay Marriage Debate,” *Charleston Post and Courier*, June 27, 2015, A16.
2. “Race and Marriage,” *Charleston News and Courier*, June 14, 1967, 12-A.
3. *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).
4. *Loving v. Virginia*, 388 U.S. 1 (1967).
5. “McLeod Said Court Ruling Affects Palmetto State Law,” *Charleston News and Courier*, June 13, 1967, 5-B.
6. The truth, presumably, is that the *Post and Courier*’s senior editorial staff feels some ambivalence about their posture. On the same day they ran the editorial quoted here, they published an eloquent pro-*Obergefell* ruling by a junior editorial staffer on the op-ed page: Ed Buckley, “Wise Decision Not Just a Win for Gay People,” *Charleston Post and Courier*, June 27, 2015, A17.
7. *Missouri v. Jenkins*, 515 U.S. 70 (1995). Roberts also contends that *Loving* is significantly different from *Obergefell*, but he doesn’t really engage with Kennedy’s argument, offering little more than the assertion that *Obergefell* would change “the core definition of marriage” in a way that *Loving* does not (*Obergefell*, Roberts dissent, 16)—a view which is deeply problematic, as I will explain later.
8. Rehnquist’s clerk memo to Jackson, housed among Jackson’s papers stored at the Library of Congress (“A Random Thought on the Segregation Cases,” December 1952, L.C. Manuscript Division, Box 184, Folder 5), first came to public attention in 1971, when *Newsweek* published it during Rehnquist’s Senate confirmation hearings (“Supreme Court: Memo from Rehnquist,” *Newsweek*, December 13, 1971, 32).
9. This was in the immediate wake of the *Newsweek* revelation, when Rehnquist wrote to Mississippi Senator James O. Eastland, the chair of the Senate Judiciary Committee, asserting that the memo was a rough draft of Robert Jackson’s own views, composed at Jackson’s request, and did not represent his (Rehnquist’s) personal views at all (117 *Congressional Record* 45, 440 [1971]).
10. The grammatical structure of the memo, and even the title (“A Random Thought on the Segregation Cases,” my emphasis), render Rehnquist’s gloss for the Senate Judiciary Committee quite implausible. For a completely convincing confirmation of the longstanding counterargument that Rehnquist was simply impugning Jackson’s judicial record to save his own hide during his Supreme Court confirmation process, see Brad Snyder and John Q. Barrett, “Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and *Brown*,” *Boston College Law Review* 53, no. 2 (2012): 631–60.
11. Or at least require major state and local investment in the county’s black schools.

12. 106 U.S. 583 (1883), at 585.
13. And as severely as interracial fornicators: two to seven years imprisonment or hard labor, a law passed, ironically, only after emancipation, in 1865. Prior to that, the only parties subject to punishment in Alabama were those who officiated at interracial marriages, not the marriage partners themselves. For a thorough discussion of the evolution of nineteenth-century anti-miscegenation laws, see Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History* (New York: Palgrave MacMillan, 2002).
14. It is telling that Scalia and Alito, in their *Obergefell* dissents, never mention *Loving*. This is at least in part because *Loving* is a very awkward precedent for them, the elephant in the room where the constitutional status of same-sex marriage is concerned. I wonder, however, if it is also partly because they secretly agree with the early Rehnquist position. But it is no more socially political for them to say so today than it was for Rehnquist to reaffirm that view at the time of his Supreme Court nomination hearings.
 

Instead of dealing with *Loving*, Scalia expends his ire fulminating about the *Obergefell* majority's alleged subversion of democratic processes. That's a rather ironic posture, given Scalia's own role in halting Florida's presidential vote recount in *Bush v. Gore* back in December of 2000, a performance in which he forever ceased having any credibility as a champion of democracy against judicial excesses.

