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"In Sickness and in Health, Until Death Do Us Part": An Examination of FMLA Rights for Same-Sex Spouses and a Case Note on Obergefell v. Hodges

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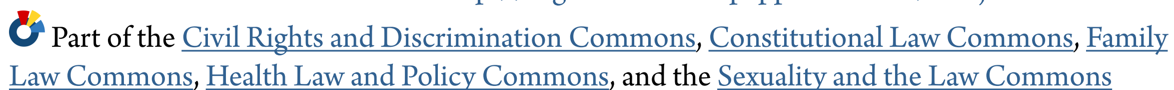
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"In Sickness and in Health, Until Death Do Us Part": An Examination of FMLA Rights for Same-Sex Spouses and a Case Note on *Obergefell v. Hodges*

By Jasmine Foo*

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"At some point in our lifetime, gay marriage won't be an issue, and everyone who stood against this civil right will look as outdated as George Wallace standing on the school steps keeping James Hood from entering the University of Alabama because he was black."

– George Clooney[1]

I. Introduction

If you visit an elementary school yard during recess time in the United States, you would likely hear some kids chanting to their friends some version of this rhyme: "Jack and Jill, sitting in a tree. K-I-S-S-I-N-G. First comes love, then comes marriage, then comes a baby in a baby carriage!" Perhaps you even remember teasing some school friends with that same chant when you were younger. As children, we were likely naïve enough to believe that rhymes and chants had a certain measure of power in telling our futures; it was similar to playing a game of "MASH"[2] on a piece of scrap paper.

Figure 1

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[1] Ted Casablanca, *George Clooney Weighs In on Prop 8*, E! ONLINE (Nov. 11, 2008, 5:19 PM), http://www.eonline.com/uk/news/68338/george-clooney-weighs-in-on-prop-8.

[2] *See* Figure 1. "MASH" is a paper and pencil game commonly played between two people, most likely children or pre-teens. The name of the game is an acronym for "Mansion, Apartment, Shack, and House." The players choose a few categories regarding what they may have in their future and write answers underneath. A specific number is then chosen at random by one player making marks on the sheet and a second player saying when to stop and tally the marks up. The number is then used to count each item down the page. An item is crossed off when landed on, until there are no more items left in that category. The last item

Marriage was an assumed right in many of these games that we played as children, viewed with a basic, black and white understanding of what it entailed. However, most adults would agree that life is never as simple as our childhood games have led us to believe.

There are many different dimensions to the definition of marriage in the United States: it oftentimes holds a certain amount of spiritual significance and can function as a personal commitment of two individuals to one another, as a social statement that defines "a person's relationships and place in society,"[3] or as a "relationship between a couple and the government"[4] that grants each party certain "legal and economic protections and responsibilities."[5] But for same-sex couples, marriage is a hotly contested right that, until only recently, was largely denied to the community. Within the past forty years, the marriage landscape has slowly become more accessible to same-sex couples through their challenges to "the traditional conception of marriage in an effort to gain the same rights in and for their relationships as conferred upon heterosexual couples."[6]

The opportunity for same-sex marriage existed in some states, civil partnerships were recognized in others, and other states completely denied same-sex couples the rights to marriage and partnership. But because of the United States Supreme Court's (SCOTUS) recent decision in *Obergefell v. Hodges*,[7] same-sex marriage equality has been extended to the entire United States—it is now federally mandated as a Constitutional individual right that cannot be denied by individual states to their inhabitants.

This note discusses the history of the lesbian, gay, bisexual, and transgender (LGBT) struggle for equal rights alongside the Supreme Court's recent ruling in *Obergefell v. Hodges* and uses this to

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left in each category is considered the answer to each category, thus telling the future for that second player.

[3] EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 4 (2004).

[4] *Id.*

[5] *Id.*

[6] Mark Kleinman & Katelyn D. Wicks, *Thirteenth Annual Gender and Sexuality Law: Annual Review Article: Legal Recognition of Same-Sex Relationships: III. State Recognition of Same-Sex Relationships*, 13 GEO. J. GENDER & L. 365, 366 (2012).

[7] 135 S. Ct. 2584 (2015).

examine the potential effect on the rights granted to same-sex spouses by the Family Medical Leave Act (FMLA). Part II records the jurisprudence that has slowly evolved over the past forty to fifty years to make the present a more hospitable era for same-sex marriage to take root today.[8] Part III gives a general overview of the FMLA's history and current form.[9] Part IV reviews the facts prompting the Court's decision in *Obergefell*.[10] Part V analyzes the majority opinion alongside the dissenting opinions by comparing and contrasting the dissenting judges' separate and underlying interests.[11] Part VI theorizes *Obergefell*'s potential legal and social impact on FMLA requirements and the definition of "spouse," and it concludes by examining how these changes might work to open the way for further advancements in same-sex rights in employment and healthcare law.[12]

II. The History of Same-Sex Equality Rights

"The history of our nation has demonstrated that separate is seldom, if ever, equal . . . ."

– Chief Justice Margaret H. Marshall, majority opinion in *In re Opinions of the Justice to the Senate*[13]

A. The Evolution of Same-Sex Equality Rights in America

1. Before the Stonewall riots

While the origins of gay rights organizations can be traced back as far as the 1920s,[14] the fight for same-sex equal rights began taking shape on the legal plane in the late 1950s in *One, Inc. v. Olesen*,[15] a First Amendment Rights case that "mark[ed] the first time the United

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[8] *See infra* Part II and accompanying notes 13–70.
[9] *See infra* Part III and accompanying notes 71–77.
[10] *See infra* Part IV and accompanying notes 78–97.
[11] *See infra* Part V and accompanying notes 98–207.
[12] *See infra* Part VI and accompanying notes 208–221.
[13] 802 N.E.2d 565, 569 (2004).
[14] *Milestones in the American Gay Rights Movement*, American Experience: TV's Most-Watched History Series (2013), http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/.
[15] 355 U.S. 371 (1958).

States Supreme Court rule[d] in favor of homosexuals."[16] The early 1950s presented a hostile environment for homosexuals, signaled by negative Senate reports and the creation of Executive Order 10450, which banned homosexuals from federal government work because they were considered potential security risks.[17] But as time passed, the LGBT community reacted to the hostile environment and slowly inspired change: in 1962, Illinois became the first state in America to decriminalize homosexuality by repealing their consensual sodomy laws.[18] Over the next few years, continuous harassment by overzealous police officers looking to arrest "sexual deviants" drummed up feelings of persecution and anger within the LGBT community.[19] These pent up feelings exploded on June 28, 1969 through the Stonewall riots, which began after police officers "attempt[ed] to raid the popular [Stonewall Inn]," a gay bar.[20] The riots lasted for three days and are largely considered as the starting force "behind America's modern LGBT rights movement."[21] On the anniversary of the riots the following year, the first gay pride parades were held in prominent U.S. cities—Los Angeles, New York, San Francisco, and Chicago—and have been held annually since.[22]

2. After the Stonewall riots

In 1973, the American Psychological Association's Board of Trustees decided to remove homosexuality from its mental disorders list thanks to psychologist Dr. Robert Spitzer's research showing "no clear link between homosexuality and mental illness."[23] In 1974 and 1977, Kathy Kozachenko and Harvey Milk (Milk) respectively became the first openly gay Americans to be elected to public office

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[16] *See Milestones in the American Gay Rights Movement*, *supra* note 14.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Christina Caron and Adrianne Haney, *Gay rights timeline: Key dates in the fight for equality*, NBC NEWS – U.S. NEWS (Mar 23, 2013 at 2:23AM), http://usnews.nbcnews.com/_news/2013/03/23/17418872-gay-rights-timeline-key-dates-in-the-fight-for-equality.
[23] *Id.*

within Ann Arbor and San Francisco.[24] These victories in the gay rights movement were marred by the assassination of Milk by former city supervisor Dan White (White) in 1978.[25] When White's conviction resulted in a seven year prison sentence in May 1979, more than 5,000 outraged protesters, who felt that the sentence was too lenient, ransacked San Francisco's City Hall and the surrounding area.[26] A few months later, "[a]n estimated 75,000 people participate[d] in the National March on Washington for Lesbian and Gay Rights" to "demand equal civil rights and urge for the passage of protective civil rights legislature."[27] The campaign for non-discrimination against the LGBT community took a huge step in 1980, as the Democratic Party became "the first major political party to endorse a homosexual rights platform," and yet another step in 1982 as Wisconsin became the first state to outlaw sexual orientation-based discrimination.[28]

Despite these positive civil rights developments, the same-sex marriage equality movement did not gain nearly as much traction in the 1970s.[29] On May 18, 1970, two men applied for a marriage license in Minnesota and were rejected by clerk Gerald Nelson on the basis that the applicants were the same sex.[30] The following lawsuit, *Baker v. Nelson*,[31] held that "Minnesota law on marriage made no mention of gender."[32] However, it was rebuffed at every level of the judicial system and subsequently used as a model to block same-sex marriage efforts in other states.[33] This was followed in 1973 by Maryland's decision to become the first state to ban same-sex marriage through an additional line in its Family Law Code

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[24] *See Milestones in the American Gay Rights Movement*, *supra* note 14.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *The Gay Marriage Timeline: History of the Same-Sex Marriage Debate*, PROCON.ORG, http://gaymarriage.procon.org/view.timeline.php?timelineID=000030 (last updated Oct. 6, 2014) [hereinafter *The Gay Marriage Timeline*].

