Special Section
Same-Sex Marriage: Comparative Reflections

Dropping the Other Shoe: *Obergefell* and the Inevitability of the Constitutional Right to Equal Marriage

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Abstract

After having invalidated the federal Defense of Marriage Act (DOMA), the U.S. Supreme Court "dropped the other shoe" in *Obergefell v. Hodges* by declaring the exclusion of same-sex couples from marriage at the state level unconstitutional. Written by Justice Kennedy, the majority opinion heavily relied on the dignity-bestowing character of marriage to show why this exclusion is so harmful. But this strategy comes with a cost: it inflicts a stigma even as it conveys recognition—a drawback that an equality analysis can avoid. Respondents had argued that opening marriage dangerously disconnected marriage from procreation, both the historical reason for and the essence of marriage. In finding that they had failed to provide evidence for the harmful outcomes they described, the majority not only provided the rational basis test with a new kind of "bite." It also asserted that tradition or religious beliefs were not enough to justify exclusion. Once secular purposes define marriage and rational reasons are required to regulate access, the road to marriage equality opens wide. As the line of cases leading up to *Obergefell* suggests, and developments in Germany, Austria, and other jurisdictions confirm, equality works as a one-way ratchet—albeit without necessarily including polygamy and incest. Crucially, equality changes the focus: From an equality perspective, the harm lies not in the exclusion from a dignity-conferring institution, but in the suggestion that the excluded group is not worthy of participating in it and does not deserve the recognition and benefits associated with it. Instead of aspiring to achieve dignity through marriage, in this view same-sex couples claim recognition as free and equal citizens. Discrimination on the basis of race, gender, or sexual orientation subsumes an individual under a group category whose purported characteristics are systematically devalued, thus refusing to appreciate a person as an individual. It is this denial of recognition that conveys harm to the dignity of the individual above and beyond the respective disadvantage suffered. Thus taken with equality, dignity does not have the exclusive effect it has in isolation, as struggling against degrading exclusion stresses common traits.

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A. Introduction

The *Obergefell v. Hodges*[1] petitioners appeared to step out from a strategic litigation picture book. These committed couples had respectable professions or were traditional homemakers and were all exceptionally dedicated to their families. James Obergefell gave up his career to care for his partner dying of ALS. April de Boer and Jayne Rowse adopted children with special needs. Army Reserve Sergeant First Class Ijpe DeKoe was deployed in Afghanistan. These upstanding individuals were the kind of people who made America a great nation. Yet, something was missing: They could not get married nor have their marriages recognized by their state. When de Boer and Rowse became the first same-sex couple to lose a federal appeal[2] since 2006,[3] increasing the chances of obtaining certiorari, many doubted whether petitioning the Supreme Court was a good idea. After the Proposition 8 case,[4] supporters of same-sex marriage feared another *Bowers v. Hardwick*[5] situation, which could set back the LGBT civil rights movement by at least a decade and hinder positive development at the polls.[6] But instead, as Justice Antonin Scalia predicted, the Supreme Court continued a line of jurisprudence that started with *Romer v. Evans*,[7] *Lawrence v. Texas*,[8] and *United States v. Windsor*,[9] and decided to drop the other shoe.

The Court in *Windsor* stressed that a decision on the federal Defense of Marriage Act (DOMA) did not affect states that prohibited same-sex marriage. It merely prevented the federal legislature from treating two classes of state-sanctioned, lawful marriages—heterosexual and homosexual marriages—differently. In his dissent, Justice Antonin Scalia noted that the Court had already stated in *Lawrence* that the "right to homosexual sodomy . . . had nothing, nothing at all to do with 'whether the government must give

[1] Obergefell v. Hodges, 135 S. Ct. 2584, 2619 (2015). (Roberts, J., dissenting) ("[T]he compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry.").

[2] DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[3] Citizens for Equal Protection v. Bruning, 455 F.3d 859, 871 (8th Cir. 2006).

[4] Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

[5] 478 U.S. 186, 196 (1986).

[6] *See, e.g.*, Margaret Talbot, *A Risky Proposal: Is it too Soon to Petition the Supreme Court on Gay Marriage?,* NEW YORKER (Jan. 28, 2010), http://www.newyorker.com/magazine/2010/01/18/a-risky-proposal. In 2012, North Carolina voted for a constitutional ban on same-sex marriage, while voters rejected such a constitutional amendment in Minnesota and approved same-sex marriage by ballot in Maine, Maryland, and Washington.

[7] 517 U.S. 620 (1996).

[8] 539 U.S. 558 (2003).

[9] 133 S. Ct. 2675 (2013).

formal recognition to any relationship that homosexual persons seek to enter,'" but was now using *Lawrence* to invalidate DOMA because it interfered with protected moral and sexual choices.[10] Justice Scalia had seen this coming: If moral disapproval was not a legitimate state interest and intimate conduct could be "but one element in a personal bond that is more enduring," he had inquired in his dissenting opinion in *Lawrence*, what justification was there for a state to deny same-sex couples the benefits of marriage?[11] In truth, he warned, the *Windsor* Court simply "le[ft] the second, state-law shoe to be dropped later," as the application of its reasoning to state laws would be "inevitable."[12] And so it happened. Not only do states have to recognize same-sex marriages affirmed in other states, but it is also unconstitutional to deny recognition of same-sex marriage altogether.[13]

Justice Anthony M. Kennedy wrote the majority opinion in *Romer*, *Lawrence*, and *Windsor*, and he also wrote it in *Obergefell*. Given his track record, it comes as no surprise that it takes him less than three pages to introduce the concept of dignity. The case, though, is really a lesson about the inevitable course of equality. Part B of this Article argues Justice Kennedy's sole reliance on dignity as a means for inclusion comes at the cost of exclusion and stigmatization of unmarried people. Part C elucidates how, by rejecting the argument that the exclusion of same-sex couples from marriage serves to encourage responsible procreation, the Court gives its analysis a stronger bite. In Part D, I further argue that the demand for rational, secular reasons for the exclusion of same-sex couples from marriage allows the definition of marriage to remain open to change. Finally, Part E sets out a comparison using German and Austrian cases in order to show that the equality dynamic is inevitable.

B. The Meaning of Marriage: The Cost of Dignity

The majority of the *Obergefell* opinion turns on the importance of marriage to the individual, the family, and to society at large. By defining the meaning of marriage in exalted, lofty language—something that Justice Kennedy does often and is justly criticized for—the majority set the stage for the justification inquiry: The more valuable the institution, the more harmful the exclusion. But this strategy comes with a cost. It inflicts stigma as it conveys recognition.

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[10] *See Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

[11] *See Lawrence*, 539 U.S. at 604–05 (Scalia J., dissenting) (citing *Lawrence*, 539 U.S. at 567).

[12] *Windsor*, 133 S. Ct. at 2705, 2709 (Scalia, J., dissenting).

[13] *See Obergefell*, 135 S. Ct. at 2607–08.

I. Marriage as a Dignity-Conferring Identity

Justice Kennedy begins with affirming the ennobling, dignifying effect marriage has on individuals coming together for life. [14] As a way of achieving such individual fulfillment, marriage may at first appear no different from any other liberty. Justice Kennedy also highlights the importance of marriage for individual autonomy, which is increased by joining two lives together: "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[15]

The Supreme Court has already pointed out in earlier decisions that marriage, just like procreation, involves choices that are particularly intimate with which the state cannot interfere without a strong government interest.[16] In marriage, this choice is especially protected because of the high moral value ascribed to it, "for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations."[17] Marriage responds "to the universal fear that a lonely person might call out only to find no one there" by offering "the hope of companionship and understanding . . . "[18] and creates a mutual bond of responsibility that goes beyond the self-centered pursuit of happiness. The nobility of marriage, the Court observed in *Griswold*, rests on the fact that it is "a coming together for better or for worse . . . 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."[19]

From this perspective, marriage is not simply an action, but an identity. Marriage turns the individual from a self-interested autonomous being into just one half of a partnership of two. As Justice Kennedy puts it, the right to marry "dignifies couples who 'wish to define themselves by their commitment to each other.'"[20] Marriage is a vocation; joining this institution demonstrates that an individual has reached a more advanced stage of humanity. It demonstrates that by voluntarily and freely assuming lifelong responsibility for another human being, a person is ready to exchange individual autonomy for something bigger, more noble, more dignified.

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[14] *Id.* at 2599.

[15] *Id.* at 2659.

[16] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Loving v. Virginia, 388 U.S. 1, 12 (1967); Roe v. Wade, 410 U.S. 152, 152–53 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

[17] *Obergefell*, 135 S. Ct. at 2594.

[18] *Id.* at 2600.

[19] *Griswold*, 381 U.S. at 486 (discussing contraception in marriage (citing *Obergefell*, 135 S. Ct. at 2599–60)).

[20] *Obergefell*, 135 S. Ct. at 2600 (citing *Windsor*, 133 S. Ct. at 2689).

II. Marriage as Dignifying and Stabilizing the Family

For Justice Kennedy, marriage stands for much more than merely taking responsibility for another adult. Marriage also means familial stability. The legal recognition and structure it provides "allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives' . . . . Marriage also affords the permanency and stability important to children's best interests."[21] To Justice Kennedy, marriage signals that a family is on equal footing with all of the other families in the community, whereas denying this status to individuals signals the opposite. Such a denial of status exposes children to "the stigma of knowing their families are somehow lesser" and burdens them with "the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."[22]

Thus, marriage is not just important to those who seek self-fulfillment through companionship and who pursue greater values in a unit of two. Marriage also provides benefits to the spouses and the children, and not just in a material sense. Most importantly, marriage is designed to promote stability because it promises permanency and makes it difficult for families to break apart. By dignifying the parents' union, it also dignifies the entire family. Marriage, in this sense, signals that a family has not simply come together at one point and may well break apart, but that the unity of that family is intended to last. Only a married family can be on equal standing with all other families.

