A PROPOSAL TO REFORM THE INSTITUTION OF MARRIAGE IN THE POST-DOBBS ERA THROUGH THE TWENTY-EIGHTH AMENDMENT

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I. INTRODUCTION[1]

"Embarrassed. Ashamed. Confused. Scared for the future of everyone that isn't a straight white male in this country. Between [R]oe v. [W]ade and then the comments on same sex marriage from Thomas, we are going backwards decades and its horrifying."[2]

"The fact that my wife and I have to consider getting a power of attorney [in] 2022 in case in the future someone tries to reverse same sex marriage is absolutely heartbreaking . . ."[3]

". . . [A]ctivists who oppose same sex marriage have every incentive to use an opinion like the draft in Dobbs to push arguments to overrule Obergefell. Lower courts will likely split, and the Supreme Court will feel the need to resolve. And they'll rely on Dobbs."[4]

"As the great Harvey Milk once said: 'Rights are won only by those who make their voices heard.' Because the American people made their voices heard, marriages are now more secure through the Respect for Marriage Act."[5]

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1 It is important to make the distinction now between consenting adults and child marriages. Thus, this Note will not address any need to expand marriage rights to encompass children, because the states have valid reasons to limit those types of marriages.

2 Mike Ziemer (@MikeZiemer), TWITTER (June 24, 2022, 9:45 AM), https://twitter.com/MikeZiemer/status/1540345446945677315 (discussing Mike Ziemer is a Dallas based entrepreneur and digital marketing specialist who shares his perspectives on Twitter as someone not in the political arena but affected by the decisions made in our government).

3 Emory LaCroix (@emory_lacroix), TWITTER (May 4, 2022, 1:42 PM), https://twitter.com/emory_lacroix/status/1521923231532715010.

4 Rick Hasen (@rickhasen), TWITTER (May 4, 2022, 6:26 PM), https://twitter.com/rickhasen/status/1521994689645215744 (providing Rick Hasen is an internationally recognized expert in election law, a professor of law and political science at UCLA, and named one of the top 100 most influential lawyers in America by the National Law Journal in 2013).

5 Kamala Harris (@kamalaharris), TWITTER (Dec. 16, 2022, 6:18 PM), https://twitter.com/KamalaHarris/status/1603907326993436672 (stating Kamala Harris is the Vice President of the United States and served as the attorney general for California where she started her fight for marriage equality).

"Joe Biden signing the Respect [f]or Marriage Act is not the end. It's just the beginning. They have to keep pushing until all traditional morality has been destroyed. And even then, they won't be satisfied."[6]

Through their concerned language, these tweets illustrate how June 24, 2022, impacted the general public and left many feeling uncertain about the future of individual rights as American citizens once thought would be protected indefinitely.[7]

The latter tweets from Vice President Kamala Harris and conservative political pundit Ben Shapiro depict the differing views from both sides of the political spectrum in response to the Respect for Marriage Act (RFMA), a newly enacted law that recognizes the validity of same-sex and interracial marriages in the United States. However, the question remains, even in light of the new Act, of whether marriage will survive the polarization of this country for a seemingly simple question of who one will choose to marry.[8]

The Supreme Court acknowledged that "[n]o union is more profound than marriage" because it encompasses the "highest ideals of love . . . devotion, sacrifice, and family."[9] The Court has also suggested that it is a right no one should have to question.[10] From the line of cases establishing interracial marriage in *Loving v. Virginia*, through privacy rights for consensual adult non-procreative sexual activity in *Lawrence v. Texas*, and safeguarding protection for same-sex marriage in *Obergefell v. Hodges*, marriage, regardless of the parties' sex or gender, seemed like a fundamental right increasingly few questioned.[11] But for Justice Thomas, those cases' mere reliance on longstanding substantive due process analysis raised more questions about their viability than it resolved.[12]

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6 Ben Shapiro (@benshapiro), TWITTER (Dec. 15, 2022, 9:46 AM), https://twitter.com/benshapiro/status/1603416283126571008 (explaining Ben Shapiro is a renowned conservative political pundit, syndicated columnist, lawyer, and New York bestselling author who weighs in on the current state of marriage rights in the United States).

