

A REEXAMINATION OF *OBERGEFELL*: PUTTING “PRUDENCE” BACK IN JURISPRUDENCE

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Have you not read that he who made them from the beginning made them male and female, and said, “For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one?”¹

INTRODUCTION

Plato, speaking through Socrates, once said, “[a]nd of course someone who is mad or deranged attempts to rule over gods as well as men, and imagines himself capable of doing so.”² A fairy tale once put it, in the words of a child, “[b]ut [the Emperor] hasn’t got anything on.”³ Speaking of the Supreme Court’s decision to legalize same-sex marriage in all fifty states, Chief Justice Roberts once remarked, “[j]ust who do we think we are?”⁴

In 2015, the Supreme Court legalized same-sex marriage in *Obergefell v. Hodges*, claiming that the United States Constitution ensures “liberty to all within its reach . . . to define and express their identity.”⁵ The Court goes on to explain the history of marriage over time, described as “new insights” that “have strengthened, not weakened, the institution of marriage.”⁶ After this, the Court claims that the Fourteenth Amendment forms a basis for a right to same-sex marriage because of the logical conclusion of the protection of “liberty,” even though at the time of enactment of the Fourteenth Amendment there was

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1. *Matthew* 19:4–5 (Revised Standard Version, Catholic Edition).
2. PLATO, *THE REPUBLIC* Bk. IX, 573c (G. R. F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press, 3d prtg. 2018).
3. HANS CHRISTIAN ANDERSEN, *THE EMPEROR’S NEW CLOTHES* (Jean Hersholt trans., The Limited Editions Club 1952).
4. *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015).
5. *Id.* at 652.
6. *Id.* at 655–63.

no such right recognized.⁷ The Court cites *Loving v. Virginia*, among other cases, as an example of the longstanding right to marriage.⁸

In the 2022 case, *Dobbs v. Jackson Women's Health Org.*, ruling on a similar substantive due process issue regarding an abortion ban in Mississippi,⁹ the majority overturned the infamous *Roe v. Wade* case saying, “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”¹⁰ Nevertheless, both Justice Thomas’s concurrence and the dissent identify correctly that, if the rationale of *Roe* is overturned in this instance, then the logical conclusion would be that these other cases, including *Obergefell*, would be subject to reexamination by the Court. Justice Thomas’s concurrence suggests that the whole of Fourteenth Amendment jurisprudence requires a reexamination.¹¹ The dissent likewise realizes the danger posed to other substantive due process rights established by the Court over the years, including the right to same-sex marriage in *Obergefell*.¹²

This Note will examine whether same-sex marriage is, in fact, protected under the Fourteenth Amendment. It will examine the history of both substantive due process and equal protection jurisprudence. First, it will consider the matter of same-sex marriage in this jurisprudential context with respect to the Court’s own logic, and then it will consider the matter according to the nature of law itself. This latter consideration will be in line with the doctrine of the natural law and Catholic social teaching, but it will also examine the matter on philosophical and psychological grounds, as well as the dissenters’ use of Oliver Wendell Holmes. Finally, following from these considerations, this Note will conclude with proposed solutions.

I. FOURTEENTH AMENDMENT JURISPRUDENCE

A. *History of Substantive Due Process*

An analysis of *Obergefell* requires, first, an examination of the history of substantive due process. The Court’s development of substantive due process began in earnest in the twentieth century. In the infamous *Lochner v. New York* decision, the Court found that a New York labor law “necessarily interfere[d]

7. *Id.* at 672.

8. *Id.* at 664.

9. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 230 (2022).

10. *Id.* at 290.

11. *Id.* at 332 (Thomas, J., concurring).

12. *Id.* at 362–63 (Breyer, J., dissenting).

with the right of contract between the employer and employees,” a right the Court claimed was guaranteed under the Fourteenth Amendment.¹³ There, the Court said, “[t]he right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.”¹⁴ Thus, the labor law could not stand.

In his dissent, Justice Oliver Wendell Holmes, Jr., said that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire,”¹⁵ but rather “[i]t is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”¹⁶ Holmes warned of the perversion of the term “liberty” in the Fourteenth Amendment “when it is held to prevent the natural outcome of a dominant opinion,” as it just so happened in this case.¹⁷ Holmes says that “liberty” should not be used to prevent such an outcome “unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”¹⁸ Holmes’s dissent, though rooted in a positivistic understanding of the law,¹⁹ warned of what was to come of the Court’s new turn on Fourteenth Amendment jurisprudence.

Lochner, however, was overturned by the Court in *West Coast Hotel Co. v. Parrish*, where the Court reexamined the *Lochner* Court’s economic conception of Due Process.²⁰ There, the Court said, “[t]he Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty.”²¹ Moreover, it stated, in the context of the Great Depression, “that freedom of contract is a qualified, and not an absolute, right.”²² It is in the province of the states to use their “law-making power to

13. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

14. *Id.*

15. *Id.* at 75 (Holmes, J., dissenting).

16. *Id.* at 76.

17. *Id.*

18. *Id.*

19. *See infra*, Part IV.e.

20. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

21. *Id.* at 391.

22. *Id.* at 392.

correct the abuse which springs from their selfish disregard of the public interest.”²³ Therefore, the Court found the minimum wage law constitutional.²⁴

Almost thirty years later, in *Griswold v. Connecticut*, a new theory of Due Process arose. In *Griswold*, the Court asserted that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”²⁵ This is to say that there are rights guaranteed by the Constitution, which are not specifically guaranteed, such that by deconstructing a core value embodied by an amendment (an “emanation”) one can see that there are other rights implicated under such a specific guarantee (the “penumbras”).²⁶ These rights apply to the states through the Fourteenth Amendment’s guarantee of Due Process.²⁷ Under this theory, the Court in *Griswold* used the First, Third, Fourth, Fifth, and Ninth Amendments to illustrate that a right to privacy is implicated by the specific guarantees of the Bill of Rights.²⁸ Accordingly, the Court found that the statute prohibiting the use of contraception by married couples was unconstitutional.²⁹

While the Court had limited this decision as it applied to married couples, it quickly extended it in *Eisenstadt v. Baird* because “the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons,” reasoning that “the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.”³⁰ In *Roe v. Wade*, the Court expounded further upon this concept of substantive due process while extending constitutional protection to abortion.³¹ When further considering rights, the Court in *Moore v. City of East Cleveland* concerned itself with whether rights were “deeply rooted in this Nation’s history and tradition.”³² While this was grounds for the Court to grant a right to abortion in *Roe*, nevertheless the Court declined in *Bowers v. Hardwick* to extend a right to consensual sodomy, stating to the contrary that “[p]roscriptions against that conduct have ancient roots.”³³ There, the Court

23. *Id.* at 400.

24. *Id.*

25. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

26. *Id.*

27. *Id.* at 481–82.

28. *Id.* at 484.

29. *Id.* at 485–86.

30. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

31. *See Roe v. Wade*, 410 U.S. 113 (1973).

32. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

33. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

declined “to take a more expansive view” of substantive due process that would extend to conduct that, in the past, was widely regulated without issue.³⁴

This quickly changed with the Court’s decision in *Lawrence v. Texas*. In *Lawrence*, the majority overruled *Bowers* for the Court’s failure “to appreciate the extent of the liberty at stake” because “penalties and purposes [of the sodomy laws] . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.”³⁵ The Court was concerned that the laws sought “to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”³⁶ Accordingly, the Court ruled that the State has no interest in regulating the boundaries of a sexual relationship between two consenting adults because of substantive due process guarantees.³⁷ Interestingly, the Court said:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.³⁸

In other words, the alleged liberty interest in homosexual sodomy outweighs even the historical fact that neither at the time of the Framing nor at the time of Reconstruction did the legislators or the people consider it to be a fundamental right. This is, according to the Court, the logical conclusion of due process.