[30] *Id.*

[31] 191 N.W.2d 185 (Minn. 1971).

[32] *The Gay Marriage Timeline*, *supra* note 29.

[33] *Id.*

specifying that the only marriages considered valid within the state were those between a man and a woman.[34]

3. The AIDS epidemic and the fight for same-sex marriage equality

In the 1980s, gay and lesbian rights organizations began the fight against the AIDS crisis within their community by focusing on bringing awareness and inciting a faster government response to the disease.[35] The discrimination levied against those with AIDS was intense: for example, there were popular beliefs that the disease only affected "white gay communities," and it essentially served as a death sentence to the infected.[36] The activists involved in the 1987 National March on Washington demanded that President Ronald Reagan publicly acknowledge the AIDS crisis in order to separate the truth of the situation from the lies, and he did so at the end of his presidency.[37] From that point forward, both the Center for Disease Control (CDC) and the World Health Organization worked to de-mystify AIDS and increase public awareness.[38]

The fight for same-sex marriage equality rights made significant gains during this time period; in 1984, the first domestic partnership law was passed in Berkeley, California, and granted city employees with domestic partnerships the opportunity to participate in a program that included medical insurance benefits, dental insurance

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[34] *Id.*

[35] *See* One, Inc. v. Olesen, 355 U.S. 371 (1958)*; see also What Is HIV/AIDs?* WWW.AIDS.GOV, https://www.aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/ (defining and providing general information about AIDS).

[36] Natasha Geiling, *The Confusing and At-Times Counterproductive 1980s Response to the AIDS Epidemic*, SMITHSONIAN.COM (Dec. 4, 2013), http://www.smithsonianmag.com/history/the-confusing-and-at-times-counterproductive-1980s-response-to-the-aids-epidemic-180948611/?no-ist. *See also Milestones in the American Gay Rights Movement*, *supra* note 14. These misconceptions were further fueled by the Centers for Disease Control (CDC) initially naming the disease Gay Related Immune Deficiency Disorder (GRID) due to the symptoms first being found within the gay community. "When the symptoms [were] found outside the gay community, Bruce Voeller, biologist and founder of the National Gay Task Force, successfully lobbie[d] to change the name of the disease to AIDS." *Id.*

[37] *See Milestones in the American Gay Rights Movement*, supra note 14.

[38] *Id.*

coverage, and leave benefits.[39] This was followed in 1987 by the first mass same-sex wedding ceremony in which nearly 2,000 same-sex marriages symbolically took place on Washington D.C.'s National Mall, and in 1989 by the New York State Court of Appeals defining "a lesbian or gay couple living together for a [sic] least ten years . . . " as a family and other states adopting specific regulations for those in domestic partnerships.[40] In the 1990s, same-sex marriage gained "preliminary victories in Hawaii and Alaska [by] using state constitutional law" as there was no specification within their respective state constitutions as to why same-sex marriage was prohibited.[41] Each state responded to the judicial ruling by amending their constitutions to specifically ban same-sex marriage.[42] These decisions fueled "a nationwide debate" that caused other states to re-examine and create additional "legislation or constitutional amendments explicitly limiting marriage to different-sex couples."[43] The myriad of state decisions ultimately led Congress to pass the Defense of Marriage Act, a federal version of legislation that imposed further discrimination on same-sex couples.[44]

B. The Creation of the Defense of Marriage Act (DOMA) in 1996

In 1996, DOMA was enacted by Congress and signed into law by President Bill Clinton, thus passing before any individual states authorized same-sex marriages.[45] "[DOMA] specifies that the federal benefits of marriage will only be available to different-sex couples and that states will not be required, under the Full Faith and Credit Clause, to recognize same-sex marriages from other states."[46] These

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[39] *See The Gay Marriage Timeline, supra* note 29.

[40] *Id.*

[41] Nelson Tebbe & Deborah A. Widiss, *Article: Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1384 (Apr. 2010).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Linda L. Barkacs, Sherry S. Tehrani & Craig B. Barkacs, *Article: Divorcing the Defense of Marriage Act: Judicial Tensions in Upholding the Legislated Preclusion of Federal Same-Sex Marital Rights*, 3 AM. U. LABOR & EMP. L.F. 88, 89-90 (Winter 2013).

[46] Tebbe & Widiss, *supra* note 41; *see also* Barkacs, *supra* note 45 at 91 ("Congress passed DOMA to advance the following interests: (1) protecting the

two key provisions removed same-sex couples from the federal definition of marriage and pushed a rather harsh effect on same-sex married couples:

> [S]ame-sex married couples . . . [were now] preclude[d] . . . from receiving 1,100 federal benefits . . . [such as] Social Security spousal support; the protection of a spouse's assets; when the other receives Medicaid; inclusion into an untaxed family health insurance policy; the ability to file joint federal income taxes; family medical leave for a sick spouse; disability, dependency, or death benefits for veteran and public safety officer spouses; employment benefits for federal employees; protections against estate taxes for spouses; and the availability for a visa for a non-citizen spouse.[47]

Many elected officials, presidential candidates, conservative politicians, and the media "portrayed gay couples seeking to marry as a threat to the family and Western civilization."[48] The passing of DOMA encouraged the creation of State DOMAs[49] and Super-DOMAs[50] within many states, which led to much confusion and alarm—the status of a same-sex couple's relationship as recognized by the law was wholly dependent on what state they were currently in and simultaneously was categorically denied as having any legal standing in the eyes of the federal government. But, this was not the case for all states; in 2000, Vermont became the first state to authorize same-sex civil unions and registered partnerships.[51] In 2004, Massachusetts altogether abandoned DOMA laws by becoming

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institution of traditional, heterosexual marriage; (2) advancing the traditional notions of morality; (3) protecting state sovereignty; and (4) preserving scarce federal resources.").

[47] Barkacs, *supra* note 45 at 92.

[48] SEAN CAHILL, SAME-SEX MARRIAGE IN THE UNITED STATES: FOCUS ON THE FACTS 6 (2004).

[49] *Id.* at 7. State DOMAs are state specific anti-gay marriage laws legislated to further enforce the federal DOMA. *Id.*

[50] *Id.* at 9. Super-DOMAs build further on federal and state DOMAs to "prohibit any kind of recognition of same-sex relationships, including civil unions and domestic partnerships, which offer some of the rights of marriage but not most of the protections, which are federally mandated." *Id.*

[51] *See Milestones in the American Gay Rights Movement*, *supra* note 14.

"the first state to legalize gay marriage," a position that New Hampshire, Vermont, Connecticut, Iowa, and Washington D.C. followed shortly thereafter.[52] These small victories, alongside the landmark ruling of *Lawrence v. Texas*,[53] slowly but surely carved a path leading to the end of DOMA's hold on the U.S.