III. Marriage as a Keystone of Social Order

Finally, marriage affects society as a whole, because "marriage is a keystone of our social order."[23] Back in the nineteenth century, the Supreme Court considered marriage "the foundation of the family and of society, without which there would be neither civilization nor progress,"[24] an institution "giving character to our whole civil polity."[25] Justice Kennedy cited Tocqueville, who visited the United States in 1831, as a witness to the role of marriage in the American society: "[W]hen the American retires from the turmoil of public

[21] *Obergefell*, 135 S. Ct. at 2600.

[22] *Id*.

[23] *Id*. at 2601.

[24] Maynard v. Hill, 125 U.S. 190, 211 (1888).

[25] *Id.* at 213 (quoting Noel v. Ewing, 9 Ind. 37 (1857)).

life to the bosom of his family, he finds in it the image of order and of peace . . . . [H]e afterwards carries [that image] with him into public affairs."[26]

It is easy to see that the gender choice in Tocqueville's quote is not coincidental. In line with the patriarchal ideas of his time, Tocqueville imagined a man as "the American" who daily crosses the line between the tumultuous, political public sphere and the quiet, domestic private sphere, managed and maintained by his wife. Justice Kennedy may well have had an updated version of this domestic retreat in mind, which both men and women can retire to, but this does not make the image he relied on any less ideological, and the underlying public-private distinction any less gendered.[27]

IV. The Affirmation-Stigmatization Dilemma and the Cost of Dignity

Justice Kennedy's vision of marriage as both noble and dignified could be considered strategic. It elevated the institution of marriage to such an extent that excluding same-sex couples from it became untenable. Excluding them meant denying them access not just to a set of benefits, rights, and obligations, but to dignity itself. But this move, strategic or not, comes at a cost.

The majority's image of marriage is drawn in highly idealistic terms, evoking values, security, freedom, and recreation. Needless to say, the reality is often much less inspiring. Many marriages end in divorce, often leaving one part without financial means or security. In heterosexual marriages, this is usually the woman. Yet, the homemaker/breadwinner ideal also puts stay-at-home spouses in same-sex marriages at risk. And the marriages that last are not always better off either as sometimes spouses can limit, rather than expand, one another's freedoms. In the most extreme situations, for example in cases of domestic violence, a marriage can turn into a war zone rather than a retreat.[28] Again, while domestic violence often affects women, it can also concern men and happen in same-sex relationships.[29] When such challenges and issues burden a marriage, it may even be better for the children if the parents split up.

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[26] *Obergefell*, 135 S. Ct. at 2601 (citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 309 (H. Reeve trans., rev. ed. 1990 (1835)).

[27] *See, e.g.,* the analysis in Catharine MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135 (2000).

[28] See the caveat in *Planned Parenthood v Casey*, 505 U.S. at 892–93 (1992): "In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands." (O'Connor, Kennedy, and Souter, JJ.).

[29] *See, e.g.*, Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence,* 64 GEO. WASH. L. REV. 582 (1996).

Setting examples of failure aside, portraying marriage as the pinnacle of human achievement and as the one institution that protects children from a "difficult and uncertain family life"[30] was risky. In his effort to show that "[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning,"[31] and to protect their children from "the stigma of knowing their families are somehow lesser,"[32] Justice Kennedy stepped into an affirmation-stigmatization trap. Elevating the importance of marriage—to show how problematic it is to exclude whole groups of society from it—suggests that unmarried individuals lack the requisite maturity to aspire to the transcendent purposes of this unique and special union. Living with an unmarried partner appears almost egotistical while those who remain single are "condemned to live in loneliness."[33] Furthermore, emphasizing the importance of marriage for children suggests that parents raising children outside of marriage are denying them a stable home, exposing them to stigma and judgment from others. Justice Kennedy hastened to add that the right to marry is still meaningful for those who do not or cannot have children.[34] Against this background, it appears almost morally indefensible, even irresponsible, to not marry. Celebrating the extraordinary virtues of marriage, especially for families, has the effect of indirectly stigmatizing individuals, couples, and families who are not married.

This effect is compounded by the fact that this move requires showing how gay and lesbian couples are worthy of participation and recognition in this dignified institution. Katherine Franke, engaging with Jeremy Waldron's responsibility-rights,[35] has pointed out how the gay rights litigation project quickly became one of redemption, an effort to demonstrate recognizability in order to receive recognition—a recognition not of equal worth as humans, deserving respect as such, but of equal respectability as couples and families.[36]

The sanctification of same-sex couples started in *Lawrence v. Texas*.[37] Having rejected a "fundamental right to engage in homosexual sodomy" in *Bowers*,[38] the Court now

[30] *Obergefell,* 135 S. Ct. at 2600.

[31] *Id.* at 2602.

[32] *Id.* at 2600.

[33] *Id.* at 2608.

[34] *Id.* at 2601.

[35] *See* Jeremy Waldron, *Dignity, Rank, and Rights* (The 2009 Tanner Lectures at UC Berkeley, NYU Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-50, 2009); *see also* Jeremy Waldron, *Dignity, Rights, and Responsibilities,* 43 ARIZ. ST. L.J. 1107 (2012).

[36] Katherine M. Franke, *Dignifying Rights: A Comment on Jeremy Waldron's* Dignity, Rights, and Responsibilities, 43 ARIZ. ST. L.J. 1177, 1183, 1189–90 (2012).

[37] *Lawrence,* 539 U.S. 558 (2003).

highlighted a right to form enduring personal bonds.[39] Justice Kennedy, writing for the majority, called it demeaning to reduce the issue to a certain type of sexual conduct, "just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[40] Whereas the *Bowers* court had found that there was "[n]o connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other,"[41] the *Lawrence* court explicitly extended the rationale of those cases to "[p]ersons in a homosexual relationship,"[42] thereby forging a connection between same-sex intimacy, marriage, and the family. One might ask why the court found it necessary to turn this case, which at a maximum involved casual sex,[43] into one about love and intimacy by tying it to marriage and procreation cases. The answer is dignity: A case about dignity required the defendants to be depicted as respectable individuals engaged in sacrosanct intimacy, rather than quick sex and jealous lovers. Headed by Justice Kennedy, the majority decided *Lawrence* not just on liberty and privacy grounds, but also on dignity grounds.[44]

In *Obergefell*,[45] Justice Kennedy also further developed the "legal double helix"[46] of the due process and equal protection clauses developed in *Loving v. Virginia*[47] and *Lawrence*.[48]

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[38] *Bowers,* 478 U.S. at 191.

[39] *Lawrence*, 539 U.S. at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[40] *Id*.

[41] *Bowers*, 478 U.S. at 191.

[42] *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992): "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

[43] *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS, 61–74 (2012) (showing that it is highly improbable that the defendants were caught having sex). For strategic reasons, they did not dispute the charges, but focused on constitutional grounds. *See id*. at 113–20.

[44] Justice O'Connor's concurring opinion instead emphasizes equality, highlighting the stigma conveyed by criminalizing a sexual practice commonly associated with homosexuals. *Lawrence*, 539 U.S. at 581–83.

[45] *Obergefell*, 135 S. Ct. at 2604.

[46] A closer look at the jurisprudence leading up to *Lawrence* reveals "a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix." Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1989 (2004).

[47] *Loving*, 388 U.S. at 12.

[48] *Lawrence,* 539 U.S. at 575.

But instead of using dignity as the crossties of this double helix, or as part of a triangle,[49] he isolated it from the analysis, thereby giving it a very different meaning. In that analysis, dignity is not vindicated by liberty and equality; it sanctifies choices and ways of behavior. Justice Kennedy uses dignity to highlight the importance of the exclusion. This use of dignity comes with a cost: It elevates those who it includes at the cost of excluding and stigmatizing those who are not-so-dignified.[50]

C. The Bite of Rational Reasons: The Purpose of Marriage

Given how much of same-sex marriage's conservative opposition turns on the sacredness and uniqueness of marriage, one might have expected *Obergefell*'s respondents to adopt an approach similar to Justice Kennedy's, except with a stronger religious foundation. The establishment clause of the First Amendment, however, closes off that road.[51] As a result, the respondents shifted religion to another level of the argument and, in effect, they appeared to diminish the significance of marriage instead of exalting it.

I. Marriage as a Solution to a Biological Problem

Without the gloss of dignity or divinity, the role of marriage becomes a much more mundane affair. In the words of Chief Justice Roberts, marriage was created "to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship."[52] Put more succinctly, "[m]arriage is a socially arranged solution for the problem of getting people to stay together and care for children . . . ."[53]

This is more than just a sober twist on Justice Kennedy's vision. Respondents argued that marriage had to remain tied to natural procreation because procreation should remain tied to marriage. Severing the link between marriage and procreation by opening marriage to couples who cannot have children without assistance would weaken the link between children and marriage. Since 1970, the number of children born to unmarried women in

[49] Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. OF TORONTO L.J. 417 (2009).

[50] For a similar critique of dignity in the area of sexual harassment law, see SUSANNE BAER, WÜRDE ODER GLEICHHEIT? ZUR ANGEMESSENEN GRUNDRECHTLICHEN KONZEPTION VON RECHT GEGEN DISKRIMINIERUNG AM BEISPIEL SEXUELLER BELÄSTIGUNG AM ARBEITSPLATZ IN DER BUNDESREPUBLIK DEUTSCHLAND UND DEN USA 214–20 (1995).

[51] The Establishment Clause, which prevents Congress from endorsing a religion, also applies to the states by way of incorporation through the Fourteenth Amendment's Due Process Clause; *See* Everson v. Board of Education, 330 U.S. 1, 15 (1947).

[52] *Obergefell*, 135 S. Ct. at 2619 (Roberts, C.J., dissenting).