B. History of Equal Protection

Because of “[t]he synergy between the two protections,”³⁹ the other component necessary to analyze concerning *Obergefell* is the Court’s equal

34. *Id.* at 194.

35. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

36. *Id.*

37. *Id.* at 578.

38. *Id.* at 578–79; *see also id.* at 567–73 (describing the history of state sodomy laws).

39. *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015).

protection doctrine, which began to develop at the same time as the Court's substantive due process doctrine. Concerning marriage, this began to take form with *Loving v. Virginia*, where the Court ruled that Virginia's laws against miscegenation⁴⁰ were "invidious[ly]" discriminatory under the meaning of the Equal Protection Clause of the Fourteenth Amendment.⁴¹ Interestingly, the Court also stated that the laws were in violation of the Due Process Clause in that they deprived the petitioners of the "freedom to marry[,]" a freedom characterized as "fundamental to our very existence and survival."⁴² Thus, the right to marry under this Equal Protection analysis seemed to stem from the fact that marriage was central to procreation and preservation of the human race.

Along the same line of reasoning, the Court in *Zablocki v. Redhail* ruled that a law prohibiting those behind on child support payments from marrying was unconstitutional because "the right to marry is of fundamental importance" and "the classification at issue . . . significantly interfere[d] with the exercise of that right."⁴³ There, the Court said that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."⁴⁴ Accordingly, the Court applied strict scrutiny, which was a burden the State could not carry.⁴⁵

With *Romer v. Evans*, the Court began to roll back the *Bowers* standard⁴⁶ by means of Equal Protection, asserting that Colorado's attempt to roll back protected status for homosexuals "put [them] in a solitary class with respect to transactions and relations in both the private and governmental spheres."⁴⁷ This classification of homosexuals did not survive even rational basis review because it "impos[ed] a broad and undifferentiated disability on a single named group[.]" and was so overbroad that the Court deemed it "inexplicable by anything but animus toward the class it affects."⁴⁸ The Court, there, found unconvincing Colorado's argument that the state constitutional amendment was designed to protect citizens' freedom of association by ensuring that "landlords or employers who have personal or religious objections to

40. That is, interracial marriage.

41. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

42. *Id.* at 12.

43. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

44. *Id.* at 386.

45. *See id.* at 388–92.

46. *See supra* Part II.a., pp. 5–6; *see also* *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

47. *Romer v. Evans*, 517 U.S. 620, 627 (1996).

48. *Id.* at 632.

homosexuality” would not be forced to provide housing that they otherwise would be required to provide under the protected status of homosexuals in the state.⁴⁹

In his dissenting opinion in *Romer*, Justice Scalia pointed out some issues with the majority’s decision. He characterized the attempted amendment, not as motivated by animus against homosexuals, but as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”⁵⁰ Scalia, contrary to the majority, found that there very easily was a rational basis upon which to premise the revocation of protected status for homosexuals, namely that homosexual conduct has always been prohibited since the founding of this Nation.⁵¹ He asserts that it is not due to animus against homosexual persons, but rather against homosexual conduct, that the amendment was attempted:

Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.⁵²

In other words, Scalia is distinguishing the act from the actor. The logical conclusion of the majority’s line of reasoning is that prohibitions against other types of conduct would constitute “animus” against the class affected. Moreover, the implications of this for homosexuality itself, Scalia warned, could expand very easily from “merely a grudging social toleration” to “full social acceptance” via the vocal minority of gay rights activists.⁵³ Scalia’s words proved prophetic.⁵⁴

While Scalia himself declines to engage in commentary on the competing and opposed mores regarding homosexuality, he states that the majority did

49. *Id.* at 635.

50. *Id.* at 636.

51. *Id.* at 640.

52. *Id.* at 644.

53. *Id.* at 646.

54. See Matthew Impelli, *Suit Dismissed Against Baker Who Wouldn’t Make Cake for Transgender Woman*, NEWSWEEK (Oct. 8, 2024, at 9:29 ET), <https://www.newsweek.com/transgender-lawsuit-colorado-baker-dismissed-1965994> (on file with the Ave Maria Law Review) (noting that Masterpiece Cakeshop has been embroiled in litigation with LGBTQ+ activists since 2017).

just that, “not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes.”⁵⁵ The provision “does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment,” and, yet, the majority found it to be motivated by an unlawful “animus.”⁵⁶ Therefore, he says, “[s]triking it down is an act, not of judicial judgment, but of political will,” and thus, he dissents.⁵⁷

II. OBERGEFELL ITSELF

A. Treatment of History

The majority in *Obergefell* begins its analysis by surveying history, which “reveal[s] the transcendent importance of marriage.”⁵⁸ The Court calls marriage “sacred” and a vehicle for “unique fulfillment to those who find meaning in the secular realm.”⁵⁹ The Court, likewise, admits that the historical understanding of marriage throughout the centuries was “based on the understanding that marriage is a union between two persons of the opposite sex.”⁶⁰ The Court, however, agreed with the petitioners in this case “that these cases cannot end there,” but rather it says that marital status should be granted to homosexuals because they “seek it for themselves because of their respect—and need—for its privileges and responsibilities,” citing to “their immutable nature” as dictating the extension of marriage to those of the same sex.⁶¹

To support this view, the Court cites that marriage’s history “is one of both continuity and change,” using language of evolution to describe the changes to the institution “even as confined to opposite-sex relations.”⁶² Marriage, once “an arrangement by the couple’s parents based on political, religious, and financial concerns,” was at the time of the Founding “understood to be a voluntary contract between a man and a woman.”⁶³ Further, the law of coverture, which treated “a married man and woman . . . as a single, male-dominated legal entity,” has since been abrogated when “society began to

55. *Romer*, 517 U.S. at 652.

56. *Id.* at 653.

57. *Id.*

58. *Obergefell v. Hodges*, 576 U.S. 644, 656 (2015).

59. *Id.* at 656–57.

60. *Id.* at 657.

61. *Id.* at 657–58.

62. *Id.* at 659.

63. *Id.* at 659–60.

understand that women have their own equal dignity.”⁶⁴ The Court says that these “were not mere superficial changes,” but rather “worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.”⁶⁵ The Court unflinchingly asserts, “[t]hese new insights have strengthened, not weakened, the institution of marriage.”⁶⁶

The Court notes the same “dynamic” in the shifting views on homosexuality over the years.⁶⁷ Now, homosexuality is considered by psychologists “a normal expression of human sexuality and immutable.”⁶⁸ To illustrate a similar legal trend, the Court looks to cases like *Romer* and *Lawrence*.⁶⁹ The Court then notes the many legal challenges to marriage laws restricting marriage as between one man and one woman over the years since those decisions.⁷⁰

B. Treatment of History of Marriage Under the Constitution

The Court begins the legal analysis by pointing out that the Fourteenth Amendment protects “liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”⁷¹ The Court further cautions that the list of rights protected by the Fourteenth Amendment is not exhaustive because “[t]he 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.”⁷² It is because of this that “they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”⁷³ Thus, the Court concludes that it must revisit the constitutionality of longstanding “legal stricture” “[w]hen new insight reveals discord between” it and a constitutional guarantee.⁷⁴

64. *Id.* at 660.

65. *Id.* at 660.

66. *Id.* But see Valerie Schweizer, *Divorce: More than a Century of Change, 1900-2018*, BOWLING GREEN STATE UNIV. (Nov. 22, 2020), <https://www.bgsu.edu/ncfmr/resources/data/family-profiles/schweizer-divorce-century-change-1900-2018-fp-20-22.html> (on file with the Ave Maria Law Review) (pointing to the increase in divorce rates from 1% in 1900 to 21% in 2018).