C. The Demise of DOMA

1. The rise and fall of California's Proposition 8

In May 2008, California joined Massachusetts as the second state to legalize same-sex marriage.[54] Unhappy with their Supreme Court's decision, California voters approved Proposition 8 in November 2008 with 52% of the vote, which rendered same-sex marriage illegal in California by amending the state constitution.[55] Subsequent suits[56] to federal courts in 2010 and a Ninth Circuit Court of Appeals three-judge panel review of Proposition 8 in 2012 resulted in SCOTUS agreeing to hear the challenges that have been presented against Proposition 8.[57] On June 26th, 2013, SCOTUS ruled against Proposition 8 based on a lack of legal standing to appeal the lower court's ruling.[58] Because they ruled based on standing, the Court avoided substantively answering, "[W]hether the Constitution allows states to prohibit same-sex marriages" and effectively created an

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[52] *Id.*

[53] 539 U.S. 558 (2003). SCOTUS held that sodomy laws are unconstitutional. *Id.*

[54] ANQI LI, USES OF HISTORY IN THE PRESS AND IN COURT DURING CALIFORNIA'S BATTLE OVER PROPOSITION 8: CASTING SAME SEX MARRIAGE AS A CIVIL RIGHT 1 (2012). The Supreme Court of California found "that limiting marriage to heterosexual couples violated the state constitution." *Id.*

[55] *Proposition 8: Ban on Same-Sex Marriage*, INST. OF GOVERNMENTAL STUDIES – UNIV. OF CAL., BERKELEY (Nov. 4, 2008), https://igs.berkeley.edu/library/elections/proposition-8. The new provision to the Constitution clarified a valid marriage as one occurring between a man and a woman.

[56] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010). *See also* Li, *supra* note 54 at 2.

[57] *See Proposition 8: Ban on Same-Sex Marriage*, *supra* note 54. "February 7, 2012: A three-judge panel of the 9th Circuit Court of Appeals rules 2-1 that the ban on same-sex marriage in California is unconstitutional." *Id.*

[58] *Id.*

opportunity for same-sex marriages in California to resume.[59] While the Court came one step closer to addressing the legality of same-sex marriage in *United States v. Windsor*,[60] it would remain largely unaddressed until the most recent decision in *Obergefell v. Hodges*.[61]

2. The last straw: United States v. Windsor and its aftermath

In February 2011, President Barack Obama and the Department of Justice (DOJ) declared Section 3 of DOMA unconstitutional[62] and declined to legally defend the Act from that point forward.[63] This decision by President Obama's administration was instrumental in the success of *Windsor*'s suit against DOMA.[64] On June 26, 2013, SCOTUS found that key portions of DOMA violated the Constitution by interfering with a same-sex couple's right to liberty and to equal protection.[65] *Windsor* was instrumental in removing one aspect "of federal marriage discrimination-the refusal to recognize any same-sex marriages,"[66] but another aspect remained. Under the federal version of DOMA, same-sex couples were generally denied rights granted to opposite-sex couples; this was now considered unconstitutional.[67] However, this neither removed State DOMAs and Super-DOMAs from still being in effect within specific states, nor took into account how the removal of the federal DOMA would have

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[59] *Id.*

[60] 133 S. Ct. 2675 (2013).

[61] 135 S. Ct. 2584 (2015).

[62] Barkacs, *supra* note 45 at 100.

> In support of its decision to withdraw legal defense of the Act, the Administration declared that Section 3 of DOMA, when applied against legally married same-sex couples, violate[d] the equal protection guarantees of the Fifth Amendment. Determining this Act as unconstitutional, the Administration reviewed it under a standard of heightened scrutiny.

Id.

[63] *Id.*

[64] *Id.* at 94. "In *Windsor v. United States*, Windsor sued over the estate tax burden she would not have incurred had her spouse been male, or had the federal government recognized her same-sex marriage -$363,000." *Id.*

[65] *See The Gay Marriage Timeline*, *supra* note 29.

[66] Deborah A. Widiss, *Essays on the Implications of Windsor and Perry: Leveling Up After DOMA*, 89 IND. L.J. 43, 43 (2014).

[67] *Id.*

an effect on same-sex couples who lived in states that banned same-sex marriage.[68] The removal of DOMA therefore essentially separated same-sex couples into three different tiers:

> [First tier] married same-sex couples who live in states that recognize their marriages receiving the full panoply of federal marriage rights; [second tier] married same-sex couples who live in states that refuse to recognize their marriages receiving some, but not all, federal rights; and [third tier] unmarried same-sex couples receiving none of the federal rights.[69]

While *Windsor* was a step in the right direction, it did not manage to fully address the issue of marriage equality. SCOTUS takes the last step in same-sex marriage equality in the decision reached in *Obergefell v. Hodges*, thus changing the landscape of same-sex equality rights forever.[70]

III. THE HISTORY OF THE FAMILY MEDICAL LEAVE ACT (FMLA)

The FMLA was first drafted in 1984 by the Women's Legal Defense Fund and was brought to Congress every subsequent year thereafter until January 1993 when it finally "passed with bipartisan support . . . and was signed by President Clinton as the first accomplishment of his new administration."[71] The Act allows a person to take "family and temporary medical leave" dependent on the individual's circumstances, and can be very specific in the qualifications that it requires.[72] The FMLA was specifically written

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[68] *Id.* at 43–44.

[69] *Id.* at 43.

[70] *See* 135 S. Ct. 2584 (2015).

[71] *History of the FMLA*, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, http://www.nationalpartnership.org/issues/work-family/history-of-the-fmla.html?referrer=https://www.google.com/ (last visited Jan. 15, 2017).

[72] *Wage and Hour Division (WHD)*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/regs/statutes/fmla.htm (last visited Dec. 30, 2016). *See also* Gerald Mayer, *The Family and Medical Leave Act (FMLA) An Overview,* CONG. RESEARCH SERV., (Sept. 28, 2012) https://www.fas.org/sgp/crs/misc/R42758.pdf. An employee may qualify for twelve weeks of FMLA unpaid leave if they have worked for a private or public sector employer for at least twelve months, consecutively or non-consecutively, for a

with gender-neutral language in order to avoid casting women and men into preexisting roles; rather than defining roles such as "husband" and "wife," FMLA's language tends toward the use of "spouse" instead.[73] This intentional wording was also motivated by Congress's desire to significantly reduce gender discrimination in the work place, as women were often forced to choose between having children and providing them care or having a career.[74]

Unfortunately, DOMA's introduction of their definition of spouse as "a husband or wife of the opposite sex" forced the FMLA to be read similarly, which was the last thing that the FMLA creators had intended.[75] Therefore, supporters of the Progressive Act celebrated the removal of the federal DOMA in 2013, as it meant that the FMLA could interpret spouse to include same-sex spouses as well.[76]

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minimum of 1,250 hours in the twelve months before the start of their FMLA leave. If it is a private employer, they need to have employed at least fifty employees within seventy-five miles of the worksite; if it is a public employer, there is no need for a minimum employee amount.

[73] Alana M. Bell & Tamar Miller, *Note: When Harry Met Larry and Larry Got Sick: Why Same-Sex Families Should Be Entitled to Benefits under the Family and Medical Leave Act*, 22 HOFSTRA LAB. & EMP. L.J. 276, 278 (Fall 2004). "Because of its gender-neutral language, the FMLA was the first piece of federal legislation to recognize that both men and women are capable of sharing equally in family care responsibilities." *Id.*

[74] *Id.*

> Therefore, the FMLA was particularly geared towards, "minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis; and to promote the goal of equal employment opportunity for women and men . . . . "

Id. (quoting 29 U.S.C. § 2601b(4)–(5)).

[75] *Id.* at 279. "In limiting the term marriage to only include a man and a woman, Congress reverted back to archaic gender stereotypes that had segregated the spheres of men and women for so long—by insisting that men may only marry women and women may only marry men." *Id.*

[76] *Id.* at 280.

> The findings and the purposes of the FMLA hold true, regardless of whether a family has a mother and father, two mothers, or two fathers. Gay and lesbian families need to balance the demands of the workplace with the needs of the family, just like heterosexual families. They, too, require job security when taking reasonable leave in order to adequately care for their families. Therefore,

The current FMLA definition of spouse specifies that the definition used in relation to a same-sex spouse only kicks into effect in states that have legalized same-sex marriage.[77] Now that *Obergefell v. Hodges* has made same-sex marriage legal in all states, will this have any further effect on the application of the FMLA?

IV. THE FACTS OF OBERGEFELL V. HODGES

"It takes no compromise to give people their rights . . . it takes no money to respect the individual. It takes no political deal to give people freedom. It takes no survey to remove repression."

