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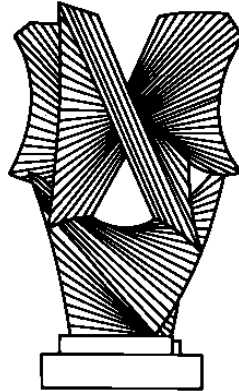
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MISSING SEX TALK IN THE SUPREME COURT'S SAME-SEX MARRIAGE CASES

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MISSING SEX TALK IN THE SUPREME COURT'S SAME-SEX MARRIAGE CASES

(forthcoming UMKC L. Rev. 2016)

Two kinds of sex talk are noticeably absent from the Supreme Court's same-sex marriage opinions: there is very little discussion either of the joy of sex or of the constitutionally mandated prohibition of discrimination in law on grounds of sex. This essay reflects on some of the troubling reasons for and implications of the absence of such sex talk.

Mary Anne Case*

I have been worrying for more than two decades about what a U.S. Supreme Court opinion recognizing a constitutional right for same-sex couples to marry might say.¹ My worry was less about the bottom-line result—after all, as even Justice Scalia has long conceded,² few legal conclusions have been as inescapable as the conclusion that our current constitutional case law, applied in routine fashion, mandates a victory for the plaintiffs in the same sex-marriage cases³ *Obergefell v. Hodges*⁴ and *United States v. Windsor*.⁵ As discussed below, any competent lawyer who connected the dots in Supreme Court case law could find half a dozen solid doctrinal routes to same-sex marriage and few, if any, potential roadblocks.⁶

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¹ See, e.g., Mary Anne Case, *The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1486-90 (2000) [hereinafter Case, *The Very Stereotype the Law Condemns*].

² See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (observing that “state laws against . . . same-sex marriage” were no longer “sustainable” once the *Lawrence* majority undercut “*Bowers*’ validation of laws based on moral choices” while making “no effort to cabin the scope of its decision to exclude them from its holding”); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Scalia, J., dissenting) (using strikeouts and substitutions to edit the Defense of Marriage Act decision so as to apply to a challenge to state bans on same-sex marriage).

³ Conservatives, including the Supreme Court dissenters in these cases, are a little like Obama birthers or Benghazi conspiracy theorists—they are centering on decisions which have strong anchors in existing settled doctrine and treating them as lawless, against a background of their acceptance of many decisions, favoring both the left and the right, that are much more readily contestable.

⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁵ 133 S. Ct. 2675.

⁶ I identified one such potential roadblock to a substantive due process holding in favor of same-sex marriage in my analysis in Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 S. CT. REV. 75, 139 (2004) [hereinafter Case, *Of This and That*]:

After *Lawrence*, every constitutionally recognized aspect of liberty legal marriage formerly monopolized (sex, reproduction, parenting, etc.) seems, as a matter of constitutional right, no longer within the state’s or marriage’s monopoly control. To the extent that the so-called fundamental right to marry is, as is customary for fundamental rights under the U.S. Constitution, a negative liberty which establishes only a limit on state interference, *Lawrence*,

I was instead concerned that, in the language it chose to recognize same-sex marriage, the Court, like certain state courts before it, might unnecessarily do serious collateral damage to other rights I value. My greatest concern, set forth at length in my 2010 piece *What Feminists Have to Lose in Same-Sex Marriage Litigation*,⁷ was that, were the Court to hold, as some state courts had done, that bans on same-sex marriage simply did not discriminate on the basis of sex, it would jeopardize “the entire body of U.S. Supreme Court sex discrimination law of the last forty years”⁸ which centered on the propositions that the right to equal protection on grounds of sex was an individual right and that this right was violated by laws entrenching or relying on “fixed notions concerning the roles and abilities of males and females,”⁹ including their roles and abilities in marriage. More generally, I worried about the harm even a favorable opinion from the Court could do to a variety of liberation projects I was committed to, and I could only hope that the Court would “above all do no harm”¹⁰ to the broader project of “preserv[ing] and extend[ing] the liberty and equality of all regardless of sex or orientation.”¹¹

Like many other readers of and commentators on Justice Kennedy’s opinions in the same-sex marriage cases,¹² I did think that the excessive emphasis on the dignity and nobility of marriage harmed the liberty and equality of those who do not marry, putting me in unusual agreement with Justice Clarence Thomas, whose footnote on the subject¹³ was that portion of the *Obergefell* opinions that had my most whole-hearted assent.¹⁴

at least as an analytical matter, may spell less the beginning than the end for same-sex couples of any claimed right of access to state-sponsored marriage rooted in substantive due process, rather than squarely in equal protection.

Justice Thomas’s dissent in *Obergefell* centers on this particular roadblock, insisting that “liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.” *Obergefell*, 135 S. Ct. at 2634 (Thomas, J., dissenting) (emphasis in original). Whatever purchase this objection may have with respect to Jim Obergefell’s claim to have his spouse’s name included on an official government death certificate, it has much less with respect to the DeBoer plaintiffs’ claim in *Obergefell* not to have Michigan take children being raised by both of them away from the survivor should her spouse happen to die or to Edith Windsor’s claim not to be put at risk of losing her marital home to estate taxes on the death of her spouse. What Edith Windsor and April DeBoer sought in their lawsuits can indeed, Justice Thomas to the contrary notwithstanding, plausibly be characterized as “freedom from governmental action.”

⁷ See generally Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010) [hereinafter Case, *What Feminists Have to Lose*].

⁸ *Id.* at 1219.

⁹ Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

¹⁰ From the Latin maxim “primum non nocere” associated with the physician’s Hippocratic Oath.

¹¹ Case, *What Feminists Have to Lose*, *supra* note 7, at 1233.

¹² See, e.g., Michael Cobb, *The Supreme Court’s Lonely Hearts Club*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html> (“Founding your dignity on something as flimsy and volatile as a sexual connection insures dignity’s precariousness as it enshrines your inherent unworthiness as a single individual.”).