7 Jake Epstein, *Hillary Clinton says Supreme Court decision to overturn Roe v Wade will 'live in infamy' and is a 'step backward' for women's rights*, BUSINESS INSIDER (June 24, 2022, 22:22 IST), https://www.businessinsider.in/politics/world/news/hillary-clinton-says-supreme-court-decision-to-overturn-roe-will-live-in-infamy-and-is-a-step-backward-for-womens-rights/articleshow/92441871.cms.

8 *Section 3: Political Polarization and Personal Life Liberals Want Walkable Communities, Conservatives Prefer More Room*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/section-3-political-polarization-and-personal-life/.

9 Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

10 *Remarks by President Biden on the Continued Battle for the Soul of the Nation*, THE WHITE HOUSE (Sep. 1, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/01/remarks-by-president-bidenon-the-continued-battle-for-the-soul-of-the-nation/.

11 *See* Loving v. Virginia, 388 U.S. 1, 5 (1967); *Obergefell*, 576 U.S. at 671; Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

12 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring).

This concern was only exacerbated when the Court famously decided to weigh in on one of the most hot-buttoned issues of the last century.[13] In *Dobbs v. Jackson Women's Health Organization*, the recent Supreme Court case to overrule *Roe v. Wade*,[14] Justice Thomas articulated in his concurring opinion:

> For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents.[15]

Though the *Dobbs* majority opinion expressly limits the decision's reach to abortion, *Roe* was a foundational opinion in many key Substantive Due Process cases.[16] Writing for the majority, Justice Alito declared, "[O]ur decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[17] Even Supreme Court Justice Brett Kavanagh, in his Senate confirmation hearing, when questioned about *Roe*, repeatedly emphasized that *Roe* was "precedent on precedent," and shortly thereafter, voted for the overturning of *Roe*.[18] These statements from future Supreme Court Justices in their Senate Confirmation Hearings seemingly suggest the law is never fully settled despite what the Justices say before stepping on the bench.[19] These rulings are always subjected to a new composition of the Supreme Court with differing articulations of the Constitution and how it relates to certain "fundamental" rights.[20]

Marriage traditionally functioned as a state's right; however, since *Obergefell,* the federal government will not permit states to deny marriage licenses solely on the basis of sexual preference.[21] It is arguably clear from the current members of the Supreme Court that *Loving v. Virginia* will not

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13 *See id.*

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

15 *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

16 *Id.* at 2277-78 (quoting J. Alito, The Court "emphasizes that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

17 *Id.*

18 Tierney Sneed, *Brett Kavanagh, who touted importance of precedent during confirmation fight, downplays it as he considers reversing Roe*, CNN (Dec. 2, 2021, 11:30 AM), https://www.cnn.com/2021/12/01/politics/kavanaugh-abortion-precedent-roe-mississippi.

19 *See id.*

20 *See id.*

21 Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, STATELINE (July 7, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans.

be overturned, but the same cannot be said about *Obergefell v. Hodges*.[22] Although *Obergefell* provided same-sex marriages the same protections afforded to heterosexual marriages, it is not settled law.[23] Any given case handed down by the Supreme Court has the potential to be overturned years later from when it was originally decided upon.[24] Although prior Courts have emphasized the importance of *stare decisis*, it is clear that the Supreme Court will not always adhere to precedent.[25] For this reason, same-sex marriage must be thoroughly analyzed to determine the plausibility of it becoming overturned, impacting millions of married couples across the country.[26]

This Note argues that it is counterintuitive to constitutionalize marriage for one group of people but strip another marriage of rights simply because those individuals are not a "traditional" couple.[27] Throughout the history of the Supreme Court, some justices vary in what definition of marriage would constitute protection.[28] However, this Note argues for the right to marry regardless of a definition attached to it because of its critical role in a functioning society.[29] Consider the Court's recent decision in *Dobbs*; the only marriage seemingly free from government intrusion is one compromising of one white male and one white female.[30] This is not every single person's definition or composition of marriage.[31] The United States is a country where everyone should be free to choose who they marry.[32] It is a country that embraces differences and embraces the culture of the many, not just the few.[33]

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22 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Thomas, J., concurring).