67. *Obergefell*, 576 U.S. at 660.

68. *Id.* at 661–62.

69. *Id.*; see *supra* Part II.

70. *Obergefell*, 576 U.S. at 662–63.

71. *Id.* at 663.

72. *Id.* at 664.

73. *Id.*

74. *Id.*

The Court notes that cases like *Loving* and *Zablocki* (among others) demonstrate that the Constitution guarantees a right to marry.⁷⁵ It concedes that previous caselaw on “the right to marry presumed a relationship involving opposite-sex partners.”⁷⁶ But this, the Court asserts, is a matter of circumstance: “[t]he Court, like many institutions, has made assumptions defined by the world and time of which it is a part.”⁷⁷ The Court explains that there are four principles underlying why this right should be extended to same-sex couples.⁷⁸ Firstly, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy,” which is outlined in the *Loving* decision.⁷⁹ It is through the choice of marriage that “two persons together can find other freedoms, such as expression, intimacy, and spirituality,” which “is true for all persons, whatever their sexual orientation.”⁸⁰ Secondly, marriage “supports a two-person union unlike any other in its importance to the committed individuals,” which “offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”⁸¹

Thirdly, marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”⁸² Despite the biological impossibility of procreation between same-sex couples in the usual course of conjugal relations, the Court asserts “that gays and lesbians can create loving, supportive families.”⁸³ The Court continues, “[a]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State,” which it further qualifies by stating that “it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate.”⁸⁴ Fourthly, the Court cites Alexis de Tocqueville to state that “marriage is a keystone of our social order.”⁸⁵ Indeed, “there would be neither civilization nor progress” without marriage.⁸⁶ For “just as a couple vows to support each other, so does society pledge to

75. *Id.*

76. *Id.* at 665.

77. *Id.*

78. *Id.*

79. *Id.*; see *supra* Part II.b.

80. *Obergefell*, 576 U.S. at 666.

81. *Id.* at 666–67.

82. *Id.* at 667.

83. *Id.* at 668.

84. *Id.* at 669.

85. *Id.*

86. *Id.* (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

support the couple, offering symbolic recognition and material benefits to protect and nourish the union.”⁸⁷ Thus, “same-sex couples are denied the constellation of benefits that the States have linked to marriage,” which produces “instability” and “demeans gays and lesbians.”⁸⁸

The Court then turns to the arguments against extending the right to marry to same-sex couples. It notes that previous caselaw did not establish the right to marry in particular circumstances, but rather “each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”⁸⁹ The Court stresses, “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”⁹⁰ Nevertheless, it says, the enactment of laws excluding same-sex couples from marriage “is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”⁹¹ Therefore, the Court asserts that “same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”⁹²

To further explain this, the Court notes “[t]he synergy between” the Due Process and Equal Protection Clauses of the Constitution.⁹³ It points to the development of the legal equality between men and women in marriage as an example of the understanding specifically in the marital context.⁹⁴ Regarding these legal changes, the Court boldly asserts, “[t]his dynamic also applies to same-sex marriage.”⁹⁵ Thus, it concludes:

[t]hese considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court

87. *Obergefell*, 576 U.S. at 669.

88. *Id.* at 670.

89. *Id.* at 671.

90. *Id.* at 672.

91. *Id.*

92. *Id.*

93. *Id.* at 673.

94. *Id.* at 673–74.

95. *Id.* at 675.

now holds that same-sex couples may exercise the fundamental right to marry.⁹⁶

Therefore, the basis for the legal argument for the legalization of same-sex marriage under the Constitution seems to run thus: (1) the Constitution guarantees a fundamental right to marriage under the Due Process Clause and (2) denial of this right to same-sex couples is a violation of the guarantee of the Equal Protection Clause by discriminating against same-sex couples. The Court brushes aside arguments by the respondents that the issue ought to have been left to the states to decide because of the alleged violations of this right,⁹⁷ and then asserts that the states must recognize the legal marriages of same-sex couples.⁹⁸

III. PROBLEMS WITH *OBERGEFELL*

There are many problems with *Obergefell*, even internally. It relies on history to derive first principles of the natural institution of marriage.⁹⁹ But history is an account of particular events, which events may or may not be in accord with the way that marriage is by its very nature.¹⁰⁰ It therefore follows that one cannot assert that marriage can change by nature unless one also asserts that there is no such thing as nature. This is the problem with extending “the concept and lawful status of marriage . . . to two persons of the same sex,”¹⁰¹ that is, that it does not matter whether there is “intent to demean the revered idea and reality of marriage.”¹⁰² This is because the nature of marriage is, itself, unchangeable, even assuming *arguendo* that those in same-sex relationships have an “immutable nature”¹⁰³ concerning their sexuality. This Part will further critique the view of the majority in *Obergefell* to illustrate the need for the Court to overturn this decision.

96. *Id.* at 676.

97. *See id.* at 676–80.

98. *See id.* at 680–81.

99. *See id.* at 656–63.

100. CATECHISM OF THE CATHOLIC CHURCH ¶ 1603 (2d ed. 1997) (“The vocation to marriage is written in the very nature of man and woman as they came from the hand of the Creator. Marriage is not a purely human institution despite the many variations it may have undergone through the centuries in different cultures, social structures, and spiritual attitudes.” (emphasis added)).

101. *Obergefell*, 567 U.S. at 657.

102. *Id.* at 658.

103. *Id.*

A. Roberts's Dissent

Chief Justice Roberts, joined with Justices Scalia and Thomas, dissented from this opinion, warning that “this Court is not a legislature.”¹⁰⁴ He points out the legal insufficiency of the arguments that the petitioners made concerning the right to marriage, which “does not include a right to make a state change its definition of marriage,” nor can it be said that such a state’s legislation can “be called irrational.”¹⁰⁵ Rather, “our Constitution does not enact any one theory of marriage,” and the states are free to enact any theory of marriage they so choose.¹⁰⁶

But “the Court,” according to Justice Roberts, “takes the extraordinary step of ordering every State to license and recognize same-sex marriage,” and “[f]ive lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.”¹⁰⁷ He characterizes this decision as bringing about “a dramatic social change that is much more difficult to accept,” since it “is an act of will, not legal judgment,” which “has no basis in the Constitution or this Court’s precedent,” and it “openly rel[ies] on its desire to remake society according to its own ‘new insight’ into the ‘nature of injustice.’”¹⁰⁸ Moreover, “the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs.”¹⁰⁹ Justice Roberts poignantly asks, “[j]ust who do we think we are?”¹¹⁰ He points to Holmes’s dissent in *Lochner* in asserting that, because “the Constitution ‘is made for people of fundamentally differing views,’” there ought to be a “restrained conception of the judicial role.”¹¹¹

Justice Roberts’s historical analysis is quite pertinent to the point of this Note. He points out, “[t]his universal definition of marriage as the union of a man and a woman is no historical coincidence.”¹¹² He states that marriage “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

104. *Id.* at 686.

105. *Id.*

106. *Id.* at 686–87.

107. *Id.* at 687.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (quoting *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting)).