¹³ See *Obergefell*, 135 S. Ct. at n.8 (Thomas, J., dissenting):

The majority also suggests that marriage confers ‘nobility’ on individuals. . . . I am unsure what that means. People may choose to marry or not to marry. The

In my essay for this symposium, however, I shall be focusing on the implications of what was missing from the opinions in *Obergefell* and *Windsor*; in particular, on what might follow from the comparative absence of two different kinds of sex talk—one concerned with discrimination on grounds of sex and the other concerned with sexuality and sexual expression.¹⁵

Despite tantalizing hints at oral arguments in both *Hollingsworth v. Perry* and *Obergefell* that the issue of sex discrimination in bans on same-sex marriage was on their minds,¹⁶ the members of the Court barely discussed sex discrimination in any of their opinions in a same-sex marriage case, thus relieving me of my worst fears. I am not yet ready to relax and let down my guard, however. In the second part of this essay, I shall explain the dangerous implications I see in the very silence of the Justices on the subject of sex discrimination in the same-sex marriage cases, especially given the public declarations and voting records of Justice Kennedy and the four *Obergefell* dissenters with respect to other cases of constitutional sex discrimination.

Before turning to these concerns, let me first comment on the absence of another kind of sex talk from the Court's consideration of same-sex marriage:

decision to do so does not make one person more 'noble' than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

My agreement with Thomas follows from my previously discussed agreement with Justice Denise Johnson of Vermont, who wrote in that state's same-sex marriage decision, *Baker v. State*, 744 A.2d 864 (Vt. 1999) that "[i]n granting a marriage license, the State is not espousing certain morals, lifestyles, or relationships, but only identifying those persons entitled to the benefits of the marital status." *Id.* at 898-99 (Johnson, J., concurring and dissenting). For further discussion see Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1781 (2005).

¹⁴ I shall be discussing this in a forthcoming piece on *Dignities in Windsor and Beyond* (unpublished manuscript on file with author).

¹⁵ In addition to building on my prior work as discussed in the text, I am also referencing in my title Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97 (2005) (focusing on the absence of what she calls "gender talk" in the public debates on same-sex marriage).

¹⁶ In the oral argument in *Perry*, Justice Kennedy asked the lawyer defending Proposition 8, "[d]o you believe this can be treated as a gender-based classification? . . . It's a difficult question that I've been trying to wrestle with." Transcript of Oral Argument at 13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). And Chief Justice Roberts asked counsel in *Obergefell*, "if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?" Transcript of Oral Argument pt.1 at 62, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556). I had been hopeful that the Chief Justice would give *Obergefell* his vote on this basis. See Liz Goodwin, *Justice Roberts Revives an Old Argument that Could Save Gay Marriage*, YAHOO NEWS (Apr. 28, 2015), <https://www.yahoo.com/politics/justice-roberts-revives-an-old-argument-that-could-117640176486.html>. In this article, I describe to a reporter the advantages for Chief Justice Roberts in holding that bans on same-sex marriage discriminated on the basis of sex, recapitulating arguments I made earlier in Case, *The Very Stereotype the Law Condemns*, *supra* note 1, at 1489. In that earlier piece, I argued that "to strike down a ban on same-sex marriage on equal protection grounds as violative of norms against sex discrimination rather than on substantive due process grounds as violative of guarantees of associational privacy and family autonomy, is in many respects the more conservative, more easily limited decision," because, inter alia, it would not open the door to claims for the recognition of polygamous and incestuous marriages. *Id.*

Although the letters “sex” appear literally hundreds of times in the *Obergefell* opinions, they almost always do so as part of the hyphenated constructs “same-sex” or “opposite-sex.” Of sex in the sense of sexual activity there is little discussion, although it would for several reasons be relevant. Among these reasons is that the line of substantive due process cases vindicating “intimate choices”¹⁷ culminating in *Obergefell* has its roots in *Griswold v. Connecticut*, a case concerning the policing of sexual activity in the “sacred precincts of marital bedrooms.”¹⁸ In 2015, the year of *Griswold*’s fiftieth anniversary, the two themes that case brought together, marriage and contracepted sex, have been pulled apart into the sacred and settled on the one hand and the profane and contested on the other, with a renewed establishment of marriage in *Obergefell* and a renewed precarization of access to contraception in *Hobby Lobby* and its progeny.¹⁹ Kennedy in *Obergefell* cites *Griswold*’s famous definition of marriage as “a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”²⁰ But, in his *Hobby Lobby* concurrence, Kennedy applies the language of “dignity” and “self-definition,” central to his view of marriage in *Obergefell*, not to female employees seeking contraception, but only to their employers who “deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations.”²¹ Religiously inflected for-profit corporations like Hobby Lobby seem now to have joined marriages in the ranks of “association[s] for as noble a purpose as any involved in our prior decisions;”²² their approach to sex has now taken center stage.

Even in discussing the evolving history of marriage, the *Obergefell* majority makes no mention of marriage’s prior role as holding a monopoly over lawful sex, notwithstanding that this monopoly was what grounded the constitutional right to marry for prior courts.²³ Instead it declares that marriage

¹⁷ *Obergefell*, 135 S. Ct. at 2957.

¹⁸ 381 U.S. 479, 485 (1965)

¹⁹ Given that the purpose of the contraception mandate of the Affordable Care Act (ACA) was to ensure easier and greater access to contraception to large numbers of women, it may seem odd to speak of a new precarity in access to contraception, but it should be noted that before advocates for religious exemption focused their attention on the intersection of the Religious Freedom Restoration Act (RFRA) and the ACA, Hobby Lobby itself was providing its employees the contraceptive insurance it now objects to, as were a number of religious employers now challenging the mandate’s application to them. For further discussion, see Mary Anne Case, *Why “Live-And-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 U.S.C. L. REV. 463, 464 n.3 (2015).

²⁰ *Obergefell*, 135 S. Ct. at 2599 (citing *Griswold*, 381 U.S. at 486).

²¹ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). As for the interests of the female employees, Kennedy mentions only their “health” given the “many medical conditions for which pregnancy is contraindicated.” *Id.*

²² *Obergefell*, 135 S. Ct. at 2599, 2600 (citing *Griswold*, 381 U.S. at 486).

²³ See, e.g., *Poe v. Ullman*, 367 U.S. 497, 546 (Harlan, J., dissenting).

“fulfills yearnings for security, safe haven, and connection” (quoting the Massachusetts same-sex marriage case, *Goodridge v. Department of Public Health*),²⁴ “expression, intimacy, and spirituality” (citing *Windsor*), “love, fidelity, devotion, sacrifice, and family,” “companionship and understanding and assurance that while both still live there will be someone to care for the other.”²⁵

I. MISSING TALK OF SEXUALITY

The following sentences perhaps best encapsulate the absence of talk of sexuality from Justice Kennedy’s opinions in the same-sex marriage cases: “Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”²⁶

The laws regarding marriage which provide both when the sexual powers must be used and the legal and social context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into our social life that any Constitutional doctrine in this area must build on that basis.

Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (“[I]f appellee’s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.”). Instead of quoting from the passages in *Zablocki* centering on sex, Kennedy chooses those highlighting family formation, quoting that portion of the opinion holding “it would be contradictory ‘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.’” *Obergefell*, 135 S. Ct. at 2599 (quoting *Zablocki*, 434 U.S. at 386).

²⁴ 798 N.E.2d 941, 955 (Mass. 2003).

²⁵ *Obergefell*, 135 S. Ct. at 2600. As will be discussed further below, a similarly sex-free articulation of the issues can be found in Justice Kennedy’s preliminary summation of

the petitioners’ stories [which] make clear the urgency of the issue they present to the Court: James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage.

Id. at 2606.

²⁶ *Lawrence*, 539 U.S. at 574. *Obergefell*, 135 S. Ct. at 2599. The quoted language is from a section of the opinion in which Kennedy traces the importance of marriage first to the individual, next to the couple, then to the family, and finally to “the social order.” In my 1993 article, *Mary Anne Case, Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1644 (1993), I similarly identified the individual, the couple and the community as central foci of gay life and rights, but observed that the development of the Supreme Court case law of intimate association began with the community (somewhat broader than the family) in cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923) (protecting an interest in educating children in foreign languages), continued to the couple, when *Griswold v. Connecticut*, 381 U.S. 479 (1965) protected their right to use contraceptives and finally reached the individual when *Eisenstadt v. Baird*, 405 U.S. 438 (1972) extended access to contraceptives to individuals.

Here, even though the citation is to *Lawrence v. Texas*, a case exclusively about sexual activity, without any connection to procreation, family, marriage, or childrearing,²⁷ there is no mention of the particular intimate constitutionally-protected choice of whether and with whom to have sex.²⁸ As I and others have observed, even thinking, let alone talking, about sex seems to make judges like Justice Kennedy uncomfortable.²⁹

When, in 1993, I first wrote about the legal history of litigating for lesbian and gay rights, I noted that up to that point, “courts [had] accord[ed] the most favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect ha[d] perforce been removed due to the death, illness, or imprisonment of one of the members of the couple,”³⁰ perhaps because courts could then “focus on all the wonderful pair bonding without being threatened by the sexual implications of that pair bonding.”³¹ It is worth highlighting that the named plaintiffs in the same-sex marriage cases recently before the U.S. Supreme Court fit this pattern: that Edie Windsor was a widow and Jim Obergefell a widower was central to the claims

²⁷ Cf. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), the case *Lawrence* overruled (upholding criminalization of private consensual adult homosexual sodomy because “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated”).

²⁸ Cf. *id.* at 205 (Blackmun, J., dissenting) (quoting *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 63 (1973)):

Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality. . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

Although Kennedy does acknowledge in *Obergefell*, that “*Lawrence* invalidated laws that made same-sex intimacy a criminal act,” he again, as in *Lawrence*, makes of intimate association something almost necessarily broader than sexual activity, saying again that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” *Obergefell*, 135 S. Ct. at 2600 (quoting *Lawrence*, 539 U.S. at 567).

²⁹ See, e.g., Case, *Of This and That*, *supra* note 6, at 77. Interpreting *Obergefell* similarly, Nan Hunter has suggested:

Perhaps one reason for the overblown language of the opinion is an impulse to deflect attention from the historical association of marriage not only with commitment and children, but also with sexuality. The words “dignity” and “sexuality” do not usually appear in the same sentence. Consciously or not, the Court uses the language of dignity in ways that occlude the physical intimacy dimensions of what is at stake, even though, until relatively recently, marriage was the only social location in which sexual activity was lawful.

Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIRCUIT 107, 110 (2015).

³⁰ Case, *supra* note 26, at 1644.

³¹ *Id.* at 1660.

each pressed before the court; Windsor was seeking the marital exemption from estate taxes and Obergefell to “be listed as the surviving spouse on [his spouse’s] death certificate.”³²

Even when one goes beyond these two named plaintiffs, there is a striking emphasis in the same-sex marriage cases recently drawn to the Supreme Court’s attention on the spouses’ desire to be recognized as unified, not so much in life and in bed as in death. Thus, in *Gill v. Office of Personnel Management*,³³ the Defense of Marriage Act (DOMA) test case carefully prepared by Gay & Lesbian Advocates & Defenders’ Mary Bonauto, who argued *Obergefell*, one of the lead plaintiffs was the widower of a Congressman suing for recognition for death benefits.³⁴ Similarly, in the companion case brought by the state of Massachusetts, a principal alleged harm to the state’s interests from the enforcement of DOMA was that “burying a veteran with his or her same-sex spouse removes federal ‘veterans’ cemetery’ status and gives the Department of Veterans’ Affairs discretion to recapture all federal funding for the cemetery” from the state.³⁵ Solicitor General Donald Verrilli’s first point to the court in *Windsor*, (the only point he got to make before being barraged with questions) was that DOMA “means that the spouse of a soldier killed in the line of duty cannot receive the dignity and solace of an official notification of next of kin.”³⁶

Moreover, both Thea Speyer, Edie Windsor’s spouse,³⁷ and John Arthur, Jim Obergefell’s husband, did not die suddenly, but each after a long, debilitating illness in which they were faithfully tended by their respective spouses, who each exemplified the wedding vows a couple makes to take one another “for better for worse, . . . in sickness and in health, until death us do part.” In both cases, the legally cognizable exchange of those wedding vows was made, after decades of the couple’s living their fulfillment, in what amounted to a tarmac wedding,³⁸

³² *Obergefell*, 135 S. Ct. at 2594.

³³ 699 F. Supp. 2d 374 (2010). A cert petition in these two Massachusetts cases was before the Supreme Court at the same time as Windsor’s, but was passed over in favor of Windsor’s, most likely because Elena Kagan, who as Solicitor General had participated in them, would have had to recuse herself, potentially leading to a deadlock.

³⁴ *Massachusetts v. United States HHS*, 682 F.3d 1 (2012).