– Harvey Milk[78]

In four different states within the Sixth Circuit, fourteen same-sex couples and two men with deceased same-sex partners brought forth their individual cases questioning whether their Fourteenth Amendment right to marriage had been illegally denied.[79] The four states[80] each viewed legal marriage purely as a union between a man and a woman and therefore refused to recognize that a legal marriage had occurred between each of these couples.[81] All cases followed the same route: each district court where the case was brought ruled in favor of recognizing each couple as legally married, which was appealed by each case's respondents and brought to the United States

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> logic dictates that gays and lesbians should be entitled to claim the benefits of the FMLA, just like their heterosexual counterparts.

Id.

[77] *FREQUENTLY ASKED QUESTIONS: FMLA Notice of Proposed Rulemaking*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/fmla/nprm-spouse/faq.htm#2 (last visited Dec. 30, 2016). According to the website, the FMLA still defines a husband or wife based on the laws of the State where the employee resides. "Under the current definition of spouse, eligible employees may take FMLA leave to care for a same-sex spouse only if they reside in a State that recognizes same-sex marriages." *Id.*

[78] Jeremy Goldman, *26 Quotes to Help Celebrate LGBT Pride Month*, Inc.com (Jun. 25, 2016), http://www.inc.com/jeremy-goldman/26-quotes-to-help-celebrate-lgbt-pride-month.html.

[79] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

[80] The four states that the cases were brought in were Michigan, Kentucky, Ohio, and Tennessee. *Id.*

[81] *Id.*

Court of Appeals for the Sixth Circuit.[82] In order to equally address the concerns of each case, as they all addressed similar issues, the Sixth Circuit "consolidated the cases and reversed the judgments of the District Courts . . . [and] held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State."[83] In consolidating these cases and presenting a lot of them to the Court, three stood out and "illustrate[d] the urgency of the petitioners' cause from their perspective."[84]

The first case involved petitioner, James Obergefell, who met his partner, Arthur, in Ohio over two decades ago.[85] When Arthur was diagnosed with amyotrophic lateral sclerosis[86] in 2011, the couple resolved to marry and travelled via a medical transport plane to Maryland, a state that legally recognized same-sex marriages.[87] Three months after they married, Arthur passed away in their domiciled state, Ohio, and James was not allowed to list himself as Arthur's surviving spouse on his death certificate, thus bringing about this suit.[88]

The second case concerned co-plaintiffs from Michigan, April DeBoer (April) and Jayne Rowse (Jayne), who in 2007 participated

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[82] *Id.*

[83] *Id.* *See also* Deboer v. Snyder, 772 F.3d at 396, 436 (6th Cir. 2014).

> Through a mixture of common law decisions, statutes, and constitutional problems, each State in the Sixth Circuit has long adhered to the traditional definition of marriage . . . . Today, my colleagues seem to have fallen prey to the misguided notion that the intent of the framers of the United States Constitution can be effectuated only by cleaving to the legislative will and ignoring and demonizing an independent judiciary. Of course, the framers presciently recognized that two of the three co-equal branches of government were representative in nature and necessarily would be guided by self-interest and the pull of popular opinion. To restrain those natural, human impulses, the framers crafted Article III to ensure that rights, liberties, and duties need not be held hostage by popular whims.

Id.

[84] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 2594–95. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." *Id.*

in a ceremony to honor their commitment to each other.[89] In the years following their commitment ceremony, April and Jayne adopted three children under Michigan's then current adoption laws, which only gave either single individuals or heterosexual married couples the right to legally adopt.[90] The couple brought suit in order to gain legally recognized married status, in hopes that doing so would clarify their legal rights over their adopted children.[91]

The third case involved co-plaintiffs from Tennessee, Army Reserve Sergeant First Class Ijpe DeKoe (DeKoe) and his partner Thomas Kostura, whom in 2011 married in New York after DeKoe received deployment orders for Afghanistan.[92] After DeKoe's deployment was completed, the couple "settled in Tennessee, where DeKoe work[ed] full-time for the Army Reserve. Their lawful marriage [was] stripped from them whenever they reside[d] in Tennessee, returning and disappearing as they travel[ed] across state lines."[93] Co-plaintiffs found it ironic that even though DeKoe "served this Nation to preserve the freedom the Constitution protects," he was not granted the freedom to be married to his spouse depending on what state they were currently residing in, and thus brought this suit to court.[94]

These three cases, while highlighted in Justice Kennedy's majority opinion, only serve as a piece of the overall experience of all involved plaintiffs: "Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond."[95] In a sense, the plaintiffs involved in *Obergefell* have the Sixth Circuit's ruling to thank for creating a situation that the Court could no longer ignore. The Sixth Circuit's decision to uphold the ban against same–sex marriage was instrumental in forcing SCOTUS to examine same–sex marriage

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[89] *Id.* at 2595.

[90] Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015). The inability to adopt their children underneath both names presented many issues: If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt." *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

rights, which the Court had previously declined to do despite having the opportunity to in previous sessions.[96] It "create[d] the 'circuit split' that was lacking when the [C]ourt passed on appeals from pro-gay-marriage rulings by the Fourth, Seventh and Tenth Circuit Courts of Appeal."[97] When a circuit split is created over an issue, it usually indicates that the issue can be interpreted in multiple ways, thus providing conflicting rulings over federal laws that SCOTUS should then examine and clarify.

V. THE ANALYSIS OF OBERGEFELL'S OPINION

A. Justice Kennedy's Majority Opinion

Hark! Love is love, and
Love is love is love is love.
It is so ordered.[98]

Justice Kennedy began his opinion by recounting the basic facts and issue of the case[99] that led to *Obergefell* being presented to SCOTUS, and followed this with a quick synopsis of marriage in the context of human history.[100] He compared the respondent and

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[96] Michael McGough, *Opinion: A 'Circuit Split' Will Force a Ruling on Gay Marriage*, LATIMES.COM (Nov. 6, 2014, 3:13 PM), http://www.latimes.com/opinion/opinion-la/la-ol-supremecourt-gaymarriage-constitution-20141106-story.html.

[97] *Id.*

[98] Daniela Lapidous, *The SCOTUS Marriage Decision, In Haiku*, MCSWEENY (June 26, 2015), http://www.mcsweeneys.net/articles/the-scotus-marriage-decision-in-haiku.

[99] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015). Justice Kennedy identified two different issues that would be reviewed by the Court in this opinion:

> The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State, which does grant that right.

Id.

[100] *Id.* at 2593–94.

> From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage . .

petitioner arguments here by contrasting how each side believed the history of marriage would be affected by the Court's decision.[101] The sympathetic tone that Justice Kennedy set from the start of his opinion signals a significant shift in the majority opinion of the current Court from Courts of the past,[102] to a place where SCOTUS might be more forgiving to the plight of same-sex couples interested in marriage. Justice Kennedy then went on to highlight the main three cases out of the sixteen that had been consolidated.[103] In highlighting these cases, Justice Kennedy shifted the focus of the case at hand to the fact that these relationships faced struggles that heterosexual couples do not regularly have to face, even though the love and respect that same-sex couples may experience are experiences that any human in a committed relationship may face. He then addressed how previous shifts in the nation's definition of marriage have worked to strengthen the institution of marriage within America, and set up the history of marriage as "one of both

> . . Its dynamic allows two people to find a life that could not be found alone, 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.

Id.

[101] *Id.* at 2594.

> That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman.

Id. "[I]t is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. *Id.*

[102] *See* Adam Polaski, *Live Blog: The Freedom to Marry Comes to 5 More States, Paves Way in 6 More*, FREEDOMTOMARRY.ORG (Oct. 06, 2014), http://www.freedomtomarry.org/blog/entry/live-blog-the-freedom-to-marry-comes-to-5-more-states. The last time that SCOTUS dealt with same-sex marriage occurred on October 6, 2014, when the Court refused to review five same-sex marriage equality cases. The decision to review *Obergefell* thus signals the Court's movement in a new direction. *Id.*

[103] Obergefell, 135 S. Ct. at 2594–95; *supra* Part IV and accompanying notes 78–97.

continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time."[104]

Viewing the history of marriage as an evolution rather than a stagnant entity, Justice Kennedy argued that the idea of marriage is strengthened as a whole, and drew comparisons between this historical evolution and the Nation's gradual acceptance of gay and lesbian rights with the passage of time.[105] His overview of the fight for lesbian and gay equal rights led into a brief discussion of the history of same-sex marriage rights, noting that "[a]fter years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage."[106] Starting from this point, Justice Kennedy discussed three different legal concepts that led the majority of the Court to believe that same-sex marriage should be legalized: the Due Process Clause, the Equal Protection Clause, and the First Amendment.