112. *Id.* at 689.

conditions of a *lifelong relationship*.”¹¹³ The implication is that marriage is a *natural institution* whereby children are *conceived and raised* in a loving home. Marriage indeed involves the spouses loving one another, but there is a naturally ordered reproductive element to the institution itself: “[t]he human race must procreate to survive.”¹¹⁴ He reasons:

[p]rocreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.¹¹⁵

Justice Roberts goes on to speak of the “respected status and material benefits,” which the majority had alluded to in its decision, saying that the entire purpose of this has always been to “encourage[] men and women to conduct sexual relations within marriage rather than without.”¹¹⁶ In point of fact, “[t]his singular understanding of marriage has prevailed in the United States throughout our history.”¹¹⁷ He even goes through this longstanding traditional understanding throughout this Nation’s history.¹¹⁸ Developments in the understanding of marriage in the Court’s jurisprudence, as the majority characterizes as “deep transformations,” Justice Roberts points out, “did not, however, work any transformation in the core structure of marriage as the union between a man and a woman.”¹¹⁹

Regarding the legal arguments under the Fourteenth Amendment jurisprudence, Justice Roberts likewise takes issue with the reasoning of the majority. He states that, regarding the declaration of fundamental rights, there is “need for restraint in administering the strong medicine of substantive due process.”¹²⁰ He notes, “[o]ur precedents have required that implied fundamental rights be ‘objectively, deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty, such that neither

113. *Id.* (emphasis added).

114. *Id.*

115. *Id.*

116. *Id.* at 689–90.

117. *Id.* at 690.

118. *See id.* at 690–91.

119. *Id.* at 692.

120. *Id.* at 695.

liberty nor justice would exist if they were sacrificed.”¹²¹ He points out that the cases cited by the majority “do not hold . . . that anyone who wants to get married has a constitutional right to do so,” but rather “require a State to justify barriers to marriage as that institution has always been understood,” which the States in those cases failed to demonstrate.¹²² As he notes, “[n]one of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman,” and the petitioners’ case here was really “about a right to make a State change its definition of marriage,” which does not exist under the Constitution.¹²³

After pointing out other issues with the due process claim of the petitioners,¹²⁴ Chief Justice Roberts points out that, as Holmes said in his dissent in *Lochner*, the Court’s “assertion of the ‘harm principle’ sounds more in philosophy than law.”¹²⁵ He says that “a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of ‘due process.’”¹²⁶ Indeed, following the thought of Holmes, he says that “the Fourteenth Amendment does not enact John Stuart Mill’s *On Liberty* any more than it enacts Herbert Spencer’s *Social Statics*.”¹²⁷ He questions, “[i]f an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?”¹²⁸

Justice Roberts goes on to explain the incoherence of the equal protection analysis of the majority. “Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases.”¹²⁹ He says that “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 violation of the canon

121. *Id.* at 697–98 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (2015)).

122. *Id.* at 699–700.

123. *Id.* at 700.

124. *See id.* at 700–05 (taking issue with the arguments of the right to privacy and individual autonomy).

125. *Id.* at 705 (Roberts, C.J., dissenting) (quoting *Lochner v. New York*, 198 U.S. 45, 57 (1905) (Holmes, J., dissenting)).

126. *Glucksberg*, 521 U.S. at 705.

127. *Obergefell*, 576 U.S. at 706 (Roberts, C.J., dissenting) (citing A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL’Y 1035, 1036–37, 1058 (2006)).

128. *Id.* at 706 (Roberts, C.J., dissenting).

129. *Id.* at 706–07.

against unnecessarily resolving constitutional questions.”¹³⁰ He points out that, regardless of the insufficiency of the majority’s reasoning in this case, “the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ ‘legitimate state interest’ in ‘preserving the traditional institution of marriage.’”¹³¹ The benefits that society grants to married couples, he says, were challenged without precision or specificity, and thus, should have been deemed an insufficient basis for the decision on equal protection grounds.¹³²

Justice Roberts says that the very legitimacy of the Supreme Court is at stake with decisions like these, which “exalts the role of the judiciary in delivering social change.”¹³³ Indeed, “[t]hose who founded our country would not recognize the majority’s conception of the judicial role,” which is “yielding that right [of self-governance] on a question of social policy to unaccountable and unelected judges.”¹³⁴ The judiciary’s “accumulation of power . . . comes at the expense of the people,” as it wrests that power from hands of the people to decide on questions such as these, and it gives it over to the hands of a few lawyers.¹³⁵ Creating a right such as the majority imagines jeopardizes the rights of religious people:

[m]any good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority’s decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to “advocate” and “teach” their views of marriage. The First Amendment guarantees, however, the freedom to “exercise” religion. Ominously, that is not a word the majority uses.¹³⁶

130. *Id.* at 707; *see also supra* Part III.b (explaining the *Obergefell* Court’s analysis under the Equal Protection Clause of the U.S. Constitution).

131. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003)).

132. *Id.* at 707–08.

133. *Id.* at 708.

134. *Id.* at 709.

135. *Id.*

136. *Id.* at 711.

While Justice Roberts tells the people in favor of the majority's opinion to celebrate their victory, he also warns, "[b]ut do not celebrate the Constitution. It had nothing to do with it."¹³⁷ Thus runs his dissent.

B. Catholic Social Teaching

1. The Teaching in Itself

Often, in discussions on human sexuality, Catholic Social Teaching begins with the words of Scripture:¹³⁸ "So God created man in his own image, in the image of God he created him; male and female he created them."¹³⁹ Again, in the second chapter of *Genesis*, Scripture speaks of how, among all the animals which God had created for Adam, "there was not found a helper fit for him,"¹⁴⁰ and so God made Eve out of Adam's side, which Scripture says, is the reason why "a man leaves his father and his mother and cleaves to his wife, and they become one flesh."¹⁴¹ This last passage is quoted three times in the New Testament when Christ (and subsequently St. Paul) instructs the faithful on marriage.¹⁴²

While the sin of Sodom is ranked among those which "cry to heaven,"¹⁴³ and homosexual acts are considered "contrary to the natural law,"¹⁴⁴

137. *Id.* at 713.

138. See Second Vatican Council, *Dei Verbum* [Dogmatic Constitution on Divine Revelation] ¶¶ 11–13 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 373 (Nat'l Cath. Welfare Conf. trans., 1967) [hereinafter *Dei Verbum*]. For those who may be concerned about whether discussion of the Bible is warranted in this context, especially the Creation story of the Book of Genesis, the Church in this constitution warns the faithful to pay attention to "literary forms" of Scripture because "truth is set forth and expressed differently in texts which are variously historical, prophetic, poetic, or of other forms of discourse." *Id.* ¶ 12. This, in tandem with "the content and unity of the whole of Scripture" allows the faithful to get at the root of what is revealed with respect to human nature. *Id.*

139. *Genesis* 1:27.

140. *Genesis* 2:20.

141. *Genesis* 2:21–24.

142. See *Matthew* 19:5; *Mark* 10:7; *Ephesians* 5:31.

143. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 100, ¶ 1867.

144. *Id.* ¶ 2357; see also St. John Paul II, *Veritatis Splendor* [Encyclical Letter Regarding Certain Fundamental Questions of the Church's Moral Teaching] ¶¶ 12, 40, 42–45 (1993) (defining the natural law as: "the light of understanding infused in us by God, whereby we understand what must be done and what must be avoided" at creation; "an imprint on us of the divine light;" "the human expression of God's eternal law;" and "the eternal law, implanted in beings endowed with reason, and inclining them towards their right action and end . . . none other than the eternal reason of the Creator and Ruler of the universe," as well as asserting that "the natural law is written and engraved in the heart of each and every man"); see also ST. THOMAS AQUINAS, SUMMA THEOLOGIAE Pt. I-II, QQ. 91, Art. 2; 94 (Fathers of the Eng. Dominican Province trans., Christian Classics 1981) [hereinafter SUMMA THEOLOGICA].

nevertheless the faithful must avoid “unjust discrimination in their regard,” treating those who are homosexual instead “with respect, compassion, and sensitivity.”¹⁴⁵ Since homosexual acts are contrary to natural law, homosexual persons are called to chastity because, “[b]y the virtues of self-mastery that teach them their inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.”¹⁴⁶ The Church has consistently stated and restated her teaching on this.¹⁴⁷ Thus, “since blessings on persons are in relationship with the sacraments, the blessing of homosexual unions cannot be considered licit,” that is, because “they would constitute a certain imitation or analogue of the nuptial blessing invoked on the man and woman united in the sacrament of Matrimony.”¹⁴⁸ But for this to be made clear, a demonstration from reason is in order.