³⁵ *Id.* at 7.

³⁶ Transcript of Oral Argument at 80, *United States v. Windsor*, 133 S. Ct. 2675 (2015).

³⁷ Windsor insisted one should never call Speyer, the butch to Windsor’s femme, her wife. See Ariel Levy, *The Perfect Wife: How Edith Windsor Fell in Love, Got Married, and Won a Landmark Case for Gay Marriage*, NEW YORKER (Sept. 30, 2013), <http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife> (“Every time somebody calls her my wife, I am furious,” Windsor said. . . . “[Y]ou can say she’s my spouse. Or you can say nothing. But you cannot say she’s my wife. It’s a fucking insult to her!”). It is somewhat of a paradox that precisely their social gender role differentiation leads to terminological parity: they are each other’s spouses. By contrast, Roberta Kaplan, Windsor’s lawyer, insisted on being introduced as a speaker at the Association of American Law Schools annual meeting in 2014 as “Mrs.,” not “Ms.,” Kaplan.

³⁸ Literally in Obergefell’s case, his spouse being too sick even to disembark from the plane, whereas Thea Speyer, with the help of friends and special equipment, made it off the plane into Toronto just long enough to exchange vows. See *id.*

with special arrangements made to transport the sick spouse to a jurisdiction that offered same-sex marriage just long enough to exchange vows and drink a toast before returning to their home state, shortly thereafter to die.

This puts Windsor and Obergefell as plaintiffs in a direct line of descent from the successful litigants in early gay rights victories such as *Braschi v. Stahl Associates Co.*³⁹ and *In re Guardianship of Kowalski*.⁴⁰ In none of these cases was the couple still functioning as a sexual couple at the time of litigation.⁴¹ Like Windsor and Obergefell's spouses, "Braschi's lover [wa]s dead, [and] Kowalski had emerged from a coma severely impaired."⁴² In all of these cases, the hallmark of the couple's relationship was the long-term care of one for the other in sickness. Like Braschi, Windsor and Obergefell can be assimilated to the traditionally favored class of widows.

Another set of plaintiffs before the Court, those in the Michigan same-sex marriage case, belongs to a different class conceptually distanced from sexuality—they are adoptive mothers.⁴³ Indeed, a noteworthy feature of the Michigan case is that the plaintiff couple, April De Boer and Jayne Rowse, both nurses and licensed foster parents, initially filed suit, not in order to marry, but in

³⁹ *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (holding that, where rent control laws prevent dispossession by a landlord of family members of a deceased tenant who lived in a controlled apartment with the tenant, "a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence" so that Braschi was entitled to succession rights in the apartment he had shared with his lover for ten years before the latter's death).

⁴⁰ *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991). After Sharon Kowalski was severely injured in an auto accident in 1983, Karen Thompson, the lover with whom she had been "living together as a couple for four years," waged a protracted court battle for guardianship against Kowalski's parents, who were unaware of their daughter's lesbian relationship before the accident and sought to bar Thompson from contact with their daughter, expressing a fear that she might sexually molest her. *Id.* at 791. The parents won the first several rounds of litigation, in opinions that described the two women as "roommates" and their relationship as "uncertain." *In re Guardianship of Kowalski*, 382 N.W.2d 861, 863 (Minn. Ct. App. 1986). In the final decision, the court awarded guardianship of Kowalski to Thompson, whom it described as "her lesbian partner," finding such guardianship consistent with Kowalski's wishes and in her best interests. *Kowalski*, 478 N.W.2d at 791. The decision paved the way for Thompson to bring Kowalski home from the hospital into a "fully handicap-accessible [sic] home she had built in the hope that Sharon will be able to live there." *Id.* at 794. See also KAREN THOMPSON & JULIE ANDRZEJEWSKI, WHY CAN'T SHARON KOWALSKI COME HOME? *passim* (1988) (telling Thompson's side of the story).

⁴¹ Marriage is also distanced, at least temporally, from sexuality in the case of the Tennessee plaintiff couple discussed in *Obergefell*, who, the Court notes, chose to marry just before one of them was deployed to Afghanistan "for almost a year." *Obergefell*, 135 S. Ct. at 2595.

⁴² Case, *supra* note 26, at 1650.

⁴³ When a mother's sexuality is highlighted in litigation, this tends to bode ill for her success. Thus, for example, in the infamous lesbian custody case, *Bottoms v. Bottoms*, 249 Va. 410 (1995), Sharon Bottoms lost custody of her son to her own mother in part because, unlike her mother, she was unwilling to abandon her sexual partner so as to prioritize what the court saw as a healthy environment for her son.

order both to be recognized as the adoptive parents of the children only one of the partners had been allowed to adopt under Michigan law.

To focus on the parental activities of a same-sex couple, as Kennedy does in both *Windsor*⁴⁴ and *Obergefell*,⁴⁵ is precisely not to focus on their sexual activities, because it is a central given that their sexual activity played no role in their becoming parents.

It is the dissenters in these cases who mention sexual activity, in a way that is both focused on procreation and not particularly affirmative or attractive. Thus, for example, Chief Justice Roberts asserts that “[p]rocreation occurs through sexual relations between a man and a woman”⁴⁶ and that “Noah Webster defined marriage as ‘the legal union of a man and woman for life,’ which served the purposes of ‘preventing the promiscuous intercourse of the sexes.’”⁴⁷ Although there are occasional mentions of “romantic love”⁴⁸ in the opinions, of the joy of sex there is scarcely a trace. This seems to me a sad and dangerous loss. Although Kennedy may have been right in *Lawrence* to claim that “it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse,” it should be seen as equally demeaning to both sex and a married couple to ignore that marriage is about sex. There is a reason the same Book of Common Prayer marriage service from which the more familiar vows “in sickness and in health” are taken also included the vow “with my body I thee worship;”⁴⁹ just as there is a reason why gay rights advocates since the 1970s insisted, “[n]ever forget one thing: What this movement is about is fucking.”⁵⁰

This was something Edie Windsor herself never forgot. Although instructed by her lawyer Roberta Kaplan, “not to talk publicly about sex,”⁵¹

⁴⁴ See, e.g., *Windsor*, 133 S. Ct. at 2694 (DOMA “humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

⁴⁵ See, e.g., *Obergefell*, 135 S. Ct. at 2600 (“[H]undreds of thousands of children are presently being raised by such couples . . . Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”).