1. The Due Process Clause

In 1866, the Fourteenth Amendment of the U.S. Constitution was passed by Congress and was subsequently ratified in 1868 by the states.[107] Originally passed to grant citizenship to recently freed slaves after the Civil War, the Fourteenth Amendment has gone on to further protect other minority groups and establish landmark equal rights cases. The amendment establishes federal and state citizenship for all people who are born or naturalized in the United States.[108]

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[104] *Id.* at 2595.

> As women gained legal, political, an property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned . . . . These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

Id.

[105] Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).

[106] *Id.* at 2597.

[107] *See* Richard Wormser, *The Fourteenth Amendment Ratified (1868)*, PBS.ORG, http://www.pbs.org/wnet/jimcrow/stories_events_14th.html.

[108] U.S. CONST. amend. XIV. On top of the Due Process Clause and the Equal Protection Clause, the Fourteenth Amendment also guarantees that laws may not

The Due Process Clause, found in the Fourteenth Amendment, protects state governments from violating a person's inherent rights to life, liberty, or property without granting them the due process of law.[109] Justice Kennedy referred to previous cases that utilized the Fourteenth Amendment Due Process Clause in order to establish that "these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[110] By approaching the issue with this perspective, Justice Kennedy drew a correlation between same-sex marriage rights and the fundamental rights and interests that the Due Process Clause has been previously used to protect.[111] He also noted that when determining what rights may be deemed fundamental, the current social and political environment could easily influence and change how people interpret what an injustice to others may entail.[112]

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take away formations from a citizen in its structure. Justice Kennedy does not examine this in *Obergefell*.

[109] *See Obergefell*, 135 S. Ct. at 2595.

[110] *Id. See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965) (determining that the Fourteenth Amendment Due Process Clause protected a person's fundamental right to privacy); *see also* Eisenstadt v. Baird, 405 U.S. 438, 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis added)).

[111] *Obergefell*, 135 S. Ct. at 2597. "The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Id.* (citations omitted).

[112] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

> History and tradition guide and discipline this inquiry but do not set its outer boundaries . . . . The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and received legal stricture, a claim to liberty must be addressed.

Id.

Justice Kennedy then moved on to the multiple precedents that indicate that same-sex marriage should be considered a fundamental right. There have been many previous cases where the Court found that the right to marriage is constitutionally fundamental among opposite-sex partners.[113] While Justice Kennedy acknowledged that these cases all presumed that the relationships in question occurred between opposite-sex partners,[114] he argued that, combined with four other principles and traditions, the fundamental right to marry for opposite-sex couples may be extended to same-sex couples as well.[115]

The first precedent, found in *Loving v. Virginia*,[116] is "the concept of individual autonomy" that allows individuals the right to choose whom they wish to marry.[117] The second precedent that Justice Kennedy discussed was that the fundamental right to marry "supports a two-person union unlike any other in its importance to the committed individuals."[118] He reasoned that because SCOTUS had

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[113] *Id.* Justice Kennedy lists multiple cases in which the Due Process Clause is utilized for this very purpose. *See, e.g.,* M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 (1996); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

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

[115] *Obergefell*, 135 S. Ct. at 2598–99.

> Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond . . . This analysis compels the conclusion that same-sex couples may exercise the right to marry.

Id.

[116] *See* 388 U.S. 1, 12 (1967) (using the Due Process Clause to invalidate interracial marriage bans).

[117] *Obergefell*, 135 S. Ct. at 2599.

> Choices about marriage shape an individual's destiny . . . [t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.

Id.

[118] *Id. See also Griswold*, 281 U.S. at 486.

already removed barriers that prevented same-sex couples from engaging in intimate relations, it stood to reason that the legal acknowledgment that same-sex couples may legally exist should not end at the step before commitment.[119]

The third precedent discussed for protecting the same-sex right to marry was that it allowed families with same-sex parents who have children to feel secure and know that they are legally protected as a family unit.[120] Many states have opened up the adoption process to same-sex couples, and it is acknowledged that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."[121] Justice Kennedy did not see the reasoning in allowing the law to support the creation of families underneath same-sex couples via adoption without allowing them to legally acknowledge the commitment that both parties are willing to make to each other.[122]

The fourth and final precedent discussed was that marriage is considered vital to America's social order.[123] When an American couple agrees to commit to each other, "so does society pledge to support the couple, offering symbolic recognition and material

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> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

[119] *Id.* at 2600.

[120] Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

[121] *Id.*

[122] *Id.*

> Most States have allowed gays and lesbians to adopt, either as individuals or as couples . . . . This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families. Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.

Id.

[123] *Id.* at 2601.

benefits to protect and nourish the union . . . [the States] have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities."[124] Justice Kennedy once again reiterated that the couples who currently receive these benefits and the ones that do not are separated by virtue of their life partner's gender, which ultimately creates an unstable situation for same-sex couples that opposite-sex couples do not have to face.[125] He therefore concluded that these four fundamental liberties granted to opposite-sex couples should also apply to same-sex couples, as "it would disparage their choices and diminish their personhood to deny them this right."[126]

2. The Equal Protection Clause

Using the Due Process Clause, Justice Kennedy demonstrated that previous case law and precedent established the concept of marriage as a fundamental liberty for both opposite-sex and same-sex couples.[127] He further demonstrated this by using the Equal Protection Clause, another part of the Fourteenth Amendment that "prohibits states from denying any person within its territory the equal protection of the laws."[128] The Due Process Clause and the Equal Protection Clause function separately but intersect on many issues.[129] Justice Kennedy argued that examining both concepts

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[124] *Id.*

[125] *Id.* at 2601-02.

> As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

Id.

[126] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

[127] *See supra* Part V.a.i and accompanying notes 107–126.

[128] *See Equal Protection: An Overview*, LAW.CORNELL.EDU, https://www.law.cornell.edu/wex/equal_protection (last updated June 2016).

[129] *Obergefell*, 135 S. Ct. at 2603 ("This interrelation of the two principles furthers our understanding of what freedom is and must become."); *see, e.g., .,* M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996); Bearden v. Georgia, 461 U.S. 660, 665 (1983); *Loving*, 388 U.S. at 12 ("There can be no doubt that restricting the

together created a greater understanding and analysis of the situation at hand.[130] Essentially, the Equal Protection Clause should guarantee that same-sex couples be treated the same as opposite-sex couples: by denying same-sex couples the right to marry, the law serves to deny them equal protection of their peers.[131] Justice Kennedy reaffirmed the Court's belief that as society continues to evolve and grow; its capacity to understand and recognize social inequality will grow as well.[132] The Equal Protection Clause is, specifically, an excellent tool for finding these inequalities and correcting them, thus ensuring that all people are equally protected underneath the law.[133] Therefore, Justice Kennedy concluded that same-sex couples must be granted the fundamental right to marry, as it is a liberty that all American citizens should be free to enjoy.[134]

3. The First Amendment's role

In addressing the opinions of religious organizations that condone same-sex marriage, Justice Kennedy "emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction . . . ."[135] The First

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freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

[130] *Obergefell*, 135 S. Ct. at 2603.

[131] *Id.* at 2604.

[132] Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

[133] *Id.* at 2604. Justice Kennedy further notes,

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.

Id.

[134] *Id.* at 2605.

[135] *Id.* at 2607.

Amendment right to free speech[136] protects those who oppose the legalization of same-sex marriage, but it does not give individual states the right to refuse same-sex couples the ability to be legally married.[137] Nor does it give states the right to refuse recognition of same-sex marriages validly performed in outside states.[138] By specifying these terms, Justice Kennedy and the majority of SCOTUS essentially struck down any leftover legality that individual state DOMAs[139] might have clung on to in order to further their beliefs.[140]

B. Dissenting Opinions

The majority of SCOTUS reached a conclusive finding that same-sex couples have a fundamental right to marry that is equal to opposite-sex couples in a 5–4 decision that proved to be rather divisive.[141] The four remaining Justices felt such opposition to the legal basis in the majority's opinion, that each ultimately wrote a separate dissenting opinion extolling his own beliefs and viewpoints

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[136] U.S. CONST. amend. I.