St. Thomas Aquinas speaks of marriage as “natural” in the sense that “natural reason is inclined to it in two ways,” namely for (1) procreation and rearing of children and (2) “mutual service that the spouses devote to each other in domestic matters.”¹⁴⁹ He deduces this from the nature of the family, in which he observes that “certain works of those things that are needed for human life are suited to men and certain to women,” which explains “why nature moves that there be that association of a man with a woman, in which marriage consists.”¹⁵⁰ This is to say that the differences between men and women, biological and psychological, are conducive both to the bearing and rearing of children within a family unit.

But a homosexual relationship cannot provide in either of these ways. It cannot produce children through the reproductive organs involved. St. Thomas numbers homosexual conduct with other sins of lust which are against nature, that is, as “contrary to the natural order of the venereal act as becoming to the human race.”¹⁵¹ This is because it is a “venereal act from which generation

145. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 100, ¶ 2358.

146. *Id.* ¶ 2359.

147. See Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (1986); Congregation for the Doctrine of the Faith, *Responsum of the Congregation for the Doctrine of the Faith to a Dubium Regarding the Blessing of the Unions of Persons of the Same Sex* (2021) [hereinafter *Responsum*].

148. *Responsum*, *supra* note 147.

149. ST. THOMAS AQUINAS, *Scriptum Super Sententiis IV* [Commentary on Sentences IV], D.26, Q.1, Art.1.

150. *Id.*

151. SUMMA THEOLOGIAE, Pt. II-II, Q. 154, Art.11.

cannot follow,” that is, by the very nature of the action itself.¹⁵² Accordingly, he emphasizes the need for the “use of the right sex” in sexual relations.¹⁵³ Furthermore, as the Church teaches, “[t]he fecundity of conjugal love cannot be reduced solely to the procreation of children, but must extend to their moral education and their spiritual formation,”¹⁵⁴ which entails great responsibility in child rearing. While “sin cannot entirely take away from man the fact that he is a rational being,” nevertheless a man’s reason “may be continually diminished by sin.”¹⁵⁵ If man’s reason is diminished by sin, especially by lust,¹⁵⁶ then this second aspect of prudent child rearing is certain to be affected negatively in the case of a homosexual relationship.¹⁵⁷

St. John Paul II reiterates the Church’s teachings on sexual ethics in his encyclical, *Veritatis Splendor*. He engages briefly with certain ethicists who deny what the Church teaches as “biologistic or naturalistic argumentation,” a denial of the natural law as “*physicalism and naturalism*.”¹⁵⁸ Such ethicists understand that “man, as a rational being, not only can but actually *must freely determine the meaning* of his behaviour.”¹⁵⁹ Such a view, however, disregards “*the place of the human body in questions of natural law*” and “ends up treating the human body as a raw datum, devoid of any meaning and moral values until freedom has shaped it in accordance with its design,” with a disconnect between the soul and the body of the human person.¹⁶⁰ But St. John Paul II emphasizes the “*unity of the human person*, whose rational soul is *per se et essentialiter* [in itself and essentially] the form of his body,” such that

152. *Id.* at Pt. II-II, Q.154, Art.1. This is to be distinguished from those heterosexual married couples who suffer from infertility. A homosexual couple cannot in any way generate offspring by homosexual conduct involving the reproductive organs, whereas a heterosexual couple’s inability to produce offspring stems from something other than the inherent capacity of the reproductive organs to produce offspring.

153. *Id.* at Pt. II-II, Q. 154, Art.12, rep.4.

154. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 100, ¶ 2221.

155. SUMMA THEOLOGIAE, Pt. I-II, Q. 85, Art. 2.

156. *Id.* Pt. I-II, Q. 153, Art. 5. (“Consequently the higher powers, namely the reason and the will, are most grievously disordered by lust.”).

157. See ST. THOMAS AQUINAS, SENTENTIA LIBRI ETHICORUM [COMMENTARY ON THE NICOMACHEAN ETHICS], Bk. 10, Lecture. 15, 2155–56 (C. I. Litzinger, O.P., trans., 1964), <https://aquinas.cc/la/en/~Eth>. Commenting on Aristotle, St. Thomas notes that, because there are usually few laws regarding the rearing of children, “it seems fitting that each private person do something to help his children and friends to become virtuous, or if he cannot, at least he should select the means to make this possible.” *Id.* He emphasizes the acquisition of virtue as a primary goal of parents, which they will be impeded from imparting without having virtue, themselves. *Id.*

158. *Veritatis Splendor*, *supra* note 144, ¶ 47.

159. *Id.*

160. *Id.* ¶ 48.

“reason and free will are linked with all the bodily and sense faculties.”¹⁶¹ There is “a particular spiritual and bodily structure” of the human person that defines the very measure of the human person’s actions in accord with human nature itself.¹⁶² Natural law “refers to man’s proper and primordial nature,” and this can in no wise divorce the actions which he takes from his intentions.¹⁶³

2. *Misconceptions about the Teaching—Fiducia Supplicans*

There are some who are under a false belief that the Church’s stance on the morality of same-sex marriage has changed with Pope Francis’s issuance of *Fiducia Supplicans*.¹⁶⁴ In that document, it is reiterated “that the Church does not have the power to impart blessings on unions of persons of the same sex.”¹⁶⁵ Specifically, “the Church does not have the power to confer its liturgical blessing when that would somehow offer a form of moral legitimacy to a union that presumes to be a marriage or to an extra-marital sexual practice.”¹⁶⁶ That is, the unions themselves cannot be blessed according to the express words of the document.

The Church does, however, emphasize that one who seeks a blessing for himself from the Church admits that he is “in need of God’s saving presence in his life,”¹⁶⁷ and that there are occasions “when people spontaneously ask for a blessing”¹⁶⁸ where it would be appropriate to give such a blessing notwithstanding the circumstances. Thus, while “avoiding all serious forms of scandal and confusion among the faithful,” it may be permissible for “the ordained minister [to] join in the prayer of those persons” in a same-sex union, but not the union itself.¹⁶⁹ The Church emphasizes that “this blessing should

161. *Id.*

162. *Id.*

163. *Id.* ¶ 50; see also STEVEN A. LONG, THE TELEOLOGICAL GRAMMAR OF THE MORAL ACT 77-104 (2d. ed., 2015) (discussing the inseparable relationship between the reason for which an agent acts along with the act itself and its integral nature and giving illustrative examples of this principle).

164. See Christopher White, *In Major Doctrinal Shift, Vatican Officially OKs Catholic Blessings for Gay Couples*, NAT’L CATH. REP. (Dec. 18, 2023), <https://www.ncronline.org/vatican/vatican-news/major-doctrinal-shift-vatican-officially-oks-catholic-blessings-gay-couples> (on file with the Ave Maria Law Review).

165. Dicastery for the Doctrine of Faith, *Fiducia Supplicans* [On the Pastoral Meaning of Blessings] ¶ 5 (2023).

166. *Id.* ¶ 11.

167. *Id.* ¶ 20.

168. *Id.* ¶ 28.

169. *Id.* ¶ 30.

never be imparted in concurrence with the ceremonies of a civil union, and not even in connection with them.”¹⁷⁰ Thus, the Church did not change her moral doctrine on homosexuality.