[53] *Id*. at 2613 (citing JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 41 (2002)).

the United States has dramatically risen from ten to about forty percent.[54] Accelerating that trend by opening marriage to same-sex couples, they claimed, could compound a situation that was already "not a good result for children."[55]

As counsel for respondents argued during oral arguments, marriage did not develop in order to exclude people but rather "to serve purposes that, by their nature, arise from biology."[56] It is clear that the terms "biology" and "natural procreation" are meant to exclude not only pregnancies achieved through medical intervention, such as in vitro fertilization. They are also meant to exclude donor insemination, despite the fact that it requires no medical intervention into natural biological processes; all that is needed is a cup and a plastic syringe. When respondents spoke of "natural procreation" they referred to the common forms of sexual intercourse between partners of opposite sexes that can lead to pregnancy (if both parties are fertile and not using contraception), unlike with same-sex intercourse.[57] The real issue, thus, is not childbirth as such, but unplanned pregnancy, which respondents wished to reserve for marriage.

II. Intuition as an Argument

The problem with the argument that marriage and procreation must be linked is not the question of why marriage first developed as an institution; this would just be a version of the "we have always done it" justification.[58] The problem is that it rests on the assumption that opening marriage to same-sex couples generally would have a negative effect on society's, and the state's, interest in "encourag[ing] men and women to conduct sexual relations within marriage rather than without"[59]—a claim mainly based on intuition, not evidence. This larger claim contains several underlying assumptions: (1) Marriage, as it had been defined so far, is tied to a couple's ability to procreate without external assistance; (2) this has the effect of encouraging procreation to take place within marriage; (3) growing up in a marriage is usually beneficial for children; (4) opening marriage to couples which clearly cannot procreate without external assistance signals that families and marriage need not necessarily be tied together; and (5) this will accelerate a trend toward births outside of marriage, which would bring negative effects on children.

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[54] *Id*. at 2641 (Alito J., dissenting); Transcript of Oral Argument at 64, *Obergefell*, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter *Obergefell*, Transcript of Oral Argument].

[55] *Obergefell*, Transcript of Oral Argument, *supra* note 54.

[56] *Id*. at 43.

[57] Couples who are able to have children together without assistance can also legally be of the same sex, as if, for example, a trans* partner's procreative abilities were not affected by surgical intervention or hormonal therapy.

[58] *Obergefell*, Transcript of Oral Argument, *supra* note 54, at 42–43 (Breyer, J.).

[59] *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting).

Each of the assumptions runs into problems, many of which were pointed out by some of the justices during oral arguments. The first assumption conflicts with the fact that marriage is open to couples who are unable to procreate without assistance, as long as they are of the opposite sex.[60] Justices Kagan and Kennedy asked whether couples could be asked if they wanted children before according them a marriage license; the respondents admitted that to do so would be an unconstitutional invasion of privacy.[61] Justice Ginsburg proposed the hypothetical of a seventy-year-old couple wanting to get married: "You don't have to ask them any questions. You know they are not going to have any children."[62] Counsel for respondents replied this was merely a question of over-inclusiveness; the mere fact that marriage was limited to opposite-sex couples meant that marriage still signaled that procreation was supposed to take place within a marriage.[63] Regarding this second assumption, respondents did not produce any social science evidence of their claim, a failure that was especially problematic because it was the necessary basis for the fourth and fifth assumptions, namely that opening marriage to same-sex couples weakened this encouragement.

The third assumption is probably the easiest to sustain because studies show that children thrive in stable conditions.[64] It is also fair to assume that married couples tend to stay together longer than unmarried couples, although it is difficult to determine the true cause and effect of this correlation. If couples marry because they think that they have a good chance of staying together, they might have also remained together unmarried. Still, given that the difficulty of going through a divorce, rather than a simple separation, discourages breakups, marriage can be assumed to promote stability and thus be beneficial for children.[65] Of course, the reverse is not necessarily true: Children growing up outside of marriage will not necessarily grow up in unstable conditions, be it in a single-parent or a two-parent household.[66] But scientific studies of children growing up in different settings

[60] *See also id.* at 2601.

[61] *Obergefell*, Transcript of Oral Argument, *supra* note 54, at 54–55 (Kagan and Kennedy, JJ.).

[62] *Id*. at 55.

[63] *Id*.

[64] Brief for Am. Psychological Assoc. et al. as Amici Curiae Supporting Petitioners, *Obergefell*, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter APA Brief].

[65] *Id.* at 16.

[66] Michael J. Rosenfeld, *Nontraditional Families & Childhood Progress Through School*, 47 DEMOGRAPHY 755 (2010) (finding no statistically relevant difference in grade retention between children of married heterosexual couples and children of unmarried same-sex couples of equal socio-economic status).

do support the assumption that marriage has a positive effect on child development.[67] Of course, this would appear to be an argument in favor of expanding the definition of marriage instead of keeping it limited to opposite-sex couples.

The fourth assumption, that opening marriage weakens its link to reproduction, is harder to sustain because same-sex couples do in fact have children through sperm donors, surrogacy, and adoption, and there is nothing to suggest that the introduction of same-sex marriage in their state discourages them from doing so. If marriage is good for children, it seems counterintuitive to withhold it from all of these children growing up with same-sex parents.

The fifth assumption, that opening marriage to same-sex couples would actually encourage births outside of marriage and, therefore, negatively affect children, concerns causality. Respondents assumed that symbolic encouragement is a driving factor for couples getting married when they want to have, or expect to have, a child: "[I]n people's minds, if marriage and creating children don't have anything to do with each other, then what do you expect? You expect more children outside of marriage."[68] In turn, married parents would be more likely to split up when love faded, rather than stay together for the sake of the children.[69] Respondents did not consider whether couples would not marry anyway, or remain married, because of the benefits, rights, and mutual obligations attached to marriage, or because of marriage's dignity-bestowing function, as Justice Kennedy called it. Moreover, for example, marriage rates in Massachusetts have remained constant since *Goodridge v. Department of Human Health* permitted same-sex marriage in 2003[70]—actual

[67] *See* APA Brief, *supra* note 64, at 17–18 (citing Kristin Anderson Moore, Suzanne Jekielek, & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?* 2 (2002), http://www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf) (examining marriage versus cohabitation)); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876 (Nov. 2003) (showing that marriage enhances socioeconomic resources for families); Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 L. & POL'Y 87, 94 (2004) (examining the role of marriage in family stability).

[68] *Obergefell*, Transcript of Oral Argument, *supra* note 54, at 47.

[69] *Id.* at 66.

[70] *Id.* at 64–65 (Sotomayor, J.). The contrary claim in Brief for 100 Scholars of Marriage as Amici Curiae Supporting Respondents at 18, 20*, Obergefell*, 135 S. Ct. 2584 (No. 14-556), appears to be a rather tendentious reading of Mircea Trendafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence From the Netherlands*, 51 DEMOGRAPHY 317 (2014), and of Alexis Dinno & Chelsea White, *Same Sex Marriage and the Perceived Assault on Opposite Sex Marriage* (2013), 8 PLOS ONE 6 (June 11, 2013), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0065730. *See also* Brief of Massachusetts et al., 22–23.

data which respondents did not dispute but rather simply countered that it was too early to tell.[71]

The main problem is that the chain of assumptions respondents built to support a restrictive definition of marriage is mainly based on intuition, not evidence. Accordingly, they sought to exclude same-sex couples from the fundamental right to marry to secure rational-basis review.[72] But even under rational-basis review, courts have repeatedly failed to see why opening marriage to others would prevent opposite-sex couples from getting married.[73]

As Suzanne Goldberg points out, requiring demonstrable facts as justification for discrimination creates space for empirical contestation, while relying on intuition does not.[74] While respondents stressed that the rational-basis test does not require such empirical proof,[75] this is not a blank check; rather, the burden under *Vance v. Bradley* is to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[76] The Supreme Court found that this test—not cited in the opinion—had not been met. In fact, Justice Kennedy called respondents' argument "counterintuitive," and considered it "unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so." Respondents failed to show "a foundation for the conclusion that same-sex marriage will cause the harmful outcomes they describe."[77] This reverses the burden ever so slightly, as it is not for the petitioner to show that there is no rational basis, but for the respondent to show that there is. Under this type of analysis, rational basis is developing a new kind of "bite."[78]

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[71] *Obergefell*, Transcript of Oral Argument, *supra* note 54, at 65.

[72] Fundamental rights trigger heightened scrutiny, requiring not just a rational relation to a legitimate state interest, but narrow tailoring to a compelling state interest. Carolene Products v. U.S., 304 U.S. 144, 153 n.4 (1938).

[73] *See, e.g.*, Perry v. Brown, 671 F3d 1052, 1091 (9th Cir. 2012) ("Proposition 8 is 'so far removed from these particular justifications that we find it impossible to credit them.' *Romer*, 517 U.S. at 635."); Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (overturned for lack of standing).

[74] Suzanne Goldberg, *Intuition and Feminist Constitutionalism*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 98, 99–100 (Beverly Baines, Daphne Barak-Erez, & Tsvi Kahana eds., 2012) (warning against intuition's susceptibility to bias and stereotypes). On implicit bias, see Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

[75] *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993); Vance v. Bradley, 440 U.S. 93, 110–11 (1979).

[76] *Vance*, 440 U.S. at 111.

[77] *Obergefell*, 135 S. Ct. at 2607.

[78] On animus as "bite," see Kenji Yoshino, *The New Equal Protection,* 24 HARV. L. REV. 747, 759–60 (2011).

D. Defining Marriage: Tradition and Reason

Arguably though, the issue of justification only arises if marriage can, in principle, be extended to same-sex couples. If, on the other hand, marriage is understood as an opposite-sex institution by definition, then anti-discrimination claims cannot be used to leverage access to marriage.[79] What, then, is marriage? Is it an institution that merely comprises a set of rights and responsibilities providing recognition and security for long-term relationships? Or is it the more narrowly defined union of one man and one woman? Depending on the answer to this question, the right claimed by same-sex couples is either a right to marry, just like heterosexual couples, or a right to a distinct and separate institution of *same-sex* marriage. Same-sex couples are either seeking to join the existing institution of marriage or to redefine it for themselves,[80] either relying on an existing fundamental right[81] or seeking a new right under the Due Process Clause.[82] In the absence of a textual basis in the Constitution, respondents relied on historical arguments to narrowly define marriage.