[137] *Obergefell*, 135 S. Ct. at 2604. *But see* Jack Jenkins, *The Religious Beliefs of Kim Davis, The Anti-Gay Clerk Who Refuses To Do Her Job, Explained*, THINKPROGRESS.ORG (Sept. 2, 2015), http://thinkprogress.org/lgbt/2015/09/02/3698100/kim-davis-hypocritical-theology/. Justice Kennedy may have warned that First Amendment rights would not protect individual states from refusing to grant same-sex couples rights to marriage, but that did not stop Kim Davis, a local county clerk from Kentucky, from attempting to deny same-sex couples their legal right to marry in September 2015. Her stubborn refusals based on her claims of religious beliefs did not protect her from being arrested and ordered to either grant marriage licenses to same-sex couples or step down from her position.

[138] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

[139] *See supra* Part II.c and accompanying notes 54–70.

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

> The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

Id.

[141] *Id.* at 2608.

regarding the issue.[142] The decision of each dissenting Justice to write his own opinion is representative of how controversial the topic of same-sex marriage still is to this day. The fact that four dissenting opinions are pitted against one majority opinion within this case potentially indicates a "high level of uncertainty"[143] regarding the case's judgment, even if the Justices were attempting to bolster each other's dissent through his own words. Here, we will examine each Justice's dissenting opinion to gain an overall grasp of the dissenting minority's concerns.

1. Chief Justice John G. Roberts

I support you all
No, really, I do, but this
Isn't our problem.[144]

The round of dissents began with Chief Justice Roberts, who was joined by Justice Scalia and Justice Thomas in his belief that by ruling in such a manner, the Court essentially legislated over the issue when it should have been judging it.[145] Chief Justice Roberts pointed out that "[w]hether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be."[146] While Chief Justice Roberts admitted that the petitioners of *Obergefell* used "strong arguments rooted in social policy and considerations of fairness" to make their point that same-sex marriage should be legalized, he

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[142] *See Obergefell*, 135 S. Ct. at 2611–31.

[143] *See* Cass R. Sunstein, *Centennial Issue: Article: Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 815 (May 2015) ("Separate opinions and internal divisions can have costs as well . . . . [T]he broader conclusion is clear: as a general rule, a conscientious Justice ought not to silence himself or herself for fear that the costs of a separate opinion will be high. To be sure, the Court's legitimacy might be at risk if it rules in ways that deeply offend the American public or if large segments of that public perceive themselves as consistent losers. But separate opinions, as such, are unlikely to threaten the Court's legitimacy, certainly not in specific cases and probably not even across a wide range of cases.").

[144] Lapidous, *supra* note 98.

[145] Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015).

[146] *Id.*

ultimately viewed them at best as compelling policy arguments.[147] To him, there was no legal argument that would allow the Court to rule that individual states must extend the fundamental right to marry to same-sex couples.[148]

Chief Justice Roberts further argued that by engaging in judicial policymaking, the Court effectively stepped outside of the Constitution's purview and into a state's ability to deem what is the best definition of marriage within its jurisdiction.[149] He was emphatic that his main issue regarding the majority was:

> [N]ot about whether, in [his] judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in [this] democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law.[150]

Chief Justice Roberts did not contest that the Constitution works to protect an individual's right to marry, which thus "requires [s]tates to apply their marriage laws equally."[151] Instead, the next section of his dissent is dedicated to discussion of who should be allowed to determine the definition of marriage that the Constitution refers to.[152] His historical overview of the concept of marriage differed greatly from Justice Kennedy's, who chose to focus instead on how the concept of marriage has evolved throughout history.[153] According to Chief Justice Roberts, the historical concept of marriage remained centered around opposite-sex couples for a large part of history due to the inherent need that humans have to procreate and raise their progeny:

> This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political

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[147] *Id.*
[148] *Id.*
[149] *Id.* at 2612.
[150] *Id.*
[151] Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015).
[152] *Id.*
[153] *Id.* at 2612–13.

> movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things 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.[154]

By aligning the core American concept of marriage with this traditional meaning, Chief Justice Roberts restricted the scope of the Constitution's protection to heterosexual couples. Using this perspective, he therefore argued that SCOTUS had no standing to address the issue at hand.

Chief Justice Roberts then moved on to discuss the Due Process Clause and the four principles and traditions[155] that Justice Kennedy had identified in his opinion.[156] According to Chief Justice Roberts, "the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking . . . the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society."[157] By relying on his interpretation that the Constitution's treatment of marriage as a fundamental right only extends to heterosexual couples, Chief Justice Roberts denounced the Court's use of the Due Process Clause as an abuse of judicial power.[158] He referenced *Dred Scott v. Sandford*[159] in an attempt to

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[154] *Id.* at 2613.

[155] *Id*. at 2598–99 ("Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based on history, tradition and other constitutional liberties inherent in this intimate bond . . . This analysis compels the conclusion that same-sex couples may exercise the right to marry").

[156] Obergefell v. Hodges, 135 S. Ct. 2584, 2615–16 (2015).

[157] *Id.* at 2616.

[158] *Id*.

> Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges 'exercise the utmost care' in identifying implied fundamental rights, "lest the liberty protected by the Due Process

show where the Court had previously erred in ruling while relying on substantive due process.[160] From here, he detailed the *Lochner*-ian era as a further example of what happens when the Court disregards the Constitution in favor of following its own judgments in regards to policy.[161] Chief Justice Roberts noted that "this doctrinal background" is not mentioned within the majority opinion, which perhaps demonstrated the majority's unwillingness to address the possibility that "[the Court's] aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*."[162]

Chief Justice Roberts next examined separate cases and laws that the majority opinion used to address how the definition of marriage has been altered in American legal history, and once more tied it into his opinion that there is no constitutional bearing to the right for

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> Clause be subtly transformed into the policy preferences of the Members of this Court."

Id. (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

[159] 60 U.S. 393 (1857). Many of us have learned about the famous Dred Scott case in middle school and high school U.S. History classes. The Missouri Compromise was a law devised by Congress to equally divide the states into free and slave states as a means to de-escalate rising tensions between pro-slavery and anti-slavery groups. *See* Eric Foner & John A. Garraty, *The Reader's Companion to American History–Missouri Compromise*, HISTORY.COM, http://www.history.com/topics/missouri-compromise (last visited Jan. 16, 2017). Dred Scott, a slave who lived in the slave state Missouri, sued his new owner Sanford for freedom on the basis that he had been living in a free state for an extended period of time before returning to Missouri with his then-owner and being sold to Sanford. *Scott*, 60 U.S. at 400. In this case, SCOTUS ruled that slaves were not considered citizens underneath the US Constitution, but merely property. *Id.* at 407. This decision would later be overturned by the Fourteenth Amendment, which grants citizenship to anyone who is born in the United States, regardless of color. *See* U.S. CONST. amend. XIV, *supra* note 106.

[160] *Obergefell*, 135 S. Ct. at 2616. "[In *Dred Scott v. Sandford*,] the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so." *Id.*

[161] *Id.* at 2617 ("In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty . . . By empowering judges to elevate their own policy judgments to the status of constitutionally protected 'liberty,' the *Lochner* line of cases left 'no alternative to regarding the court as a . . . legislative chamber.'") (quoting L. Hand, The Bill of Rights 42 (1958)).

[162] Obergefell v. Hodges, 135 S. Ct. 2584, 2618–19 (2015).

same-sex marriage.[163] He tackled the privacy cases cited in the majority opinion within this portion of his dissent and found that they "provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits."[164] Regarding the majority's use of the Due Process Clause, Chief Justice Roberts once more accused the majority of consorting with "judicial policymaking" and concluded that its use in *Obergefell* creates a dangerous precedent for the current SCOTUS that implicitly guarantees its ability to rule on cases based on its own beliefs, rather than history and law.[165]

The next prong of Chief Justice Robert's dissent briefly focused on the majority opinion's use of the Equal Protection Clause.[166] In that prong, he described Justice Kennedy's discussion of the Equal Protection Clause as "difficult to follow," and felt as if the majority did not "seriously engage with this claim."[167] While Chief Justice

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[163] *Id.* at 2619 ("In short, the 'right to marry' cases stand for the important but limited proposition that particular restrictions on access to marriage as *traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here.).