3. *Argument from Natural Philosophy*

These principles of Catholic Social Teaching are not merely to be taken on faith alone but can be proven by reason as well. Indeed, the ancient pagan philosopher, Aristotle, begins his *Politics* by speaking about “a union of those who cannot exist without each other; namely, of male and female, that the race may continue.”¹⁷¹ Aristotle qualifies that this is “not of deliberate purpose, but because . . . mankind have a natural desire to leave behind them an image of themselves,”¹⁷² which is to say that the entire purpose of this sort of union between man and woman arises from the natural desire of human beings to propagate the species as a matter of biological reality. This, he explains, forms the basic unit, the family, and the village comes into existence through the union of families, and thence, the city through the union of villages.¹⁷³ All this is to say that families form the foundation of the state as the most basic unit of unions of persons in the community.¹⁷⁴ While one may retort that homosexuality was widely practiced among many pagan peoples, nevertheless marriage remained a distinct institution that, as Aristotle illustrates, did not extend to same-sex couples.

4. *Psychological Considerations*

Up until 1973, the American Psychiatric Association (APA) had defined homosexuality as a mental illness.¹⁷⁵ The change was part of a lobbying campaign called the “declassification effort.”¹⁷⁶ Under the second edition of

170. *Id.* ¶ 39.

171. ARISTOTLE, *POLITICS*, Bk. I, Ch. 2, 1252a (Benjamin Jowett trans.), reprinted in *THE BASIC WORKS OF ARISTOTLE* 1127 (Richard McKeon ed., 2001) [hereinafter *POLITICS*].

172. *Id.* at 1127–28.

173. *Id.* at 1252b–1253a.

174. See *id.* (The abovementioned portion of *POLITICS* illustrates the necessity of the family’s “political” purpose for ensuring the survival of the species; however, Aristotle’s understanding was not perfect (see *id.* Bk. II, Ch. 10, 1272a, 21–25 (mentioning possible benefits of “companionship” of men with other men))).

175. Ray Levy Uyeda, *How LGBTQ+ Activists Got “Homosexuality” out of the DSM*, JSTOR DAILY (May 21, 2021), <https://daily.jstor.org/how-lgbtq-activists-got-homosexuality-out-of-the-dsm/> (on file with the Ave Maria Law Review).

176. *Id.*

the APA's Diagnostic and Statistical Manual of Mental Disorders (DSM-II), homosexuality was placed under the heading of "Personality Disorders and Certain Other Non-Psychotic Mental Disorders," specifically under Section 302, which lists sexual deviations.¹⁷⁷ There, it states, "[t]his category is for individuals whose sexual interests are directed primarily toward objects other than people of the opposite sex. . . . Even though many find their practices distasteful, they remain unable to substitute normal sexual behavior for them."¹⁷⁸ To this day, there remains something of a debate as to whether the removal of homosexuality from the DSM was a wise decision.¹⁷⁹

Prior to the removal of homosexuality from the list of sexual deviations, other professionals in the psychiatric field, seeing "growing sexual laxity and degeneration" in the modern world, sought to bring clarity to certain key insights in sexuality as between one man and one woman in a monogamous relationship.¹⁸⁰ Dr. F. W. Foerester specifically notes that "those who aim at loosening the ties of marriage ignore the child's most fundamental right—the *right to possess a mother and a father*."¹⁸¹ She asserts that erotic love is not the most fundamental aspect of sexuality, as many modern theorists groundlessly suppose.¹⁸² Rather, "those unfortunate people whose dispositions are perverse . . . can receive comfort, support, and help only by refusing to accept erotic satisfaction as the central event of life, and directing their attention towards the superior significance of other interests and values."¹⁸³

Moreover, Foerester takes issue with "Neo-Malthusian" assertions that artificial contraception is a net positive to marriage because "[i]t merely frees [the sexual feeling] from producing its normal results : and it is these very results which have, in the past, so powerfully contributed towards self-discipline and self-control [sic]."¹⁸⁴ Such an attitude towards marriage leads to an understanding that "the purpose of life as a whole . . . will necessarily become more pleasure-seeking and more recklessly selfish than it could be

177. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41, 44 (2d ed. 1968).

178. *Id.*

179. See Genevieve Pollock, *Change Is Possible for Gays, Says Psychologist*, ZENIT (June 19, 2009), <https://zenit.org/2009/06/15/change-is-possible-for-gays-says-psychologist/> (on file with the Ave Maria Law Review).

180. F. W. FOERESTER, MARRIAGE AND THE SEX-PROBLEM xi (Meyrick Booth, trans., Frederick A. Stokes Co. 1936).

181. *Id.* at 47.

182. *Id.* at 69.

183. *Id.* at 70–71.

184. *Id.* at 93.

under normal conditions.”¹⁸⁵ This analysis could be equally applied to the natural sterility of homosexual acts.

Since the change of the DSM, Foerester’s warning seems to have been prophetic. The percentage of married people with children in the United States dropped from 69% in 1970 to 37% in 2021.¹⁸⁶ 50% of U.S. adults were married in 2021, compared to 69% in 1970.¹⁸⁷ 31% had never been married in 2021, compared to 17% in 1970.¹⁸⁸ Between 2015, when *Obergefell* was decided, and 2021, the same-sex marriage rate rose from 0.7% of civil marriages to a mere 1.1% of civil marriages.¹⁸⁹ The birth rate in the United States has been steadily declining by about 2% per annum.¹⁹⁰ While divorce rates are dropping, marriage rates are stagnating.¹⁹¹ Other studies have shown that both men and women tend to be unhappier when unmarried with no children.¹⁹² Though this may not necessarily be a cause, depression rates have nevertheless been steadily rising among Americans, more generally, since 2015, with the number of people at one time or another suffering from depression rising from 19.6% to 29% by 2023.¹⁹³ Among same-sex marriages, only about 18.9% had children in the household under the age of 18.¹⁹⁴ Another study showed that “[o]ver two-thirds (71% SE 30) of the children with same-sex married parents who had ever had sexual intercourse reported that they had been forced to have

185. *Id.* at 95.

186. Carolina Aragão et al., *The Modern American Family*, PEW RSCH. CTR. (Sept. 14, 2023), <https://www.pewresearch.org/social-trends/2023/09/14/the-modern-american-family/> (on file with the Ave Maria Law Review).

187. *Id.*

188. *Id.*

189. *Id.*

190. *U.S. Fertility Rate Drops to Another Historic Low*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 25, 2024), <https://www.cdc.gov/nchs/pressroom/releases/20240425.html> (on file with the Ave Maria Law Review).

191. Clayton Buck, Paul Hemez & Lydia Anderson, *How Does Your State Compare With National Marriage and Divorce Trends?*, U.S. CENSUS BUREAU (Oct. 8, 2024), <https://www.census.gov/library/stories/2024/10/marriage-and-divorce.html> (on file with the Ave Maria Law Review).

192. Brad Wilcox & Wendy Wang, *Who Is Happiest? Married Mothers and Fathers, Per the Latest General Social Survey*, INST. FOR FAM. STUD. (Sept. 12, 2023), <https://ifstudies.org/blog/who-is-happiest-married-mothers-and-fathers-per-the-latest-general-social-survey> (on file with the Ave Maria Law Review).

193. Dan Witters, *U.S. Depression Rates Reach New Highs*, GALLUP (May 17, 2023), <https://news.gallup.com/poll/505745/depression-rates-reach-new-highs.aspx> (on file with the Ave Maria Law Review).

194. *Characteristics of Adults in Same-Sex and Opposite-Sex Couples by State: 2019*, U.S. CENSUS BUREAU (Mar. 24, 2021), <https://www.census.gov/library/visualizations/interactive/characteristics-of-adults-in-same-sex-and-opposite-sex-couples-2019.html> (on file with the Ave Maria Law Review).

sex against their will at some point.”¹⁹⁵ All of these statistics taken together, one might reasonably question whether the Court’s understanding of marriage is in touch with reality.