⁴⁶ *Id.* at 2613 (Roberts, C.J., dissenting). It is worth highlighting that, given the context of the new reproductive technologies, and especially their use by same-sex couples, Roberts’s description of how procreation occurs is terribly underinclusive.

⁴⁷ *Id.* at 2614, 2627 (“The law can recognize as marriage whatever sexual attachments and living arrangements it wishes.”).

⁴⁸ *Id.* at 2614 (“Arranged marriages have largely given way to pairings based on romantic love.”).

⁴⁹ See, e.g., *The Form of Solemnization of Matrimony*, in *THE BOOK OF COMMON PRAYER – 1559*, available at http://justus.anglican.org/resources/bcp/1559/Marriage_1559.htm (last visited Nov. 4, 2015).

⁵⁰ DUDLEY CLENDINNEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 466 (Simon & Schuster, 1999) (former Advocate publisher David Goodstein citing Jim Foster).

⁵¹ Levy, *supra* note 37 (“Until we’ve won, you have to stop talking about you and Thea as passionate butch-femme lovers.”). See generally LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* *passim* (2015).

Windsor made clear in her public statements both before and after the case how very important good sex was to her marriage. “I never wanted anybody inside me till Thea. And then I wanted her inside me all the time,” she told the *New Yorker*.⁵² “Keep it hot” is her constant advice to fans who ask “the secrets to a long marriage.”⁵³ And in the documentary *Edie and Thea: A Very Long Engagement*, made before Speyer’s death, she reveals just how they kept it hot, incorporating the paralyzed Speyer’s wheelchair into their dance routines and the apparatus used to hoist her into bed into their lovemaking.

The triumph of same-sex marriage in the courts, is, however, not the triumph of this explicitly sex positive vision, but perhaps of what was called the homophile movement. It is the long-delayed triumph of the first same sex marriage claimant before the Supreme Court, Jack Baker,⁵⁴ who objected that the term “homosexual implies strictly sexual activity,”⁵⁵ and wanted the laws protecting gays against discrimination to speak in terms of “affectional preference.”

II. MISSING TALK OF SEX EQUALITY

In addition to the substantive due process route it seems to have taken, the Court in *Obergefell* easily could have held that a state ban on same-sex marriage violated equal protection guarantees because it lacked a rational relationship to a permissible governmental interest; because it discriminated with respect to the fundamental right to marry and on the basis of sex, and because it had an impermissible disparate impact on the basis of sexual orientation. Precisely given how many well-nigh inescapable routes to same-sex marriage there are under existing settled constitutional doctrine, it is particularly disturbing for Chief Justice Roberts’s dissenting opinion to end with the ringing declaration that “the Constitution . . . had nothing to do with” the Court’s decision “expanding same-sex marriage,”⁵⁶ especially since his opinion does not in any serious way engage with the equal protection claims for same sex marriage, saying nothing about heightened scrutiny, only that “the marriage laws at issue

⁵² Levy, *supra* note 37.

⁵³ *Id.*

⁵⁴ His case, *Baker v. Nelson*, 409 U.S. 810 (1972), dismissed for want of a substantial federal question, was explicitly overruled by *Obergefell*, 135 S. Ct. at 2604, after having previously presented, for some lower court judges, an obstacle to recognizing a federal constitutional right to same-sex marriage. For further discussion, see Mary Anne Case, *Marriage Licenses*, 2004 *Lockhart Lecture*, 89 MINN. L. REV. 1758 (2005) [hereinafter Case, *Marriage Licenses*].

⁵⁵ See Lars Bjornson, *Baker Rejects “Homosexual” in Gay Rights Amendment*, *ADVOCATE*, May 23, 1973, at 6. Said Baker, “I consider that word insulting, equivalent to and on a par with the word ‘cocksucker.’” An early adopter of the language of dignity in connection with gay rights, Baker insisted, “We have a right to expect our government to provide solutions to our problems in a manner that does not deprive us of our dignity as persons.” See Case, *Marriage Licenses*, *supra* note 54, at 1790, for further discussion.

⁵⁶ *Obergefell*, 135 S. Ct. at 2626 (Roberts, J., dissenting).

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.'"⁵⁷

For Roberts, joined by Scalia and Thomas, to make the claim that the Constitution has "nothing to do" with the result in *Obergefell* could be a dark warning about the extent to which the dissenting justices see our current constitutional law of equal protection regardless of sex and of constitutional protection for intimate association⁵⁸ as illegitimate, *stare decisis* notwithstanding. My own greatest fear is for the fragility, in the absence of a ratified Equal Rights Amendment, of what can be called the Ruth Bader Ginsburg revolution in constitutional sex discrimination law, i.e. the consistent line of cases extending from *Reed v. Reed*⁵⁹ and *Frontiero v. Richardson*⁶⁰ (which she respectively briefed and argued for the ACLU) through *United States v. Virginia*⁶¹ (which she wrote for the Court).⁶² Although this line of cases was affirmed as constitutional orthodoxy by no less than Chief Justice Rehnquist in *Nevada Department of Human Resources v. Hibbs*,⁶³ none of the dissenters in *Obergefell* has ever, as far as I can tell, voted in favor of a constitutional sex discrimination claim,⁶⁴ and

⁵⁷ *Id.* at 2623 (Roberts, J., dissenting) ((quoting *Lawrence*, 539 U.S. at 585) (O'Connor, J., concurring in judgment)). Even Roberts's conclusions on rational basis are difficult to sustain if *Lawrence* is seen as good law. In his *Lawrence* dissent, Scalia correctly describes as a mere "conclusory statement that 'preserving the traditional institution of marriage' is a legitimate state interest," noting that "preserving the traditional institution of marriage is just a kinder way of describing the State's moral disapproval of same-sex couples. Texas's interest in [criminalizing homosexual sex] could be recast in similarly euphemistic terms: 'preserving the traditional sexual mores of our society.'" *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

⁵⁸ Recall that in the Justice Department in which Roberts served, saying one agreed with *Griswold* made one an unacceptable squish.

⁵⁹ 404 U.S. 71 (1971).

⁶⁰ 411 U.S. 677 (1973).