I. An Institution Transcending Time and Space

Both the majority and the dissenters emphasized the longstanding character of the institution of marriage. According to Justice Kennedy, "the institution has existed for millennia and across civilizations," even "[s]ince the dawn of history."[83] Chief Justice Roberts stated that marriage "has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs."[84] For Justice Scalia, the fact that "[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman . . . resolves these cases."[85] Justice Samuel Alito is even more specific: "For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate."[86]

[79] *See* Schalk and Kopf v. Austria, 2010-IV Eur. Ct. H.R, 409 (June 24, 2010).

[80] *See Obergefell*, Transcript of Oral Argument, *supra* note 54, at 5.

[81] *Loving*, 388 U.S. at 12.

[82] *Obergefell*, 135 S. Ct. at 2620 (Roberts C.J., dissenting); *id.* at 2635–37 (Thomas J., dissenting).

[83] *Id.* at 2594 (majority opinion).

[84] *Id*. at 2612 (Roberts, C.J., dissenting).

[85] *Id*. at 2628 (Scalia, J., dissenting).

[86] *Id*. at 2541 (Alito J., dissenting).

It is true that—as far as we know—same-sex marriage did not exist before 2000, even in societies where same-sex intimacy was not condemned.[87] Respondents inferred from this that the institution of marriage is by definition exclusively an institution for opposite sexes. Nonetheless, the face of marriage in the United States, and abroad, has changed dramatically over the most recent centuries. Many features of marriage, long thought to be essential, were even declared unconstitutional under the equal protection clause. Tradition does not insulate a civil institution from constitutional scrutiny—and it is the very nature of equality claims that they upset the traditional order of things. But at what point does marriage stray so far from its fundamental and traditional definition that it becomes something entirely different?

The question of who possesses the fundamental right to marry depends on the definition of the institution of marriage itself. In that way, the U.S. Constitution works very similarly to the constitutional systems of other countries. The institution of marriage is rarely defined at the constitutional level, even if the constitution contains an explicit right to marry—except, of course, in the case of those U.S. state constitutions that were amended in the wake of *Baehr v. Lewin*.[88] Rather, in most cases, the exact definition of this institution in terms of access, rights, obligations, and benefits is left up to the legislature.[89] Thus, Article 6(1) of the German Basic Law is known as a *normgeprägtes Grundrecht* (a fundamental right defined by statutory law):[90] The State affords special protection to whatever the law defines as marriage. Nevertheless, the definitional power of the legislator is limited by a guarantee that the institution cannot be fully eviscerated or abolished.[91] Marriage, therefore, has a "constitutional essence" that is protected against change. The *Bundesverfassungsgericht* (the German Federal Constitutional Court) recently reconfirmed that the opposite-sex character of marriage is essential[92]—although marriage in Germany has changed just as much as in the United States, and although it seems to be the constant purpose rather than a formal definition of marriage that seems to be driving Karlsruhe's jurisprudence.

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[87] *See Obergefell*, Transcript of Oral Argument, *supra* note 54, at 14-15; *see also Windsor*, 133 S. Ct. at 2715 (Alito J., dissenting).

[88] *Baehr v Lewin*, 852 P. 2d 44, 64, 67 (Haw. 1993) (denying marriage licenses to same-sex couples is sex discrimination).

[89] For Article 12 ECHR see *infra* note 149.

[90] *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Case No. 1 BvR 636/68, paras. 31, 58, 69 (May 04, 1971), http://dejure.org/dienste/vernetzung/rechtsprechung?Text=BverfGE%2031,%2058.

[91] *See* Peter Badura, *Artikel 6 GG*, *in* GRUNDGESETZ-KOMMENTAR (Theodor Maunz & Günter Dürig eds., 75th update, 2015), at MN 69–72; *see also* DONALD KOMMERS & RUSSELL MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 610 (3d ed. 2012).

[92] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 17, 2002, 105 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 313 (345)—Lebenspartnerschaftsgesetz [Civil Partnership Act]; May 7, 2013, 133 BVERFGE 377 (409)—Ehegattensplitting [Spousal Tax Splitting].

II. An Ever-Changing Institution

Respondents' claim that encouraging responsible procreation has always been at the heart of civil marriage in the United States has faced strong criticism. In fact, in an amicus brief cited by the majority opinion,[93] several historians of marriage and the American Historical Society (AHA) pointed out that

> states have recognized that marriage serves to facilitate the state's regulation of the population; to create stable households; to foster social order; to increase economic welfare and minimize public support of the indigent or vulnerable; to legitimate children; to assign providers to care for dependents; to facilitate the ownership and transmission of property and to compose the body politic.[94]

These interests exist "whether or not children ensue."[95] The brief describes how western European sovereigns, when separating civil from religious marriage, sought to create governable and economically viable sub-units of society by making the husband the head of household. He was obliged to care not only for his wife and biological children, but also for orphans, apprentices, servants, and slaves.[96] The couple's ability or willingness to procreate was never necessary to conclude or maintain a valid marriage in any state in the union[97] and state laws "have long encouraged married couples to incorporate non-biological children into the family structure."[98]

Thus, while marriage also provided security for children, both biological and non-biological, it was consent and economic integration that dominated the institution. Binding the household together as a political, legal, and economic unit, the legal doctrine of coverture was also used to justify the drastically unequal treatment of men and women. This doctrine defined marriage for many years and was even seen as its "essence."[99] Yet, it was

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[93] *Obergefell*, 135 S. Ct. at 2595.

[94] Brief for Historians of Marriage and The American Historical Association as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter Brief for Historians of Marriage].

[95] *Id*. at 7.

[96] *Id*. at 7–10, with further references.

[97] *Id*. at 12–13.

[98] *Id*. at 14.

[99] *Id*. at 18.

this feature that the Supreme Court eviscerated in a series of decisions on gender equality in the 1970s.[100] A similar case can be made for anti-miscegenation laws, abolished by the Court in 1967.[101] The introduction of no-fault divorce in 1969[102] followed the belief that marriage does not have to last a lifetime if love does not hold. In any event, the parents' legal relation to their children remains unaffected by a divorce: They remain responsible for their children's well-being and have the right to remain in contact.

As Justice Kennedy observed, these developments in the definition of marriage "were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential."[103] Although marriage is an institution of long pedigree, it has arguably changed more than it has remained the same. Originally arranged by the couple's parents for strategic reasons, marriage later developed into a freely chosen contract that forged all household members into a single legal and economic unit, headed by the man. Finally, it evolved into a union of equal partners, bound together for better or for worse—unless they change their minds.

Such transformations are certainly not unique to the United States. Germany experienced similar developments, where the joint, rather than separate protection of "marriage and family" in Article 6 of the Basic Law, underscored the traditional association of marriage, sexuality, and procreation prevalent in 1949.[104] But the *Bundesverfassungsgericht* has long affirmed that the concept of marriage ("Bild der Ehe") is subject to changes in societal views, as marriage is "not guaranteed in the abstract, but in the implementation, guided by the Constitution, that corresponds to the prevalent views expressed authoritatively in the legislative regulation."[105] In 1966, the *Bundesgerichtshof* (Supreme Court) held that a wife who merely endured intercourse without displaying pleasure or interest had not fulfilled her marital duties.[106] Similarly, rape within marriage was not criminalized until 1997.[107]

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[100] *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

[101] *See* Brief for Historians of Marriage, *supra* note 94, at 20–21, with further references; *Loving*, 388 U.S. at 12.

[102] For an overview, see Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 1 (1987).

[103] *Obergefell*, 135 S. Ct. at 2595.

[104] *See* Nora Markard, *Eheschließungsfreiheit im Kampf der Kulturen*, *in* REGULIERUNGEN DES INTIMEN 139, 140 (Ulrike Lembke ed., 2016).

[105] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 20, 1963, 15 BVERFGE 328 (332)—Hypothekengewinnabgabe [Levy on Mortgage Profits]; May 04, 1971, 31 BVERFGE 58 (82–83)—Spanierbeschluss [Spaniard Decision]; Feb. 28, 1980, 53 BVERFGE 224 (225)—Ehescheidung [Divorce].

[106] Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 02, 1966, 20 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1078.

Today, sexual intercourse is no longer considered an enforceable conjugal duty,[108] and with the abolition of divorce for fault, marital fidelity lost its legal relevance.[109] Marriage enjoys protection, regardless of a spouse's ability to have children,[110] and children born out of wedlock enjoy constitutional equality with children born within marriages, Article 6(5) Basic Law. While the legislature may take into account that marriage to a significant extent remains the basis for a "sheltered" upbringing of children,[111] marital benefits granted irrespective of children cannot be justified by reference to their positive effect on families.[112] The mutual responsibility between spouses has therefore replaced sexuality and procreation as the essence of marriage. The constitutional concept of marriage is "based on the notion that the spouses are bound to one another in conjugal community [*eheliche Lebensgemeinschaft*]."[113] They have not only a moral but also a legal obligation[114] to provide "mutual support in times of hardship and especially in times of particular physical and emotional strain."[115] While emotionally significant relationships can exist both within and outside of marriage, it is this promise of interpersonal solidarity that warrants recognition, protection, and promotion.[116] Marriage, therefore, protects a union of two

[107] Until 1997, STRAFGESETZBUCH [STGB] [PENAL CODE] § 177(1) provided: "He who coerces a woman into *extramarital* intercourse with himself or a third person by use of force or by threatening her with a present danger for life or person will be punished with a prison sentence not below two years." (emphasis added).

[108] See Bettina Heiderhoff, *Eheliche (Rechts-)Pflichten: Ein verborgener Diskurs*, *in* REGULIERUNGEN DES INTIMEN (Ulrike Lembke ed., 2016). Still, some authors assume that sexual duties continue to exist as part of the "mutual duty of conjugal community" (BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 1353(1)), the enforcement of which § 120(3) FamFG explicitly excludes; *see id.* Conspicuously, section 2 of the Life Partnership Act (*Lebenspartnerschaftsgesetz*, LPartG) does not contain a similar clause and is not mentioned in section 120(3) FamFG. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 1353(1).