5. *A Legal Realist Perspective*

American jurisprudence takes much inspiration from Oliver Wendell Holmes Jr. Holmes began the “legal realist” movement of jurisprudential thought,¹⁹⁶ and his dissent in *Lochner* plays a great role in the dissenting opinion of Justice Roberts in *Obergefell*.¹⁹⁷ Holmes once famously remarked that the study of law is nothing other than “the prediction of the incidence of the public force through the instrumentality of the courts.”¹⁹⁸ He says that “a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right.”¹⁹⁹ By his article, he wishes to “dispel a confusion between morality and law” by pointing out that “learning and understanding the law” has nothing to do with morality.²⁰⁰ He gives as an example of his reasoning the fact that under contract law, a man is strictly liable for failing to perform his end of the bargain, regardless of the morality of his failure.²⁰¹ Likewise, in tort law, one may be liable to a plaintiff regardless of moral malevolence.²⁰²

Thus, he draws the distinction that “[m]orals deal with the actual internal state of the individual’s mind, what he actually intends,”²⁰³ whereas the law will only be whatever the court says the law is to enforce that aforementioned

195. D. PAUL SULLINS, THE UNEXPECTED HARM OF SAME-SEX MARRIAGE: A CRITICAL APPRAISAL, REPLICATION AND RE-ANALYSIS OF WAINRIGHT AND PATTERSON’S STUDIES OF ADOLESCENTS WITH SAME-SEX PARENTS, BRITISH JOURNAL OF EDUCATION, SOCIETY & BEHAVIOURAL SCIENCE (2015); see also Alex Oliveira, *Gay couple who showed off picture-perfect family gets 100 years in prison for horrific rape of adopted sons*, N.Y. POST (Dec. 23, 2024, at 5:14 ET), <https://nypost.com/2024/12/23/us-news/georgia-couple-convicted-for-sickening-sexual-abuse-of-adopted-sons-get-100-years-in-jail-a-house-of-horrors/> (on file with the Ave Maria Law Review) (detailing one such instance of sexual abuse by a same-sex couple of their adopted sons).

196. See MARK TEBBIT, PHILOSOPHY OF LAW: AN INTRODUCTION 61 (3d ed. 2017).

197. *Obergefell v. Hodges*, 576 U.S. 644, 705–06 (2015).

198. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

199. *Id.* at 458.

200. *Id.* at 459.

201. *Id.* at 462.

202. *Id.* at 462–63.

203. *Id.* at 463.

“public force.”²⁰⁴ He laments “the use of moral phraseology” in the law,²⁰⁵ questioning “whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.”²⁰⁶ Thus runs his critique of the view that law and morality are interrelated.

Holmes then goes on to criticize the view that the law must be logical, or even rational. He says that it is often believed, “with Hobbes and Bentham and Austin, that all law emanates from the sovereign,” and commonly it so happens that “we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down.”²⁰⁷ He concedes that “in the broadest sense it is true that the law is a logical development,” but he cautions against the idea that a judicial pronouncement necessarily entails objective reasoning.²⁰⁸ Indeed, “[w]e do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind,” for “[n]o concrete proposition is self evident, no matter how ready we may be to accept it.”²⁰⁹ Throughout the history of legal developments, it was not objective truths that lawyers were arguing for, but rather “they were taking sides upon debatable and often burning questions,”²¹⁰ which he characterizes more as an unquantifiable attitude than an objectively logical conclusion.²¹¹

Thus, an understanding of law follows an evolutionary path for Holmes that must be suspicious of tradition. He says that this entails “the study of history” which “is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.”²¹² In wielding the predictive power of law from this understanding of history, Holmes says that, “the man of the future is the man of statistics and the master of economics.”²¹³ He asks rhetorically, “What have we better than a blind guess to show that the criminal law in its present form does more good than

204. *Id.* at 457.

205. *Id.* at 463.

206. *Id.* at 464.

207. *Id.* at 464–65.

208. *Id.* at 465.

209. *Id.* at 466.

210. *Id.* at 467–68.

211. *Id.* at 466.

212. *Id.* at 469.

213. *Id.*

harm?”²¹⁴ If one has a thorough grasp of statistics, one might find with Holmes that the only way to deal adequately with crime would be to eliminate the criminal, who typically “cannot be improved.”²¹⁵ It may be the case that “tradition not only overrides rational policy, but overrides it after first having been misunderstood and having been given a new and broader scope than it had when it had a meaning.”²¹⁶ Holmes seeks, by this critique of law, to “do what in [him] lies to improve it” and to “point it[s] future] out and to press toward it with all [his] heart.”²¹⁷

Holmes moves on to speak about jurisprudence, which he calls “law in its most generalized part.”²¹⁸ Jurisprudence is useful insofar as it assists the lawyer “to follow the existing body of dogma into its highest generalizations.”²¹⁹ After this, history assists in ascertaining the origins of this dogma, and, from there, the lawyer may “consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.”²²⁰ Thus, “[t]heory is the most important part of the dogma of the law” because it gets “to the bottom of the subject” to allow one to evaluate the path forward.²²¹ By this process, a lawyer can be happy in his profession:

[t]he remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.²²²

Thus runs Holmes’s article.

Holmes’s article does bring up several points worth noting with respect to *Obergefell*. One could criticize the Court’s opinion based on what appears to be an assumed moral reason for its decision, as Justice Roberts did in his dissent.²²³ Moreover, one could argue, with Holmes, that the Court assumes,

214. *Id.* at 470.

215. *Id.*

216. *Id.* at 472.

217. *Id.* at 473.

218. *Id.* at 474.

219. *Id.* at 475.

220. *Id.* at 476.

221. *Id.* at 477.

222. *Id.* at 478.

223. *Obergefell v. Hodges*, 576 U.S. 644, 705–06 (2015) (Roberts, C.J., dissenting).

without much reasoning, the nature of marriage to be other than how it had always been understood throughout history.²²⁴ Holmes would indeed be useful in bringing to light these issues with the majority's reasoning in *Obergefell*.

However, certain dangers can arise in the use of Holmes for critiquing this decision. Holmes himself speaks of the law as something evolutionary, and he is suspicious of holding too fast to traditional understandings.²²⁵ The majority in *Obergefell*, though not citing Holmes, echoes this point when it speaks of how marriage "has evolved over time."²²⁶ Moreover, Holmes's understanding of jurisprudence is an almost deconstructivist account, whereby he believes that the courts should generalize law in order to determine the path forward for the law.²²⁷ The whole of substantive due process jurisprudence has followed this schema since *Griswold*, where the Court said "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."²²⁸ Even if Justice Roberts is correct that "the Fourteenth Amendment does not enact John Stuart Mill's *On Liberty* any more than it enacts Herbert Spencer's *Social Statics*,"²²⁹ nevertheless, under Holmes's theory of law, the Court is likely to continue this deconstructive campaign in the name of progress.

Thus, Holmes's reasoning needs to be tempered with objectivity. There needs to be a true and proper understanding of the human person and the nature of marriage in order for a viable argument in favor of overturning *Obergefell*, rather than simple reliance on the procedural impropriety of the majority's decision.²³⁰ There are good reasons to suppose that Catholic Social Teaching on these matters brings the sort of objectivity (lacking in Holmes) to the argument, such as the natural philosophical and psychological considerations raised in this Note.²³¹ Thus, it is the position of this Note that the use of Holmes in *Lochner* should be used sparingly and carefully in reevaluating *Obergefell*.