⁶¹ 518 U.S. 515 (1996)

⁶² For an extended explication of the parameters of this case law, see generally Mary Anne Case, "The Very Stereotype the Law Condemns:" *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000) [hereinafter Case, *The Very Stereotype the Law Condemns*]; for an explanation of its relevance to the same-sex marriage cases, see generally Case, *What Feminists Have to Lose*, *supra* note 7.

⁶³ 538 U.S. 721, 736 (2003) (upholding Congress's Section V power to apply the Family and Medical Leave Act to the states because of the need to overcome "[s]tereotypes about women's domestic roles . . . reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men").

⁶⁴ Chief Justice Roberts did, in his confirmation hearings, express a commitment to heightened scrutiny for sex distinctions, but in a way that, although not as slippery as Justice Alito's concessions in *Hobby Lobby*, does not quite commit him to upholding, let alone extending, the current settled law of constitutional sex discrimination. Asked by then-Senator Biden:

Do you think that if a state law distinguishes between a right that your daughter may have and your son may have, or your wife may have, or your sister may have and your brother may have, that the Supreme Court should engage in heightened scrutiny, not just look and see whether or not it makes any sense, but take an extra special look? You and I know the terms, but the public listening here, the Supreme Court has said since 1971, you know, when a state

Justice Kennedy's allegiance to this line of cases is somewhat questionable.⁶⁵ I shall therefore devote the remainder of this essay to a discussion of the implications of the absence in the same-sex marriage cases of an affirmation by all members of Court of the constitutional prohibition on sex discrimination in the laws of marriage.

A premise that seems to unite all the justices who write opinions in *Obergefell* is that the long history of marriage is relevant if not determinative. Noting that "the institution has existed for millennia and across civilizations," Kennedy cites Confucius and Cicero and alludes to "religious and philosophical texts spanning time, cultures, and faiths," insisting "[t]hat history is the beginning of these cases."⁶⁶ He might, however, have taken a lesson from his own approach to earlier constitutional cases concerning same-sex intimacy. *Bowers v. Hardwick* had stressed the long history and wide geographical dispersion of prohibitions on same-sex coupling.⁶⁷ But, in his own majority opinion in *Lawrence*, Kennedy downplayed both the accuracy and the relevance of the claim in *Bowers* that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization," holding: "our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."⁶⁸

Precisely that same past half-century had completely transformed the law of marriage in the United States from what existed in preceding millennia. A crucial feature of that transformation, and its relation to the continuing exclusion of same-sex couples from marriage, was summed up well by Judge Vaughan

passes a law that treats in any way a woman different than a man, there may be a rational for it, but the Supreme Court's going to take a very close look. Not strict scrutiny, which means you can hardly ever get over that bar, like race, but going to take a heightened—they're going to look at it more closely. Do you think that that needs to be done, the Constitution calls for that?

Roberts responded, "Yes, Senator, I do. And I, again, always have." *Transcript: Day Two of the Roberts Confirmation Hearing*, WASH. POST (Sept. 13, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300979.html>. I am grateful to my colleague Will Baude for drawing this passage to my attention.

⁶⁵ Kennedy dissented in *Hibbs*, 538 U.S. at 744 (Kennedy, J., dissenting), for example, and wrote the opinion cabining the sex discrimination cases in *Nguyen v. INS*, 533 U.S. 53 (2001), in which he attempted to define the legally significant term "stereotype . . . as a frame of mind resulting from irrational or uncritical analysis," although in previous cases it had been used to refer to any imperfect proxy, even one for which there was substantial empirical support. See generally Case, *The Very Stereotype the Law Condemns*, *supra* note 62, for further discussion.

⁶⁶ *Obergefell*, 135 S. Ct. at 2594.

⁶⁷ *Bowers*, 478 U.S. at 192 ("Proscriptions against that conduct have ancient roots."). See also *id.* at 196 (Burger, C.J., concurring) ("Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law.").

⁶⁸ *Lawrence*, 539 U.S. at 571-2.

Walker in his opinion in *Perry v. Schwarzenegger*, striking down California's Proposition 8:⁶⁹

The marital bargain in [the states] traditionally required that a woman's legal and economic identity be subsumed by her husband's upon marriage under the doctrine of coverture. . . . As states moved to recognize the equality of the sexes, they eliminated laws and practices like coverture that had made gender a proxy for a spouse's role within a marriage. . . . Marriage was thus transformed from a male-dominated institution into an institution recognizing men and women as equals, [T]he exclusion [of same-sex couples from marriage] exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed. . . . Gender no longer forms an essential part of marriage; marriage under law is a union of equals.⁷⁰

Kennedy, too, tells the history of the move away from coverture and legally imposed role differentiation in marriage,⁷¹ but only as evidence that marriage has

⁶⁹ Walker was neither the first nor the last judge to recognize the close logical and historical connection between the constitutional revolution abolishing female subordination and fixed sex roles in marriage and claims for same-sex marriage. For example, in the very first case to result in state recognition for same-sex couples, *Baker v. Vermont*, 170 Vt. 194 (1999), Justice Denise Johnson, concurring and dissenting, insisted that “[v]iewing the discrimination [in the marriage laws] as sex-based . . . is important” because “the sex-based classification contained in the marriage laws is unrelated to any valid purpose, but rather is a vestige of sex-role stereotyping that applies to both men and women” and “the State may [not] maintain a classification today only by giving credence to generally discredited sex-role stereotyping.” *Id.* at 254. For further discussion see Case, *What Feminists Have to Lose*, *supra* note 7, at 1226. Fifteen years after *Baker*, citing both Judge Walker and Justice Johnson, Ninth Circuit Judge Marsha Berzon, concurring in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), condemned “the sex-based classification contained in the[se] marriage laws” because “as the only gender classification that persists in some states’ marriage statutes, [it] is, at best, ‘a vestige of sex-role stereotyping’ that long plagued marital regimes before the modern era and, at worst, an attempt to reintroduce gender roles.” *Id.* at 490 (citations omitted). According to Berzon, “same-sex marriage bars constitute gender discrimination both facially and when recognized, in their historical context, both as resting on sex stereotyping and as a vestige of the sex-based legal rules once imbedded in the institution of marriage.” *Id.* They cannot withstand intermediate scrutiny, according to her, in part because “interests in promoting and enforcing gender stereotyping . . . simply are not legitimate governmental interests.” *Id.*

⁷⁰ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992-3 (N.D. Cal. 2010). Because Judge Walker frames this passage as part of his findings of fact, rather than as the conclusion of constitutional law it actually is, he leaves himself open to Justice Alito’s derisive dismissal in his *Windsor* dissent. There, Justice Alito cites Walker’s *Perry* opinion to highlight “the degree to which this question [as to whether the Constitution codifies a particular view of marriage] is intractable to typical judicial processes of decisionmaking.” *Windsor*, 133 S. Ct. at 2719 (Alito, J., dissenting).