Alito simply echoed Roberts's "core definition of marriage" argument in *Obergefell*, and his own dissent on the merits in *U.S. v. Windsor*, 570 U.S. \_\_\_\_ (2013), the case in which the substantive portion of the Federal Defense of Marriage Act was struck down. (For a newsletter discussion of this case, see my "*U.S. v. Windsor* and *Hollingsworth v. Perry* Decisions: Supreme Court Conservatives at the Deep End of the Pool," *APA Newsletter on Lesbian, Gay, Bisexual, and Transgender Issues in Philosophy* 13, no. 1 [2013]: 11–21.) It's a mystery to me why Alito didn't simply sign off on the relevant sections of Roberts's argument.
15. *Obergefell* Kennedy majority, slip opinion 10. All future references to *Obergefell* pagination will be to the slip opinions for the Kennedy majority and each of the dissents.
16. William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 693–706. For other contributions to the *locus classicus* of contemporary originalism, see Edwin Meese III, "The Supreme Court of the United States: Bulwark of a Limited Constitution," *South Texas Law Review* 27 (1986): 455–66; and Antonin Scalia, "Originalism, the Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849–64.
17. Rehnquist, "The Notion of a Living Constitution," 695.
18. *Obergefell*, Kennedy, 11-12.
19. *Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972). *Obergefell*, Kennedy, 10.
20. *Loving*, 12.
21. Kennedy is referring here to *Zablocki v. Redhail*, 434 U. S. 374 and *Turner v. Safley*, 482 U. S. 78, respectively.
22. *Obergefell*, Kennedy, 13.
23. *Ibid.*
24. *Obergefell*, Kennedy, 14.
25. 262 U. S. 390 (1923) and 268 U. S. 510 (1925), respectively.
26. *Obergefell*, Kennedy, 16.
27. For a good brief summary of this history, see Stephen G. Calebresi and Abe Salander, "Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers," *Florida Law Review* 65 (July 2013): 909–1087, at 920–34.
28. *Poe v. Ullman*, 367 U.S. 497 (1961), 541.
29. *Lochner v. New York*, 198 U.S. 45 (1905).
30. *Scott v. Sandford*, 60 U.S. 393 (1857), 450.
31. *Griswold v. Connecticut*, 381 U.S. 479 (1965), 501.
32. *Rochin v. CA*, 342 U.S. 165 (1952), 169; Frankfurter quoting Cardozo from *Snyder v. Massachusetts* (1934) and *Palko v. Connecticut*, (1937).
33. *Obergefell*, Kennedy, 24, citing *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943), at 638.
34. *Obergefell*, Roberts dissent, 2,4
35. *Obergefell*, Alito dissent, 6-7
36. *Bowers v. Hardwick*, 478 U.S. 186 (1986), 197.
37. "Same-Sex Couples Creating Households in Old Regime France: The Uses of the *Affrèment*," *Journal of Modern History* 79 (Sept. 2007): 613–47. See also John Boswell, *Same Sex Unions in Premodern Europe* (New York: Villard Books, 1994).
38. Roberts in particular serves up still more historical fiction:
 

Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together . . . the laws in no way interfere with the "right to be let alone." (*Obergefell*, Roberts dissent, 17-18)

Of course, such couples would have suffered considerable interference if Roberts had had his way in *U.S. v. Windsor*, where he argued (in dissent) that the parties lacked adequate standing for the lawsuit to proceed. This would have meant that same-sex married couples would definitely not have been "let alone" with respect to federal marriage benefits (but denied them), even in states where same-sex marriage was legal. His behavior in *Windsor* suggests an element of hypocrisy in his *Obergefell* claim that equal protection analysis "might be different" if the Court "were confronted with a more focused challenge to the denial of certain tangible benefits" (*Obergefell*, Roberts dissent, 24).

Also, if Roberts had his way in *Obergefell*, states would be free to refuse recognition of same-sex marriage, even among couples moving in from out-of-state—still more government interference with "the right to be let alone."
39. *Obergefell*, Thomas dissent, 16.
40. "The Dangers of a Constitutional 'Right to Dignity'," *The Atlantic*, April, 29, 2015.
41. *Obergefell*, Thomas dissent, 17.
42. *Brown v. Board of Education*, 347 U.S. 483, at 492-93.
43. *Missouri v. Jenkins*, 515 U.S. 70 (1995), 120-21.
44. *Obergefell*, Roberts, 7-8.
45. Cong. Globe, 39th Cong., 1st Sess., 1063 and pages following.
46. *Ibid.*, 604.
47. *Obergefell*, Kennedy, 18.