[109] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 1565, reformed in 1977. Yet, marriage is not open to couples that are closely related (BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 1307); *see*, *infra* note 216.

[110] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 07, 2009, 124 BVERFGE 199, paras. 112–13—Hinterbliebenenversorgung [Provision for Dependants].

[111] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 19, 2012, 131 BVERFGE 239, para. 66—Familienzuschlag [Family Allowance]; 133 BVERFGE 377, at para. 83.

[112] 133 BVERFGE 377, at para. 97. The Court went on to consider that, if such a benefit is designed to make it easier for one spouse to stay at home to care for children, it cannot be denied to same-sex partners in the same situation, even if they have children less often than married couples; *id.* paras. 99–102.

[113] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 12, 1987, 76 BVERFGE 1 (43)—Familiennachzug [Family Reunification].

[114] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 2007, 117 BVERFGE 316 (327) – künstliche Befruchtung [Artificial Insemination].

[115] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 25, 2011, 30 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 870, para. 20.

people in a relation of mutual responsibility, regardless of whether that union forms the basis of a family.

III. Plus Ça Change*: Secular Purposes and Rational Reasons*

Against this background, can it be said that what petitioners in *Obergefell* sought "is not the protection of a deeply rooted right but the recognition of a very new right"?[117] As the preceding sections explained, marriage has indeed long been understood to be an exclusively heterosexual institution, certainly as long as homosexuality was criminalized.[118] But over time, marriage has also changed more than it has remained the same. Can it change again yet remain true to itself? Did petitioners simply claim equal access to the right to marry, as others had done before them, or did they claim a new liberty, or even an entitlement—the right to same-sex marriage?

Scope of protection was already an issue in relation to same-sex intimacy. In *Bowers*, the Supreme Court rejected a narrowly defined "right to engage in homosexual sodomy,"[119] whereas in *Lawrence*, it affirmed a broad and universal "right to intimacy" as part of the right to privacy derived from the due process clause.[120] The court's marriage cases can be read in the same broad manner. As Justice Kennedy explains, "*Loving* did not ask about a 'right to inter-racial 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.'"[121] All of these cases were simply about the right to marry and the obstacles to exercising or accessing that right. This, Justice Kennedy suggests, holds true for *Obergefell.*

It is not surprising the dissenting justices did not see it quite that way. For Chief Justice Roberts, the "universal definition of marriage as the union of a man and a woman" has "prevailed in the United States throughout our history."[122] It was considered "a given" by

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[116] Anne Röthel, *Regelungsaufgabe Paarbeziehung und die Instrumente des Rechts*, *in* REGELUNGSAUFGABE PAARBEZIEHUNG: WAS KANN, WAS DARF, WAS WILL DER STAAT? 17, 22, 26–29 (Anne Röthel & Bettina Heiderhoff eds., 2012); Susanne Baer, *Regelungsaufgabe Paarbeziehung: Was darf der Staat?*, *in* REGELUNGSAUFGABE PAARBEZIEHUNG: WAS KANN, WAS DARF, WAS WILL DER STAAT? 35, 37 (Anne Röthel & Bettina Heiderhoff eds., 2012); NINA DETHLOFF, FAMILIENRECHT: EIN STUDIENBUCH 2–3 (30th ed. 2012).

[117] *Windsor*, 133 S. Ct. at 2715 (Alito J., dissenting).

[118] *Obergefell*, 135 S. Ct. at 2596.

[119] *Bowers,* 478 U.S. at 191.

[120] *Lawrence,* 539 U.S. at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[121] *Obergefell*, 135 S. Ct. at 2602.

[122] *Id.* at 2613 (Roberts, CJ., dissenting).

the Framers; its meaning "went without saying."[123] The changes it underwent did not "work any transformation in the core structure of marriage" as an opposite-sex union.[124] The marriage cases so far had merely opened "access to marriage *as traditionally defined*"[125]—none of the challenges had altered the definition of marriage. Thus, as Chief Justice Roberts pointed out, marriage then was not defined as "the union of a man and a woman, *where neither party owes child support or is in prison*," or "a man and a woman *of the same race*."[126] Granting the Lovings access to marriage, therefore, "did not change what a marriage was any more than integrating schools changed what a school was."[127]

Defining limits into the institution effectively seals it off against change. But, as Justice Kennedy rightly stated, if rights were defined by who had access to them in the past, then discriminatory practices could serve as their own justification and "new groups could not invoke rights once denied."[128] Equality guarantees have always transformed existing societal structures. It is the very nature of an equality guarantee that it contains a counter-factual promise of equality. Social movements demanding equal treatment have always had to challenge meanings that "went without saying"[129] by demanding explicit reasons for their exclusion that go beyond bias and discrimination.[130] If an institution such as marriage is defined by purpose and function, rather than tradition, then giving new groups access to it will not change its meaning "any more than integrating schools changed what a school was":[131] *Plus ça change, plus c'est la même chose*.[132]

While the fundamental character of a right may have a lot to do with history and tradition,[133] even sincerely held traditional or religious views of marriage cannot justify

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[123] *Id.* at 2614.

[124] *Id.*

[125] *Id*. at 2619.

[126] *Id*.

[127] *Id*.

[128] *Id.*

[129] *Id*. at 2614.

[130] Anna Katharina Mangold, *Ehe für alle: Der Kampf um die Gleichberechtigung*, 60 BLÄTTER FÜR DEUTSCHE UND INTERNATIONALE POLITIK 10, 111 (2015).

[131] *Obergefell*, 135 S. Ct. at 2619.

[132] Alphonse Karr, *Juillet 1849*, 6 LES GUÊPES 274, 278 (1859) (meaning: The more it changes, the more it remains the same).

[133] *Obergefell*, 135 S. Ct. at 2602.

"enact[ing] law and public policy"[134] that demean or stigmatize a group of society. Marriage as a legal institution—a set of rights and obligations provided by the state—is not identical with marriage as a social or religious institution with its own traditions (e.g., heterosexuality, sacredness) and unenforceable rules (e.g., sexual monogamy). The legal institution of marriage affords certain state-sanctioned privileges to couples that fulfill the requirements set out in the legislation. Excluding others from those privileges requires inter-subjectively recognizable rational reasons, not reasons taken from tradition or religion.[135]

Merely pointing to the traditional definition of marriage thus misses the point: This definition has always been changing with developing constitutional standards. In *Washington v. Glucksberg*, the Court demanded that "fundamental rights be 'objectively, deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'"[136] It is undisputed that the right to marry fits this definition. But its scope cannot be defined by what those before us thought proper. In the words of Justice Kennedy, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[137]

IV. Change Waits for No One

Public opinion on the rights of homosexuals in the United States has been changing at breathtaking speed. Several state legislatures have introduced civil unions, and eleven states legalized same-sex marriage, some by referendum.[138] Meanwhile, voters in another state turned down efforts to prevent such developments.[139] A similar process is underway in Europe, where the Irish have surprised many with a successful referendum in favor of opening marriage to same-sex couples. In the words of Chief Justice Roberts, "[s]upporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today."[140]

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[134] *Id.*

[135] *Id.*

[136] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

[137] *Lawrence,* 539 U.S. at 579.

[138] *See supra* note 6; *see also Obergefell*, 135 S. Ct. at 2615 (Roberts, C.J., dissenting).

[139] Minnesota Amendment 1 was rejected by 51.19% of the voters on November 6, 2012. *See Ballot Measure: Minnesota (Minnesota Amendment 1)*, CNN, http://edition.cnn.com/election/2012/results/state/MN/ballot/01/ (last visited July 16, 2016).

[140] *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

The respondents in *Obergefell* argued that the Court should allow democracy to run its course, and they even sought to turn the constitutional rights argument on its head: "This case isn't about how to define marriage. It's about who gets to decide that question. Is it the people acting through the democratic process, or is it the Federal courts? And we're asking you to affirm every individual's fundamental liberty interest in deciding the meaning of marriage."[141] This "wait and see" strategy partly draws on the effect of *Roe v. Wade*, whose sweeping scope fueled controversy, stopped an ongoing trend toward allowing abortion, and divided the country.[142] Chief Justice Roberts feared that *Obergefell* "[would] for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."[143] In a deliberative process, even those who don't prevail "at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate . . . . Closing the debate tends to close minds."[144]

This argument holds no sway if one accepts that this is a constitutional rights issue. As Justice Kagan pointed out, a constitutional democracy is characterized by the very fact that it imposes limits on the democratic process;[145] limits that can be enforced by the courts. Whether a social movement enjoys or lacks momentum has no bearing on the content of constitutional rights.[146] Just like with *Bowers*, a "wait and see" approach is not neutral because it denies rights in the interim[147]—a harm that petitioners are constitutionally entitled to avoid.

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[141] *Obergefell*, Transcript of Oral Argument, *supra* note 54, at 41.

[142] *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–1205 (1992) (distinguishing *Roe* from *Brown*); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985) (cited in *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting)).

[143] *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting); *see also id*. at 2643 (Alito, J., dissenting) ("[T]he Nation will experience bitter and lasting wounds.").

[144] *Id*. at 2625 (Roberts, C.J., dissenting).

[145] *Obergefell*, Transcript of Oral Argument, *supra* note 54, at 74.

[146] *Obergefell*, 135 S. Ct. at 2606; *see also* Maximilian Steinbeis, *Ehe für alle: Warum Mehrheitsentscheid auch bei Minderheitsrechten nichts Schlechtes sein muss*, VERFASSUNGSBLOG (May 27, 2015), http://www.verfassungsblog.de/ehe-fuer-alle-warum-mehrheitsentscheid-auch-bei-minderheitsrechten-nichts-schlechtes-sein-muss/.

[147] *Obergefell*, 135 S. Ct. at 2606.