[164] *Id.* at 2620.

[165] *Id.* at 2622–23.

> The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policy making, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now.

Id.

[166] *Id.* at 2623.

[167] Obergefell v. Hodges, 135 S. Ct. 2584, 2623 (2015).

> The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous

Roberts admitted that the majority's use of the Clause could have created a more appealing argument to him if addressed in a different manner, he felt, overall, that the Court erred in bringing up the Clause in the first place.[168]

Chief Justice Roberts wrapped up his dissent with an expression of disappointment over the Court's actions. He once more reiterated his viewpoint that "[b]y deciding this question under the Constitution, the Court removes it from the realm of democratic decision."[169] To Chief Justice Roberts, it is obvious that the issue of same-sex marriage should have been left to the individual state legislatures to figure out, and the Court had no right in involving itself in a matter that has no Constitutional standing.[170] He argued that in pressuring the Court to resolve this issue, proponents of same-sex marriage have overall hurt their cause further.[171] He concluded:

> If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision.

> violation of the canon against unnecessarily resolving constitutional questions.

Id. (citations omitted).

[168] *Id.* at 2623–24.

> It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage . . . petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

Id.

[169] *Id.* at 2625.

[170] *Id.*

[171] *Id.*

> Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Id.

> Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.[172]

2. Justice Antonin Scalia

You're not a poet,
Kennedy. And by the way,
Democracy's dead.[173]

Justice Scalia's dissent, joined by Justice Thomas, is centered on his belief that the *Obergefell* majority opinion threatens American democracy by allowing a majority ruling of the Court "to create 'liberties' that the Constitution and its Amendments neglect to mention."[174] The basis of his dissent, while similar to Chief Justice Roberts', is different in that he focuses purely on the Constitutional merit of the matter.[175] As he specifically stated, "it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me."[176]

He moved onwards to his belief that before the Court decided to rule on the matter, the ongoing public debate regarding same-sex marriage truly represented the way that American democracy was meant to function.[177] In his opinion, the majority of the Court intervened by imposing their view over opinions and beliefs that

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[172] *Id.* at 2626.

[173] Lapidous, *supra* note 98.

[174] Obergefell v. Hodges, 135 S. Ct. 2584, 2627 (2015). "This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves." *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.* "Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work." *Id.*

were already being individually addressed by the States.[178] Chief Justice Roberts and Justice Scalia both agreed that the Court's majority take on a legislative power over the matter, essentially re-interpreting the Fourteenth Amendment into a rule that best fit their needs.[179] Justice Scalia also noted that the members of SCOTUS represent an extremely limited sub-section of America and questioned whether such a small group should make policy judgments on behalf of the American people.[180]

Justice Scalia also held issue with the way in which Justice Kennedy wrote the majority opinion, and strongly criticized how the majority opinion was laid out:

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[178] *Id.* at 2628. "[R]ather than focusing on *the People's* understanding of 'liberty'—at the time of ratification or even today—the majority focuses on four 'principles and traditions' that, *in the majority's view*, prohibit States from defining marriage as an institution consisting of one man and one woman." *Id.*

[179] *Id.* at 2629.

> This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Id.

[180] Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015).

> Judges are selected precisely for their skills as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. . . . The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

Id.

> The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. Of course the opinion's showy profundities are often profoundly incoherent.[181]

His derision[182] for Justice Kennedy's writing and analysis in *Obergefell* was visible throughout his dissent, especially so in his belief that Justice Kennedy displayed logical inconsistencies in this ruling when compared to his written opinion from *United States v. Windsor*.[183] With this, Justice Scalia warned that the States are robbed of their right to democracy every time that the Court "takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court . . . ."[184]

3. Justice Clarence Thomas

"Liberty" – this word,
I do not think Locke means what
You think it means. Sigh.[185]

Justice Thomas, who was also joined by Justice Scalia, found that his concerns largely revolved around his belief that Justice Kennedy's majority opinion distorted the democratic process through

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[181] *Id.* at 2630 (footnote omitted).

[182] *See* Maxwell Tani, *Scalia just dissed Anthony Kennedy over the Supreme Court's marriage ruling*, BUSINESS INSIDER (June 26, 2015, 10:59 AM), http://www.businessinsider.com/scalia-just-dissed-anthony-kennedy-over-gay-marriage-2015-6.

[183] *See* United States v. Windsor, 133 S. Ct. 2675 (2013). *See also* Obergefell, 1235 S. Ct. at 2627–28. The two statements written by Justice Kennedy and questioned by Justice Scalia are: (1) "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." (2) "[T]he Federal Government, through our history, has deferred to state-law policy decision with respect to domestic relations." *Id.* (quoting *Windsor*, 133 S. Ct. at 2691).

[184] Obergefell, 135 S. Ct. at 2631.

[185] Lapidous, *supra* note 98.

its revision of "the [Fourteenth Amendment] Due Process Clause as a font of substantive rights."[186] He argued that in order for petitioners to have access to the protection of the Due Process Clause, they "must first identify a deprivation of 'life, liberty, or property.'"[187] In trying to identify whether this deprivation had occurred, Justice Thomas reached back to some of the earliest understood definitions of "liberty" within the Due Process Clauses.[188] By relying on these historically American traditions, Justice Thomas further argued that the identified liberty referenced to in the Due Process Clause cannot be accessed by same-sex couples seeking legalized marriage as "liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement."[189]

To further establish the original definition of "liberty," Justice Thomas presented a synopsis of philosopher John Locke's perspective on civil liberty and how it has influenced modern concepts.[190] By discussing the 18th-century "founding-era idea of civil liberty", Justice Thomas endeavored to show that the petitioners in *Obergefell* had not been deprived of any such liberties that would allow the Court to rule in their favor.[191] He argued that, "[a]s a

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[186] Obergefell v. Hodges, 135 S. Ct. 2584, 2631 (2015).

[187] *Id.* at 2632.

[188] *Id.*

> As used in the Due Process Clauses, "liberty" most likely refers to "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Id. Justice Thomas also finds historical background for the Due Process Clauses within the Magna Carta, which provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the land." *Id.*

[189] *Id.* at 2634.

[190] *Id.* "Upon consenting to that order, men obtained civil liberty, or the freedom 'to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it.'" *Id.* (quoting J. Locke, Second Treatise of Civil Government, §22, at 13).

[191] *Id.* at 2635.

philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment."[192]

Justice Thomas further bemoaned the impact that the majority's opinion would have on religious liberty within America.[193] He accused the majority of not paying enough attention to the potential side-effects that their ruling may have on religious organizations, even though Justice Kennedy did address religious freedom within his opinion.[194] Justice Thomas concluded his dissent by questioning the majority's logic that "its decision will advance the 'dignity' of same-sex couples."[195] The idea that a person's dignity can be stripped away by the government's action (or inaction) rankled Justice Thomas, who claimed:

> Slaves did not lose their dignity . . . because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.[196]

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[192] Obergefell v. Hodges, 135 S. Ct. 2584, 2637 (2015).

[193] *Id*. at 2638–39.

> Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh-Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.* at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

Id. at *2638.*

[194] *See supra* Part II.c and accompanying notes 54–70.

[195] Obergefell, 135 S. Ct. at 2639.

[196] *Id*.