224. See *id.* at 666 (majority opinion) ("The 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.").

225. Holmes, *supra* note 198, at 469–73.

226. *Obergefell*, 576 U.S. at 659.

227. Holmes, *supra* note 198, at 474–78.

228. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

229. *Obergefell*, 576 U.S. at 706.

230. See *supra* Part IV.b.i.

231. See *supra* Part IV.(c)–(d).

IV. SOLUTIONS

Following the *Dobbs* decision, which overturned *Roe v. Wade*, there has been an increased interest in reexamining the whole corpus of Fourteenth Amendment jurisprudence, including *Obergefell*,²³² in part thanks to Justice Thomas's concurring opinion.²³³ In Justice Thomas's own dissenting opinion in *Obergefell*, he asserted that the Founders understood "that human dignity is innate," rather than deriving from the Government, as the Declaration of Independence asserts.²³⁴ In *Dobbs*, Justice Thomas concurs with the majority that "the purported right to abortion is not a form of 'liberty' protected by the Due Process Clause" because it "is neither 'deeply rooted in this Nation's history and tradition' nor 'implicit in the concept of ordered liberty.'"²³⁵ But he goes further to suggest that the entire "substantive due process" jurisprudence is oxymoronic,²³⁶ and therefore ought to be reexamined in its totality, "including *Griswold*, *Lawrence*, and *Obergefell*," stating that "we have a duty to 'correct the error' established in those precedents."²³⁷

While several states have passed resolutions asking the Court to overturn *Obergefell*, this will not be enough.²³⁸ A State must either attempt to enforce an already existing (but constitutionally invalidated) law defining marriage as between one man and one woman or pass a law to that effect.²³⁹ Thus, presenting an argument in favor of overturning *Obergefell* will require an act of courage on the part of at least one of the states.

Synthesizing all that has been said up to this point, this Note concludes that one of two things could be done by the Court. The Court could simply overturn *Obergefell* and return the matter to the hands of the states based on the principle of federalism, as it did in *Dobbs*. This would have the advantage of minimizing the negative social backlash that could threaten the legitimacy of the Court, at least in the eyes of the public. However, this position has the added disadvantage of punting the issue down the line to the states, where the "moral majority" may waver in the face of public backlash and advertising

232. See Austin Williams, *Republican lawmakers push to overturn Supreme Court's same-sex marriage ruling*, FOX 11 L.A. (Mar. 4, 2025, at 1:26 PT), <https://www.foxla.com/news/republican-lawmakers-same-sex-marriage-scotus> (on file with the Ave Maria Law Review).

233. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 330–36 (Thomas, J., concurring).

234. *Obergefell*, 576 U.S. at 721.

235. *Dobbs*, 597 U.S. at 330 (Thomas, J., concurring) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

236. *Dobbs*, 597 U.S. at 331 (Thomas, J., concurring).

237. *Id.* at 332 (quoting *Gamble v. United States*, 587 U.S. 678, 718 (2019) (Thomas, J., concurring)).

238. Williams, *supra* note 232.

239. See DAVID S. RUBENSTEIN, 1 MODERN CONSTITUTIONAL LAW § 1:3 (3d ed.).

campaigns. This could threaten, in turn, the legitimacy of the states through state constitutional amendments, as was the case with *Dobbs* returning the issue of abortion to the states.²⁴⁰

The other option of the Court is to declare marriage as between one man and one woman, based on the rational arguments in the briefs of several of the *amici curiae* from the *Obergefell* decision.²⁴¹ This would certainly yield much backlash, just as *Dobbs*,²⁴² and perhaps even more due to what would appear to be overreach on the part of the federal judiciary.²⁴³ However, such an exercise of judicial power would be in keeping with the truth about the nature of marriage. Moreover, same-sex marriage laws in any state pose a threat to religious persons by the very assertion that marriage can be between two members of the same sex.²⁴⁴ Laws that would threaten the conscience of religious persons are dangerous when license is labelled as liberty, as is apparent in the current social atmosphere.²⁴⁵ Thus, this Note advocates this latter solution as to the method of overturning *Obergefell*.

The legal argument itself would follow from what was said above about the majority's reasoning in *Obergefell*.²⁴⁶ First, it would need to establish that the Constitution does not guarantee a substantive right to marriage in the way the majority in *Obergefell* decided. The right to marriage, rather, is between one man and one woman. The right of Due Process would apply only to the procedural liberty interest that two persons of the opposite sex have in obtaining a marriage license. From there, the equal protection argument would

240. See Mary Kekatos & Katie Kindelan, *A State-By-State Breakdown of Where Abortion Stands After Ballot Initiatives Pass*, ABC NEWS (Nov. 12, 2024), <https://abcnews.go.com/GMA/Wellness/state-state-breakdown-abortion-stands-after-ballot-initiatives/story?id=115730446> (on file with the Ave Maria Law Review) (noting that seven states enshrined a right to abortion under their state constitutions in the 2024 election); see also Geoff Mulvihill, *Abortion-Rights Groups Outspend Opponents By More Than 6 to 1 In Ballot Measure Campaigns*, ASSOCIATED PRESS (Oct. 31, 2024), <https://apnews.com/article/abortion-amendment-campaign-spending-florida-arizona-539217e94f6f96200eff75e8917e525b> (on file with the Ave Maria Law Review).

241. See, e.g., Brief for U.S. Conf. of Catholic Bishops as Amici Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

242. See Maura Barrett et al., *Rage, Despair, Tears Fill Streets Across Nation As Thousands Protest Roe Reversal*, NBC NEWS (June 24, 2022), <https://www.nbcnews.com/news/us-news/rage-despair-tears-fill-streets-nation-thousands-protest-ro-reversal-rcna35194> (on file with the Ave Maria Law Review).

243. See Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 806 (2023) ("The cynicism of the *Dobbs* Court's invocation of democracy is even more pronounced when considered alongside the Court's active interventions to distort and disrupt the functioning of the electoral process.").

244. See *Obergefell v. Hodges*, 576 U.S. 644, 711–12 (2015).

245. See Impelli, *supra* note 54 (noting that Masterpiece Cakeshop has been embroiled in litigation with LGBTQ+ activists since 2017).

246. See *supra* Section III.b.

break down in so as to render the point moot—it is a simple categorical mistake to assert that it would be a failure of the law to protect equally persons of the same sex in procuring a marriage if marriage’s true definition is that of a union between one man and one woman.

Even assuming, *arguendo*, that the Due Process argument would fail to meet the Court’s scrutiny, it must be observed that, even under Equal Protection, the claim would still fail. Equal Protection based on the levels of scrutiny applied by the Court would be according to the rational basis test rather than intermediate or strict scrutiny. This is because such laws defining marriage as between one man and one woman do not single out any protected class. They are simply a definition of the state of affairs, akin to stating that the sky is blue or that the grass is green—so too is marriage between one man and one woman—as historically (and naturally) appears to be the case. Thus would run the legal argument, in summary.

CONCLUSION

This Note has examined the history of Fourteenth Amendment jurisprudence in relation to *Obergefell*, examining the history of both the Due Process and Equal Protection Clauses. It has examined, accordingly, the argument of the majority in *Obergefell* itself. Further, it has set forth an overview of the problems with *Obergefell* from the point of view of the Catholic Church as well as from philosophers, psychologists, and jurists. Finally, it has proposed a solution for overturning *Obergefell* based on its erroneous reasoning.

If the Court does, in fact, overturn *Obergefell*, it is the author’s hope that it will be done in such a way as to state the truth of marriage rather than handing off the issue to the legislature. The Court there did not have authority over the gods, as Socrates might have put it. And now the Emperor has no clothes. Marriage cannot be between two members of the same sex. Marriage is between one man and one woman. And just who do the Justices of the Supreme Court think they are to say otherwise?