E. The Inevitable Course of Equality

Once secular purposes instead of traditional features define marriage, the road to marriage equality opens wide. Heterosexual privilege holds no ground once the opponents of same-sex marriage have to provide rational reasons as to why. Equality works as a one-way ratchet, as the line of cases leading up to *Obergefell* suggests and developments in other jurisdictions confirm[148]—even where direct access to marriage equality is foreclosed.

I. Privacy: A Right to Minimal Institutionalization

The European Convention on Human Rights' (ECHR) right to marry does not apply to "everyone," like other Convention rights, but to "men and women."[149] In the absence of a new consensus among the state parties, the ECtHR in *Schalk and Kopf v. Austria*[150] confirmed the Austrian Constitutional Court's view[151] that this only conferred a right for men to marry women and vice versa.[152] Because the Convention's non-discrimination clause only applied within the scope of other Convention rights, it could not leverage access to marriage either.[153] Similarly, in 1993, the German *Bundesverfassungsgericht*[154] found that, because there had been no fundamental change in the concept of "marriage," Article 6(1) of the Basic Law did not cover same-sex couples; therefore, neither liberty—the free development of the person—nor equality provided access to the right to marry.[155] Both in Austria and in Germany, the federal legislature opted to introduce civil partnership

[148] For an in-depth comparative discussion, including examples from the United States, see Nora Markard, *Private but Equal? Why the right to privacy will not bring full equality for same-sex couples*, *in* ORDER FROM TRANSFER. PROJECTS AND PROBLEMS OF COMPARATIVE CONSTITUTIONAL STUDIES 86, 102–115 (Günter Frankenberg ed., 2013).

[149] Article 12 ECHR: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

[150] *Schalk and Kopf*, 2010-IV Eur. Ct. H.R. at 409.

[151] Verfassungsgerichtshof [VfGH] [Constitutional Court] Dec. 12, 2003, No. B777/03-5.

[152] *Schalk and Kopf*, 2010-IV Eur. Ct. H.R. paras. 55, 58, 60. Unlike a state constitution, the Convention provides common standards for 47 state parties. The Court resolves this problem through a flexible application of its margin of appreciation: The stronger the consensus among the Convention states, the narrower a state's margin of appreciation.

[153] *Id.* at para. 101.

[154] *See Markard*, *supra* note 148, at 114–15.

[155] Bundesverfassungsgericht [BVerfG-K] [Federal Constitutional Court] Apr. 10, 1993, 46 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3058. This was a decision of non-acceptance, which came in reaction to the "Aktion Standesamt," where lesbian and gay couples applied for marriage licenses and challenged the refusal in court.

instead of opening marriage.[156] Since then, however, equality litigation has managed to make important inroads on marriage discrimination to the point where it is unclear how long the distinction between marriage and civil unions can survive.

This question will become even more prevalent because the ECtHR has now explicitly recognized that the right to private life requires a minimum of legal recognition of same-sex partnerships—something the *Bundesverfassungsgericht* has already suggested as well.[157] In *Schalk and Kopf*, the ECtHR had already found that same-sex couples were also in need of "legal recognition and protection of their relationship,"[158] and that states merely enjoyed "a margin of appreciation *in the timing* of the introduction of legislative changes."[159] In 2015, in *Oliari v. Italy*, the Court decided that time was up.[160] Unlike same-sex adoption,[161] this claim was "not concerned with certain specific 'supplementary' (as opposed to core) rights which may or may not arise from such a union and which may be subject to fierce controversy in the light of their sensitive dimension."[162] Given the increasing consensus on same-sex marriage recognition, both domestically and internationally,[163] and in the absence of a prevailing community interest, Italy had "overstepped [its] margin of appreciation" by failing to provide any sort of legal framework for same-sex couples.[164]

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[156] For Germany, see GESETZ ÜBER DIE EINGETRAGENE LEBENSPARTNERSCHAFT [LPARTG] [LIFE PARTNERSHIP ACT], 2001, BGBL I at 266 (Ger.); For Austria, see EINGETRAGENE PARTNERSCHAFT-GESETZ [EPG] [REGISTERED PARTNERSHIP ACT], BGBL I at 135 (Austria).

[157] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 06, 2005, 115 BVERFGE 1, para. 55 et seq.—Transsexualität V (2005). The case concerned a couple who, due to problematic restrictions on one partner's trans* status, was caught between marriage and life partnership. *See* Laura Adamietz, *Transgender ante portas? Anmerkungen zur fünften Entscheidung des Bundesverfassungsgerichts zur Transsexualität*, 44 KRITISCHE JUSTIZ 368 (2006).

[158] *Schalk and Kopf*, 2010-IV Eur. Ct. H.R. at para. 99; confirmed in Vallianatos v. Greece, App. Nos. 29381/09 and 32684/09, para. 78 (Nov. 7, 2013), http://hudoc.echt.coe.int/.

[159] *Schalk and Kopf*, 2010-IV Eur. Ct. H.R. at paras. 104–06 (emphasis added).

[160] Oliari and others v. Italy, App. Nos. 18766/11 and 36030/11 (July 21, 2015), http://hudoc.echr.coe.int/.

[161] X and others v. Austria, App. No. 19010/07 at para. 164 (Feb. 19, 2013), http://hudoc.echr.coe.int/ (comparing discrimination in unmarried, opposite-sex couples).

[162] *Oliari*, App. Nos. 18766/11 and 36030/11 at para. 177. See also the concurring opinion of some of the *X* dissenters in *Vallianatos*, App. Nos. 29381/09 and 32684/09 at para 78.

[163] *Oliari*, App. Nos. 18766/11 and 36030/11 at paras. 178–81.

[164] *Id.* at para. 185.

The Court stressed that Article 8 ECHR only confers "core" protection rights and confirmed its stance on the right to marry.[165] The Court, however, has already vindicated some same-sex equality claims, and it will continue to assess what differences to married spouses can be justified.[166] The German and the Austrian examples demonstrate that, because leveling down is not an option, case-by-case equality litigation will lead to an ever-closer approximation of marriage.[167]

II. Turning the Equality Ratchet, Case by Case: Germany and Austria

When Germany introduced civil partnership for same-sex couples in 2001, the *Bundesverfassungsgericht*'s First Senate found that this did not discriminate on the basis of gender because men and women were equally able to marry someone of the opposite sex or register a partnership with a person of the same sex.[168] Limiting opposite-sex couples to marriage was justified by the fact that they could produce children.[169] The First Senate did not discuss whether the lower level of rights was an equality problem, and the Second Senate rejected initial attempts to claim equal access to marital benefits in a series of chamber decisions, arguing that the special protection of marriage justified the differential treatment,[170] and that access to marriage was not based on sexual orientation.[171] The framework shifted when the European Court of Justice (ECJ) decided, in *Maruko*, that if Member States introduced same-sex partnerships, they had to grant equal rights in all areas where partnerships and marriage were comparable.[172] This meant that merely

[165] *Id.* at para. 192.

[166] *X and others*, App. No. 19010/07 at para. 164. Exclusion of unmarried same-sex parents from step-parent adoption discriminatory in comparison to unmarried opposite-sex parents; *Vallianatos*, App. Nos. 29381/09 and 32684/09 at para. 92. Protecting children born out of wedlock and promoting marriage as a decision to be taken "purely on the basis of a mutual commitment entered into by two individuals, independently of outside constraints or of the prospect of having children," cannot justify excluding same-sex couples from civil unions.

[167] *Yoshino*, *supra* note 78, at 787, 800.

[168] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 17, 2002, 105 BVERFGE 313, paras. 104–06. On sex equality, see Suzanne Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2014).

[169] 105 BVERFGE 313, at para. 109.

[170] Bundesverfassungsgericht [BVerfG-K] [Federal Constitutional Court] Sep. 09, 2007, 61 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 209—Verheiratetenzuschlag I [Marriage Bonus I]; Bundesverfassungsgericht [BVerfG-K] [Federal Constitutional Court] Aug. 11, 2007, 55 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FamRZ] 487—Familienzuschlag [Family Allowance]; Bundesverfassungsgericht [BVerfG-K] [Federal Constitutional Court] May 06, 2008, 61 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2325—Verheiratetenzuschlag II [Marriage Bonus II].

[171] 55 FAMRZ 487.

[172] Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R. I‑ 1757, para. 73 (regarding survivor's benefits).

pointing to the protection of marriage was not enough to justify differential treatment.[173] There had to be rational reasons directly related to actual differences between the two institutions. This judgment left the *Bundesverfassungsgericht*'s Second Senate's chamber surprisingly unfazed,[174] but when cases started coming back to the fundamental rights senate,[175] the court changed course and never looked back. It recognized that the special protection of marriage alone cannot justify differential treatment and that the inability to procreate "naturally" made no difference, because childless marriages were also protected and children also grew up in same-sex households.[176] Instead, it looked to the purpose of the benefit—here, honoring the spouse's contribution by providing stability, care, and support—and found that it also applied to same-sex partners.[177] It even applied its version of strict scrutiny, likening sexual orientation to the grounds listed in Article 3(3) of the Basic Law.[178] In the years that followed, both Senates applied this jurisprudence to the unequal treatment of registered civil partners and spouses under the Gift and Inheritance Tax Act[179] and with respect to family allowance for public servants,[180] conveyance duties,[181] and tax breaks.[182] The court even struck down the exclusion of life partners from successive adoption[183] with arguments that would also apply to the remaining ban on joint adoption.

The dynamic is even more straightforward in Austria, where civil partnership was introduced in 2010.[184] "Though not in the vanguard," the ECtHR found that "the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act

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[173] *Maruko* only applies within the scope of the Framework Directive 2000/78/EC.

[174] 61 NJW 2325.

[175] The First Senate examines statutes and judgments in light of fundamental rights; the Second Senate is mainly in charge of inter-organ disputes, federalism disputes, and the constitutionality of statutes in other respects, see BUNDESVERFASSUNGSGERICHTSGESETZ [BVERFGG] [LAW OF THE FEDERAL CONSTITUTIONAL COURT], § 14.