The dual questions of dignity and liberty therefore led Justice Thomas to conclude that the majority misapplied the Fourteenth Amendment Due Process Clause to the *Obergefell* situation.[197]

4. Justice Samuel A. Alito

"Happiness is not
the point of marriage, fools. It's
BABIES," he whispered.[198]

For Justice Alito, the crux of the matter also rested within whether the Constitution's use of the word "liberty" encompassed and legalized the right to same-sex marriage.[199] Alito noted that America "was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings."[200] Justice Alito then referenced *Washington v. Glucksberg*[201] where the Court had previously determined that the Due Process Clause ultimately encompassed rights with an American historical and traditional context.[202] In Justice Alito's opinion, "the right to same-sex marriage lacks deep roots," which thus explains his reasoning that the Due Process Clause did not apply in this situation.[203] In further explaining his opinion, Justice Alito discussed the traditional role of marriage beyond what it is seen as today: "This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate."[204]

Justice Alito thus opined that the States that still recognized this "traditional understanding" of marriage should not have their

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[197] *Id.*
[198] Lapidous, *supra* note 98.
[199] Obergefell v. Hodges, 135 S. Ct. 2584, 2640 (2015).
[200] *Id.*
[201] 521 U.S. 702, 720–21 (1997).
[202] *Obergefell*, 135 S. Ct. at 2640.
[203] *Id.* at 2640.
[204] *Id* at 2641.

definition forcibly altered by the Court through this ruling.[205] He argued that *Obergefell* not only took this constitutional right away from the people in these States but also "will be used to vilify Americans who are unwilling to assent to the new orthodoxy."[206] Justice Alito concluded similarly to the other dissenting justices in expressing his worry that the Court had grossly overstepped their own abilities and taken on legislative powers of constitutional interpretation that did not belong to them.[207]

VI. CONCLUSION: OBERGEFELL'S IMPACT ON FMLA AND SAME-SEX RIGHTS

Obergefell came two years after the SCOTUS' landmark *Windsor* decision, which determined that the federal DOMA signed into

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[205] Obergefell v. Hodges, 135 S. Ct. 2584, 2641–42 (2015).

> While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

Id.

[206] *Id.* at 2642. "I assume that those who cling to old beliefs 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." *Id*. at 2642–43.

[207] *Id.* at 2643.

> Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Id.

legislature by President Bill Clinton constitutionally discriminated against same-sex couples by ignoring their rights via the Equal Protection and Due Process Clauses.[208] *Windsor* was instrumental in creating the climate for *Obergefell*, as it addressed only a portion of the same-sex marriage issue in America. It provided the federal solution, whereas *Obergefell* addressed the State issue and created a solution that essentially dissolved State DOMAS[209] so that same-sex marriage could exist as an equal, legally recognized partnership within the United States. The divisive majority opinion[210] will likely be dissected and squabbled over for years to come. Regardless, it is hard to deny the likelihood that the ruling will now open the way for married same-sex couples to push for rights that their opposite-sex counterparts have had legally guaranteed to them from the beginning, such as the ability to adopt children underneath the same name, to take advantage of federal and state programs tailored for married couples, and to issue wills and create estate planning that would recognize their partner as a spouse.

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[208] *See supra* Part II.b–c. and accompanying notes 45–70.

[209] *See supra* Part II.c.ii. and accompanying notes 62–70.

[210] *See supra* Part V.a. and accompanying notes 98–106. *See also* Pamela S. Karlan, *Article: The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage*, 2010 SUP. CT. REV. 159, 212 (2010) (explaining the past significance of the Court's ruling on marriage rights in substantive due process history, which directly applies to *Obergefell*)

> The marriage cases raise anew the recurring question of when the Court should intervene to declare that a contested social or political issue has been resolved as a matter of constitutional law, and how it should deal with the losing side. Few institutions are more deeply rooted in the popular consciousness than marriage. That is why it always appears, regardless of the Justice writing the opinion, in the list of fundamental rights protected by the substantive due process principle. But in asking what that tradition means today, the Court is being called upon to police an "evolving boundary" between marriage as it used to be and marriage as it is becoming . . . . How the Justices answer the marriage question may influence the Court's political and moral capital with future generations in the way that the Court's substantive due process decisions in *Dred Scott v. Sandford*, *Loving v. Virginia*, and *Roe v. Wade* have done for previous generations.

Id.

When *Windsor* was decided in 2013, it was followed by a "flood of litigation filed by same-sex couples . . . in states across the country—some seeking recognition of marriages performed in other jurisdictions, and others seeking the right to marry in their states."[211] It seems likely that *Obergefell* will have similar results from married same-sex couples who will be looking for specific definitions on what their new rights entail. After all, "many of those who do marry still do not have the full recognition of their marriage that different-sex spouses take for granted."[212]

One could argue that a federally-run program such as the FMLA would have no longer been inaccessible to same-sex couples after the *Windsor* ruling took place. And this perhaps would have been the case if the federal DOMA was the only barrier that stood in the way of a same-sex couple's right to legally marry. However, the existence of state DOMAs after the fact further complicated how both state and federal governments could classify same-sex couples.[213] Even though the FMLA is specially written with the word "spouse" to preclude gender and sexual orientation bias,[214] it cannot come into play if the state that a same-sex couple resides in does not recognize them as legally married.[215] Before *Obergefell*, same-sex couples in states such as Michigan, Kentucky, Ohio, and Tennessee might not have been able to take legally-mandated time off of work to help care for their ill spouses because they did not fit into their state's accepted definition of what a "spouse" is.[216] By taking down state DOMAs, SCOTUS essentially allowed both federal and state laws pertaining to marriage to be fairly implemented throughout the United States.[217] Author Deborah A. Widiss notes that acknowledging the implicit

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[211] Arlene Zarembka, *Feature, Advising Same-Sex Couples After Obergefell and Windsor*, 32 No. 4 GPSOLO 34, 35 (July/August 2015).

[212] *Id.*

[213] *See* Widiss, *supra* note 66 (discussing the three different tiers that married same-sex couples were sorted into after *Windsor*).

[214] *See supra* Part III and accompanying notes 71–77.

[215] *See FREQUENTLY ASKED QUESTIONS: FMLA Notice of Proposed Rulemaking*, *supra* note 76.

[216] *Id.*

[217] Widiss, *supra* note 66, at 45 ("If same-sex couples were permitted to marry in all states, the problem of derivative
federal discrimination would disappear entirely.").

influence that federal and state laws have on one another is important to the currently evolving legal situation:

> [F]ederal law makes judgments about how to fairly distribute and apportion government resources, benefits, and obligations among various family structures, and it uses marriage as a proxy for identifying couples who have made a long-term commitment to each other, who may well be raising children together, and who have integrated their finances. Same-sex (and different-sex) couples in all states form these kinds of relationships, and the federal government should strive to treat such couples, whatever their state of residence, relatively equally.[218]

Now that both federal and state DOMAs have been addressed and dissolved by *Windsor* and *Obergefell*, respectively, proponents of same-sex marriage will need to examine federal and state legislature for their definitions of "spouse" and "marriage" and how they might change now that the ruling has taken place. Already there have been attempts by certain state actors and governments to block same-sex marriage from functioning normally within their respective states.[219] The FMLA might serve as an excellent point of entry that same-sex couples may use to gain more equal treatment within states that, until recently, only recognized the legality of marriage between opposite-sex couples. The FMLA is known as a federal act that was purposefully written to remove gender from the equation,[220] which may prove beneficial to lawyers and legislators arguing on behalf of same-sex couples.

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[218] Widiss, *supra* note 66, at 48.

[219] Jenkins, *supra* note 137 (detailing Kentucky County Clerk Kim Davis's refusal to issue same-sex marriage licenses). *See generally* Andrew Wolfson & Mike Wynn *Kim Davis isn't the only one refusing same-sex marriage*, USATODAY.COM (Sep. 05, 2015), http://www.usatoday.com/story/news/nation-now/2015/09/05/kentucky-clerk-same-sex-marriage-license-religious-freedom/71770124/ (noting judges and courts refusing to issue marriage licenses in Oregon, Texas, Alabama, and North Carolina).

[220] Bell & Miller, *supra* note 73, at 279 ("By enacting the FMLA, Congress took a crucial step forward on the evolving path towards gender equality, and sought to play their part in society's struggle to eradicate certain socially engineered gender stereotypes about women and men that have persisted throughout history.").

The resolution of *Obergefell* signals a new era in marriage equality rights that America has not previously seen before. For the first time in U.S. History, same-sex couples have been granted the legal right of marriage and are allowed to partake in a range of benefits that a heterosexual married couple may take for granted. This radical change will have effects on American legislation for years to come, as “same-sex marriage can serve as a natural experiment to pull apart the [opposite-sex] marriage equation to better understand the relative significance of each factor in how couples make decisions.”[221] But in celebrating this monumental win for same-sex equality rights, one must remember all the subsequent legal battles soon to take place. At the very least, same-sex couples can take comfort in the fact that their FMLA right to take protected, unpaid time off of work, and to stick to their marriage vows of “in sickness and in health,” is further backed by the law.

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[221] Deborah A. Widiss, *Article: Reconfiguring Sex, Gender, and the Law of Marriage*, 50 FAM. CT. REV. 205, 209 (April 2012).