⁷¹ See *Obergefell*, 135 S. Ct. at 2595 (citations omitted).

As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. . . . As women

evolved over time; he fails to link it tightly to the claim for same-sex marriage or to constitutional rights. Instead of highlighting the active and definitive role of the Constitution and the Supreme Court in making the law of marriage throughout the United States egalitarian with respect to sex, Kennedy uses the passive voice: “As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned.”⁷² Even when Kennedy centers on the period “in the 1970s and 1980s” during which “[r]esponding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage” and then includes a string cite to half a dozen constitutional sex discrimination cases involving married couples, he does so only by way of providing one example among many that “the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions,”⁷³ again failing to draw the more direct connection to same-sex marriage claims.

Had Kennedy more clearly stressed the extraordinary constitutionally mandated nature of changes in the law of marriage resulting from the Supreme Court’s constitutional sex discrimination cases in the 1970s and 1980s, he would have directly refuted the claim of dissenting Chief Justice Roberts that “our Constitution does not enact any one theory of marriage”⁷⁴ and the claim of dissenting Justice Scalia that “[t]he law can recognize as marriage whatever sexual attachments and living arrangements it wishes.”⁷⁵ In an unbroken line of cases over nearly half a century, the Supreme Court has indeed entrenched one theory of marriage under our Constitution, a theory that excludes both legally enforced female subordination and legally enforced “fixed notions concerning the roles and abilities of males and females.”⁷⁶ The law can no longer require a woman to give up her own legal identity as a condition of having the law recognize her marriage. Thus, Blackstone’s “conception of marriage and family,” cited with approval in Chief Justice Roberts dissent, may have been, as Roberts claims, “a given” for the Framers, “its structure, its stability, roles, and

gained legal, political, and 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.

⁷² *Id.*

⁷³ *Id.* at 2603-4. It is perhaps Kennedy’s focus in this paragraph on the Court’s use of “equal protection principles to invalidate laws imposing sex-based inequality on marriage,” rather than on the use of those principles to invalidate laws imposing sex-based role differentiation in marriage, that inhibits him from drawing the more direct connection to same-sex marriage. If, however, all legally mandated inequality in marriage is indeed “unjustified inequality,” so, too, all “sex-based classifications in marriage” are “invidious sex-based classifications.” As used in this paragraph both negative adjectives should be read as descriptive, not limiting.

⁷⁴ *Id.* at 2612 (Roberts, C.J., dissenting).

⁷⁵ *Id.* at 2627 (Scalia, J., dissenting).

⁷⁶ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

values accepted by all;⁷⁷ it is, however, the antithesis of a given under our current constitutional order; it is now unconstitutional.

It remains, to me, frighteningly unclear whether any of the *Obergefell* dissenters accepts our constitutional commitment to an egalitarian, non-sex-role-differentiated law of marriage as settled constitutional law. Their own views of the law of marriage seem stuck in a more distant, now repudiated past. I could take comfort that the dissenters do not reject the sex discrimination argument outright, for example by holding, as some state judges did, that laws of equal application simply do not discriminate on the basis of sex.⁷⁸ I fear, however, something far more sinister may be going on—these may be justices who have never accepted and still do not accept the settled law of sex discrimination. To the extent they are serious about originalism, they believe the Constitution has no more to say about discrimination on grounds of sex in marriage (despite decades of cases all holding the contrary, beginning with *Frontiero*) than they claim it says about sexual orientation. None of the dissenters while on the Supreme Court has voted in favor of a constitutional sex discrimination claim or as far as I can tell explicitly accepted the Ruth Bader Ginsburg revolution as a matter of stare decisis. Scalia has all too recently very clearly disavowed the proposition that the Constitution “prohibits discrimination on the basis of sex.”⁷⁹

Roberts accuses the *Obergefell* majority of having “enacted their own vision of marriage as a matter of constitutional law.”⁸⁰ But that was long since done by the Burger Court and ratified by the Rehnquist Court. Roberts says he “would not ‘sweep away what has so long been settled’ without showing greater respect for all that preceded us.”⁸¹ But it is he who is disrespecting precedent. Roberts insisted in his confirmation hearings:

In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of

⁷⁷ *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting).

⁷⁸ See Case, *What Feminists Have to Lose*, *supra* note 7, for further discussion.

⁷⁹ See, e.g., *The Originalist: Justice Antonin Scalia*, CAL. LAW. (Jan. 2011), <http://www.callawyer.com/clstory.cfm?eid=913358> (answering interviewer Calvin Massey's question whether “equal protection applied to sex discrimination” by saying, “[c]ertainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that.”). For further discussion, see Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT 431, 447 (2014) [hereinafter Case, *The Ladies*].

⁸⁰ *Obergefell*, 135 S. Ct. at 2610 (Roberts, C.J., dissenting).

⁸¹ *Id.* (citation omitted).

the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent.⁸²

But, in his *Obergefell* dissent, he invokes a very odd set of foreign friends, claiming the majority has “order[ed] 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. Just who do we think we are?”⁸³ As my colleague Richard Posner aptly responded, “We’re pretty sure we’re not any of the above.”⁸⁴

The discourse in the *Obergefell* opinions is the bright side of that in *Bowers v. Hardwick*, substituting the eternal glory of marriage for the eternal ignominy of homosexuality, bringing gays and lesbians within the marital fold as civilizational. *Bowers* stressed that “[p]roscriptions against that conduct have ancient roots.”⁸⁵ Yet the same ancient roots that condemned homosexuality structured marriage so as to keep women down. It is this inegalitarian, role-differentiated view of marriage that originalists in general and the *Obergefell* dissenters in particular must acknowledge as “the historic definition” which, according to Roberts, “[t]he people of a State are free . . . to retain.”⁸⁶ Is it then, in the *Obergefell* dissenters’ eyes, only democratic will and legislative grace, not constitutional mandate, that prevents the reintroduction of coverture? This is certainly the suggestion when the Roberts dissent, after insisting that the “Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with ‘[t]he whole subject of the domestic relations of husband and wife,’” observes that “the States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant’s separate status,”⁸⁷ without mentioning that

⁸² Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 200, 200-01 (2005).