[176] 124 BVERFGE 199.

[177] *Id.* at paras. 225–30.

[178] GRUNDGESETZ [GG] [BASIC LAW], *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html. Article 3(1) GG contains a general equality clause. Art. 3(3) GG contains a specific prohibition of discrimination on the basis of "sex, parentage, race, language, homeland and origin, faith, or religious or political opinions [or] disability."

[179] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 21, 2010, 126 BVERFGE 400.

[180] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 19, 2012, 131 BVERFGE 239.

[181] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 2012, 132 BVERFGE 179.

[182] 133 BVERFGE 377.

[183] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 19, 2013, 133 BVERFGE 59.

[184] *See supra* note 156.

any earlier."[185] The *Verfassungsgerichtshof* (Austrian Constitutional Court) soon thereafter allowed registered partners to hyphenate their double last name just like married couples[186] and to adopt a double name later on.[187] But registering a partnership still worked like registering a car. In the offices of the district administration, an official takes down the couple's personal details, and then the partners sign. There are no witnesses, no "I do," no solemn confirmation by the official, and no ceremony at the registrar's office or romantic places nearby. In 2012, the court indulged the exclusion from the registrar's office, despite its "separate but equal" context;[188] the case is now pending in Strasbourg.[189] But in 2013, it coined the phrase that has controlled every case since: The court held that registered partnerships cannot be treated differently "just out of principle" (*quasi aus Prinzip*).[190] It not only demanded a registration ceremony similar to marriage,[191] but also went on to demand access to medically assisted reproduction[192] and joint adoption.[193] As same-sex partnerships were not a substitute for marriage, the court reasoned, they did not pose a threat to marriage or opposite-sex partnerships; neither was a same-sex couple's wish to have children.[194] Registered partnerships were aimed at institutionalizing long-term stable partnerships, just like marriage,[195] there was no difference between the

[185] *Schalk and Kopf*, 2010-IV Eur. Ct. H.R. para. 106; references omitted.

[186] Verfassungsgerichtshof [VfGH] [Constitutional Court] Sep. 22, 2011, Case No. B518/11 (misinterpreting the EPG).

[187] Verfassungsgerichtshof [VfGH] [Constitutional Court] Mar. 3, 2012, Case No. G131/11 (stating "easier processing" not convincing).

[188] Verfassungsgerichtshof [VfGH] [Constitutional Court] Dec. 12, 2012, Case Nos. B125/11 and 138/11. Michael Spindelegger, then president of the National Assembly and later foreign minister, had advocated this separation: "And the fact is that at the registrar's office in the summer season people especially like to get married—that will automatically lead to a contact between heterosexual and homosexual couples. Whether that is such a good idea is anybody's guess." Oliver Pink, *Spindelegger: Josef Proll is eine geniale Figur*, DIE PRESSE (Apr. 29, 2008), http://diepresse.com/home/politik/innenpolitik/380504/Spindelegger_Josef-Proll-ist-eine-geniale-Figur (author's translation).

[189] Dietz and Suttasom v. Austria, App. No. 31185/13 (May 29, 2015), http://hudoc.echr.coe.int/.

[190] Verfassungsgerichtshof [VfGH] [Constitutional Court] June 19, 2013, Case Nos. G18/13 and 19/13.

[191] VfGH, Case Nos. B125/11 and 138/11 (Dec. 12, 2012). In an earlier decision on the same case, the Court clarified that the law did not have to require but also did not exclude two people serving as witnesses, nor the ritual of question-answer-confirmation; see VfGH G 18/13 and 19/13, paras. 15–17.

[192] Verfassungsgerichtshof [VfGH] [Constitutional Court] Dec. 12, 2013, Case Nos. G16/13 and 44/13.

[193] Verfassungsgerichtshof [VfGH] [Constitutional Court] Dec. 11, 2014, Case Nos. G119/14 and 120/14. On step-parent adoption for cohabiting same-sex partners, see *X and others*, App. No. 19010/07.

[194] VfGH, Case Nos. G16/13 and 44/13 at para. 54.

[195] VfGH, Case Nos. G119/4 and 120/14 at para. 48.

institutions with respect to the conditions for the child, and it was incompatible with the child's well-being to deny it a second parent.[196]

Where same-sex couples cannot access marriage by relying directly on the right to equality, they can rely on the right to the protection of privacy to claim at least a minimum of legal recognition. I have argued elsewhere that such a privacy approach is insufficient.[197] But, as the German and Austrian examples demonstrate, as soon as two different institutions exist, with access to the institutions dependent on sexual orientation, equality requires rational reasons for each and every difference between these two institutions. Because both marriage and civil partnership are based on long-term mutual responsibility and provide a stable framework for children, it will be quite difficult to find legitimate, rational reasons to favor marriage.[198] This is especially true where a heightened standard of scrutiny applies in sexual orientation discrimination matters.[199] Equality litigation is thus closing the gap between marriage and civil partnerships case by case.

An equality approach changes the perspective and the burden of proof. Instead of requiring the claimants to present reasons why an upgrade is necessary under the liberty perspective, courts ask the government for rational reasons why a downgrade is justified under the equality perspective. This is why *Obergefell*'s dissenting Justices lack persuasiveness when they argue that, unlike in *Lawrence*, petitioners are not claiming non-interference but an entitlement—something largely unknown to U.S. constitutional law.[200] Petitioners do not claim an entitlement; they claim equal treatment in the area of entitlements. Exclusion from entitlements creates a disadvantage that requires justification.

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[196] *Id.* at paras. 39, 44–47.

[197] *Markard*, *supra* note 148.

[198] In both jurisdictions, some differences in treatment still exist. For example, the registered partner of a birth mother is not automatically her co-parent, and adoption can be burdensome. *See* Nora Markard, *Supreme Court Strengthens Rights of Private Sperm Donors at the Expense of Lesbian Couples* (Mar. 30, 2015), http://www.sexualorientationlaw.eu/120-supreme-court-strengthens-rights-of-private-sperm-donors-at-the-expense-of-lesbian-couples-germany. For a full list for Austria, see Rechtskomitee Lambda, *Ungleichbehandlungen zur Ehe (Stand: Mai 2015)*, http://www.rklambda.at/images/publikationen/2015RKL_EPG_AbweichungenvomEherecht_V9_Mai2015.pdf.

[199] Karner v. Austria, 2003 IX Eur. Ct. H.R., para. 41; Kozak v. Poland, [2010] ECHR 280, para. 99; *Vallianatos*, App. Nos. 29381/09 and 32684/09 at para. 85; 124 BVERFGE 199 (220); 126 BVERFGE 400 (419); 131 BVERFGE 239, para. 57; 133 BVERFGE 59, para. 104; 133 BVERFGE 377, para. 77.

[200] *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (citing *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 196 (1989) and *San Antonio Indep. Sch. District v. Rodriguez*, 411 U.S. 1, 35–37 (1973)). *See also id.* at 2635–37 (Thomas, J., dissenting).

III. What's in a Name? Calling it Marriage

As same-sex partnerships continue to parallel marriage, the question arises as to what happens when these two institutions become indistinguishable except in name. What rational reason justifies reserving the tradition and prestige of the term "marriage" for opposite-sex couples? As the Ninth Circuit Court of Appeals pointed out, marriage has enormous cultural significance, as evidenced in phrases such as "will you marry me," the use of marriage in famous film titles and quotes, or literary tropes such as "marrying for money" versus "marrying for love"—which do not sound the same if "registering a domestic partnership" replaces "marriage."[201] It is in this context that "[t]he name 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships."[202] "Same-sex partnership" does not confer equal recognition; rather, it emphasizes its difference from marriage—the "real thing."

It is hard not to see the parallel to *Brown v. Board of Education*, where the Court concluded that "[s]eparate educational facilities are inherently unequal."[203] The Court understood that racial differentiation rests on racial hierarchy: "[S]eparate but equal" really meant "separate, because unequal." In same-sex marriage cases, the separation is usually less literal,[204] but the hierarchy no less poignant. Both the Ninth Circuit[205] and the Mexican Supreme Court[206] relied on *Brown*'s rationale to require nominally equal treatment of opposite and same-sex unions. It will be interesting to see how courts that have so far rejected marriage equality will resolve this. Arguably, when it comes to this point, they will have to assume that the constitutional meaning of marriage has changed.

From this equality perspective, same-sex couples do not aspire to achieve dignity through marriage, as Justice Kennedy suggests.[207] They struggle against the assault to the dignity they already have, which lies in the denial of recognition as free and equal citizens. In this

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[201] *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *rev'd*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

[202] *Id.*

[203] *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

[204] *But see supra* note 189.

[205] *Perry*, 671 F.3d at 1063–64.

[206] Mexican Supreme Court, Amparo en revisión 704/2014, para. 169 (2015). As this is the fifth judgment on this matter, it now constitutes binding precedent, see Matrimonio entre personas del mismo sexo. No existe razón de índole constitucional para no reconocerlo, Pleno de las Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro 19, Tomo I, Junio de 2015, Tesis P./J. 46/2015 (10a.), Página 534 (Mex.). *Cf.* José María Serna de la Garza, *The Concept of* Jurisprudencia *in Mexican Law*, 1 MEXICAN L. REV. 131 (2009).

[207] *See supra* section B.IV.

perspective, dignity is not harmed by the exclusion from an institution of selflessness and transcendental value. The harm lies in the suggestion that the excluded group is not worthy of participating in it and does not deserve the recognition and benefits associated with it. Discrimination on the basis of race, gender, or sexual orientation subsumes an individual under a group category whose purported characteristics are systematically devalued, thus refusing to appreciate a person as an individual. It is this denial of recognition that conveys harm to the dignity of the individual above and beyond the respective disadvantage suffered. It points to the reason why we understand certain forms of unequal treatment as particularly reprehensible, requiring heightened standards of scrutiny. Taken with equality, dignity does not have the exclusive effect it has in isolation; struggling against degrading exclusion, equality does not promote "pluralism anxiety" but stresses common traits.[208]

IV. The Specters of Polygamy and Incest

Chief Justice Roberts pointed to the deep roots of polygamy "in some cultures around the world . . . . It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage."[209] If marriage equality is really inevitable, are we waiting for a third shoe to drop?

At oral argument, counsel for petitioners offered two objections. Identifying polygamy with polygyny, a practice usually associated with societies or communities marked by strongly patriarchal structures,[210] Ms. Bonauto first expressed concerns about consent.[211] Justice Alito, in response, presented the hypothetical of a group of two men and two women, "all consenting adults, highly educated. They're all lawyers."[212] Autonomy is essential to the fundamental right to marry, and the prevention of coercion and gender discrimination can certainly be considered compelling state interests.[213] But it will be a

[208] *Yoshino*, *supra* note 78, at 793–98. The author advocates liberty-dominated dignity claims, but does not take into account that the protection level of liberty may be below that of equality, as in the European cases discussed in the preceding section. He uses the term "pluralism anxiety" to describe "the fear that we are fracturing into fiefs that do not speak with each other." *Id.* at 747.

[209] *Obergefell*, 135 S. Ct. 2584 at 2621 (Roberts, C.J., dissenting).

[210] The term polygamy actually covers very different practices that can also include polyandry or even same-sex polygyny, and anthropological research suggests that power structures can be complex. See MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS (2008). For a feminist perspective, see Beverly Baines, *Polygamy and Feminist Constitutionalism*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 452 (Beverly Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012).

[211] *Obergefell*, Transcript of Oral Argument, *supra* note 54, at 18.

[212] *Id.* at 17.

[213] Kramer v. Union Free Sch. District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969), Sherbert v. Verner, 374 U.S. 398, 406 (1963).

challenge to prove that a prohibition across the board is sufficiently narrowly tailored.[214] Ms. Bonauto's second point was that today's legal system is geared toward two-person marriages. Unlike same-sex marriage that only requires making statutes gender neutral, an entirely new system must be devised for divorce or custody for plural marriages. This would mean legislative action. Here, liberty will have to take the lead over equality, possibly securing at least some form of recognition, in the vein of *Oliari*.[215]

Concerns over consent are even more pertinent with incestuous marriages because such relationships often involve highly troubling relationships of dependency and abuse. They are prohibited in Germany,[216] and the *Bundesverfassungsgericht* upheld the criminalization of incest even between adult siblings.[217] The court cited its deleterious psychological effects and its close association with sexual abuse[218] even though dependency and domestic violence—marking the underlying case[219]—appear to be rare among adult siblings.[220] Should a prohibition also apply if both parties are of age, freely consenting and not threatening to disrupt an existing family structure? Following *Lawrence*, moral disapproval is not sufficient to prohibit intimacy.[221] Again, protecting autonomy is a compelling state interest, but critics of the German criminal law have convincingly argued

[214] *See Griswold*, 381 U.S. at 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940).

[215] *Oliari*, App. Nos. 18766/11 and 36030/11.

[216] A marriage may not be concluded between direct relatives and between consanguine siblings. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1307, https://www.gesetze-im-internet.de/bgb/__1307.html.

[217] Strafgesetzbuch [StGB] [Penal Code] § 173, https://www.gesetze-im-internet.de/stgb/__173.html. This law criminalizes sexual intercourse (penile-vaginal only) between consanguine parents and children, and between consanguine siblings; only adults are liable. It is part of the section on Offenses Related to the Personal Status Registry, Marriage and the Family. Child abuse and sexual assault are part of the following section, Offenses Against Sexual Self-Determination.

[218] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Feb. 26, 2008, 120 BVERFGE 224, paras. 44-49 (Hassemer, J., dissenting) – Geschwisterinzest [Sibling Incest]. This case was later confirmed by Stübing v. Germany, App. No. 43547/08 (Apr. 13, 2012), http://hudoc.echr.coe.int/ (showing a large margin of appreciation on protection of morals, no consensus on sensitive issue). *But see* DEUTSCHER ETHIKRAT, INZESTVERBOT STELLUNGNAHME 40 (2014) (discussing that consensual incest is usually a result, not a source of family disruption).

[219] The siblings came from a broken home, and the brother never knew he had a sister. They met when he was 24 years old, she sixteen, and had four children. She was later found to be slightly mentally handicapped and highly dependent on her brother, who was once convicted for acts of domestic violence against her. 120 BVERFGE 224. Note that the Court was seized with a facial challenge.

[220] DEUTSCHER ETHIKRAT, *supra* note 218, at 10–13.

[221] *Lawrence*, 539 U.S. at 578–79 (citing Stevens's dissent in *Bowers v. Hardwick* with approval).

that it is anything but narrowly tailored, being at once overbroad and too narrow.[222] The same might be said for the prohibition of marriage.

In the cases of both polygamy and incest, as with same-sex marriage, moral disapproval—the "yuck factor"—has to yield in the face of autonomy and privacy; only rational reasons can sustain a prohibition of marriage. But both polygamy and incest are clearly distinguishable from same-sex marriage. First, such prohibitions do not burden a protected group and are not part of a societal structure of discrimination.[223] Second, in both cases there are good reasons to fear coercion, discrimination, and abuse, albeit not necessarily in all cases. Therefore, the question will be whether they are narrowly tailored enough to exclude unproblematic cases while still remaining effective. The examples discussed above suggest that while sweeping prohibitions might be disproportionate, the slope is not as slippery as it is sometimes portrayed to be.

F. The Road Ahead: Strategies of Self-Marginalization and Disintegration

This Article argues that requiring rational reasons and empirical evidence over metaphysical and intuitive reasons means either opening marriage immediately or permitting case-by-case approximation of marriage. It appears that the road ahead, at least in the United States, will be one of further inclusion, but also of strategic disintegration, as religious opponents shift gears.

The dissenters in *Obergefell* argued that, in a democratic process, exemption and accommodation clauses could have benefited religious dissenters.[224] Instead, Justice Alito claimed *Obergefell* "will be used to vilify Americans who are unwilling to assent to the new orthodoxy . . . . [They] will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[225] Chief Justice Roberts deplored the extent to which the majority "[felt] compelled to sully those on the other side of the debate" as demeaning or stigmatizing same-sex couples, disrespecting and subordinating these couples and inflicting dignitary wounds upon them.[226] It is breathtaking how Justice

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[222] *See, e.g.*, Tatjana Hörnle, *Das Verbot des Geschwisterinzests—Verfassungsgerichtliche Bestätigung und verfassungsrechtliche Kritik*, 61 NJW 2085 (2008); John Philipp Thurn, *Eugenik und Moralschutz durch Strafrecht? Verfassungsrechtliche Anmerkungen zur Inzestverbotsentscheidung des Bundesverfassungsgerichts*, 42 KRITISCHE JUSTIZ 74 (2009); Ali Al-Zand and Jan Siebenhüner, *§ 173 StGB—Eine kritische Betrachtung des strafrechtlichen Inzestverbots*, 89 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (KRITV) 68 (2006). DEUTSCHER ETHIKRAT, *supra* note 218, 72–74.

[223] Tribe, *supra* note 46, at 1944.

[224] *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting); *id.* at 2639 (Thomas, J., dissenting).

[225] *Id.* at 2642–43 (Alito, J., dissenting).

[226] *Id.* at 2626 (Roberts, C.J., dissenting).

Alito used a description so mindful of the closet—that metaphorical gay hiding place[227]—and so strikingly similar to Justice Kennedy's description of it: "A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken."[228] Justice Alito was quite explicit in whom he saw the new minority: "By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas."[229] It is them, Chief Justice Roberts agreed, who are now being stigmatized and ostracized by calling out the negative effects of the discrimination they advocate—a strategy of self-marginalization that is also popular in Germany.[230]

Religious conservatives are already seeking exemptions from public schemes, denying individuals equal access to publicly regulated benefits, or civil institutions—including same-sex marriage.[231] While the Supreme Court has granted employer exemptions from birth control coverage[232]—rejecting a fiduciary theory of health entitlements[233]—and also declined to hear the case of a photographer who refused to take pictures of a same-sex commitment ceremony,[234] it is worth remembering the words of Justice Kennedy:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the

[227] EVE SEDGWICK, THE EPISTEMOLOGY OF THE CLOSET (1990).

[228] *Obergefell*, 135 S. Ct. at 2596.

[229] *Id.* at 2643 (Alito, J., dissenting).

[230] *See* Christian Hillgruber, *Wo bleibt die Freiheit der anderen? Es ist jedem freigestellt, wie er Homosexualität bewertet. Ein Plädoyer für den Schutz einer neuen Minderheit*, Frankfurter Allgemeine Zeitung (Feb. 20, 2014), http://www.faz.net/aktuell/politik/staat-und-recht/homosexualitaet-schutz-und-freiheit-einer-neuen-minderheit-12812195.html; Matthias Matussek, *Ich bin wohl homophob. Und das ist auch gut so*, Die Welt (Feb. 12, 2014). For a critical discussion, see Anna Katharina Mangold, *Die verfolgte Unschuld vom Lande oder: Warum es keines „Grundrechts auf Diskriminierung" bedarf*, Verfassungsblog (Feb. 22, 2014), http://www.verfassungsblog.de/verfolgte-unschuld-vom-lande-oder-warum-es-keines-grundrechts-auf-diskriminierung-bedarf/. See also Ute Sacksofsky, *Das Märchen vom Untergang der Ehe*, 68 Merkur 143, 145 (2014).

[231] *See* Sheryl Gay Stolberg, *Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html?_r=0.

[232] *See* Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).

[233] *See* Margaux J. Hall, *A Fiduciary Theory of Health Entitlements*, 35 CARDOZO L. REV. 1729 (2014).

[234] *See* Elane Photography, LLC v. Willock, 309 P.3d 53*; cert. denied*, 134 S. Ct. 1787 (2014).

> imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.[235]

[235] *Obergefell*, 135 S. Ct. at 2602.