⁸³ *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting). Commentators have puzzled over Roberts’s choice of examples. See, e.g., Rosemary Joyce, *Aztec Marriage: A Lesson for Chief Justice Roberts*, PSYCHOL. TODAY (June 26, 2015), <https://www.psychologytoday.com/blog/what-makes-us-human/201506/aztec-marriage-lesson-chief-justice-roberts> (noting that the Aztecs were polygamous and, more generally, that “Roberts could hardly have picked a more challenging set of societies to support his claim that marriage is, and has been for millennia, a stable basis for social organization”). Perhaps the most promising explanation for his choices I can think of is that each of the named societies was reported to tolerate homosexuality outside of marriage. In any event, the Kalahari Bushmen, introduced at oral argument by Justice Kennedy, see Transcript of Oral Argument pt.1 at 15, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), are outliers in Roberts’s catalogue, with their relatively fluid marriage forms sympathetically described by a feminist anthropologist. See generally MARJORIE SHOSTAK, *NISA: THE LIFE AND WORDS OF A KUNG WOMAN passim* (2000).

⁸⁴ Richard A. Posner, *The Chief Justice’s Dissent Is Heartless*, SLATE (June 27, 2015), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_gay_marriage_john_roberts_dissent_in_obergefell_is_heartless.html.

⁸⁵ *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986).

⁸⁶ *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

⁸⁷ *Id.* at 2614 (Roberts, C.J., dissenting).

Supreme Court cases such as *Kirchberg v. Feenstra*⁸⁸ put the states under federal constitutional compulsion to abolish coverture.⁸⁹ Is the Bradley concurrence in *Bradwell* only contingently an anti-precedent?⁹⁰ “[F]or those who believe in a government of laws, not of men, [sic]” it is the *Obergefell* dissenters’ approach, not that of the majority, which “is deeply disheartening.”⁹¹

III. CONCLUSION: REMEMBERING THE SEX TALK OF ABIGAIL ADAMS

Asserting originalist convictions, as he does often in his *Obergefell* dissent, Chief Justice Roberts insists:

When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.⁹²

Roberts fails to acknowledge first that “the People who ratified that Provision” were all indeed “men” and second that among the practices they did not understand their guarantees of due process and equal protection to prohibit was the continued subordination of their wives to them through the law of marriage.⁹³ Instead of responding, as does Justice Kennedy’s majority opinion, by highlighting the ways in which “changed understandings of marriage are

⁸⁸ 450 U.S. 455 (1981) (holding unconstitutional Louisiana’s “head and master” rule, which allowed a husband to dispose of property held jointly held with his wife without his wife’s consent).

⁸⁹ By contrast, in the very next sentence, Roberts correctly observes that “[r]acial restrictions on marriage, which ‘arose as an incident to slavery’ to promote ‘White Supremacy,’ were repealed by many States and ultimately struck down by this Court.” *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting) (emphasis added).

⁹⁰ See *Bradwell v. Illinois*, 83 U.S. 130, 140 (1872) (Bradley, J., concurring) (endorsing as mandated by God and nature the abolition of the legal existence of married women, the legal subordination of wives to husbands, and legally enforced role differentiation between the sexes). For further discussion, see Case, *supra* note 1, at 1469-71 (describing Justice Bradley’s *Bradwell* opinion as the bogeyman of current constitutional sex discrimination law).

⁹¹ I am here turning to my own purposes a sentence from Roberts’s *Obergefell* dissent, 135 S. Ct. at 2611 (“But for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening.”).

⁹² *Obergefell*, 135 S. Ct. at 2628 (Roberts, C.J., dissenting).

⁹³ See, e.g., 43 Cong. Globe, 39th Cong., 1st Sess. 499, 1784 (1866) (remarks of Sen. Cowan) (“Will . . . anybody . . . undertake to say that [the XIII Amendment] was to prevent . . . the quasi servitude which the wife to some extent owes to her husband? Certainly not. . . . It was mentioned as a matter of ridicule, in some places, . . . that it did actually entitle the wife to be paid for her own services, that they should not go to the husband; but that was false.”). For further discussion, see generally Case, *The Ladies*, *supra* note 79; see also Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 454 (1989).

characteristic of a Nation where new dimensions of freedom become apparent to new generations”⁹⁴ let me conclude by turning instead to a member of the founding generation, Abigail Adams. In one of a long series of passionate letters to her husband John, Abigail wrote, “Deliver me from your cold phlegmatick . . . Friends, Lovers and Husbands. I thank Heaven I am not so constituted myself and so connected.”⁹⁵ Equally passionately, but to no effect, Abigail famously wrote John:

[I]n the new Code of Laws which I suppose it will be necessary for you to make I desire you to Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If p[a]rticular care and attention is not paid to the Ladies we are determined to foment a Rebel[l]ion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.⁹⁶

Though John Adams was to scoff at her demands,⁹⁷ she reminded him and all other men that “such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend.”⁹⁸ Thus, “remember[ing] the Ladies,” as Abigail Adams advised, helps us also to remember what the Supreme Court’s same-sex marriage opinions seem to have forgotten—both the joy of sex and the joy of the equality of the sexes.

⁹⁴ *Obergefell*, 135 S. Ct. at 2588.

⁹⁵ Letter from Abigail Adams to John Adams (Aug. 5, 1776), *available at* <https://www.masshist.org/digitaladams/archive/doc?id=L17760805aa>.

⁹⁶ Letter from Abigail Adams to John Adams (Mar. 31, 1776), *available at* <https://www.masshist.org/digitaladams/archive/doc?id=L17760805aa>.

⁹⁷ “As to your extraordinary Code of Laws, I cannot but laugh. . . . Depend upon it, We know better than to repeal our Masculine systems.” Letter from John Adams to Abigail Adams (Apr. 14, 1776), *available at* <https://www.masshist.org/digitaladams/archive/doc?id=L17760414ja>. For further discussion *see generally* Case, *The Ladies*, *supra* note 79.

⁹⁸ Letter from Abigail Adams to John Adams, *supra* note 96.