23 Obergefell v. Hodges, 576 U.S. 644, 734 (2015) (Roberts, C.J., dissenting).

24 *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

25 Devin Dwyer, *After Roe ruling, is 'stare decisis' dead? How the Supreme Court's view of precedent is evolving*, ABC NEWS (June 24, 2022, 11:20 AM), https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047.

26 Zachary Scherer, *Key Demographic and Economic Characteristics of Same-Sex and Opposite-Sex Couples Differed*, U.S. CENSUS BUREAU (Nov. 22, 2022), https://www.census.gov/library/stories/2022/11/same-sex-couple-households-exceeded-one-million.html (stating there are 1.2 million same-sex couple households in the United States in 2021).

27 *See* R. Kelly Raley et al., *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, FUTURE OF CHILD., Fall 2015, at 89.

28 *Obergefell*, 576 U.S. at 734 (Roberts, C.J., dissenting).

29 *See* Ryan Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, BACKGROUNDER, Mar. 11, 2013, at 1.

30 *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

31 Obergefell v. Hodges, 576 U.S. 644, 651 (2015); Loving v. Virginia, 388 U.S. 1, 2 (1967); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

32 *See* Ilya Shapiro, *The Equal Protection Clause Guarantees the Right to Marry*, CATO INST. (March 4, 2013), https://www.cato.org/commentary/equal-protection-clause-guarantees-right-marry.

33 *See id.*

The purpose of this Note is to highlight the volatile nature of the right to marry.[34] Proposing a constitutional amendment could eliminate fear that the protection of certain categories of marriage is subject to change based on the ever-changing political composition of the Supreme Court.[35] Constitutionalizing marriage would allow every single daughter, son, parent, and grandparent to no longer worry about their future loved ones being able to fully express their love for someone else, even if their definition of marriage does not fit the "traditional" form.[36]

This Note will also consider the impact *Dobbs* may have on Substantive Due Process precedents the Court has relied on since *Roe* was decided. Part I of this Note addresses how the Court's jurisprudence came to rely upon the doctrine of Substantive Due Process and examines the pitfalls that a Substantive Due Process analysis has upon these impacted rights. Part II of this Note discusses the history of same-sex marriage and interracial marriage through cases that discuss privacy and same-sex marriage bans. Part III addresses the relationship between *Roe v. Wade* and *Obergefell v. Hodges* while analyzing the similarities in the criteria for overturning a Supreme Court precedent and how that same logic could be applied in *Obergefell*. Part IV considers the Respect for Marriage Act, an attempt by Congress to protect same-sex and interracial marriage by passing a federal statute that replaces all federal definitions of marriage to eliminate "between one man and one woman."[37] Following this analysis, Part IV explains why a constitutional amendment is still pertinent in this area of the law. Finally, Part V concludes with a rationale in support of a constitutional amendment because the Respect for Marriage Act fails to protect marriage sufficiently.

II. SUBSTANTIVE DUE PROCESS

The majority in *Obergefell* rested its decision upon the fundamental right to marry.[38] The Court identified several reasons why it is fundamental that the right to marry applies equally to same-sex marriages, including: (1) individual autonomy to decide who one will marry, (2) the unique relationship of support and recognition marriage provides, (3) safeguarding children within a marriage, and (4) marriage provides social order regardless of the distinction of what type of marriage it is.[39]

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34 Reuters Staff, *Factbox: Major Supreme Court decisions on gay rights*, REUTERS (June 26, 2013), https://www.reuters.com/article/us-usa-court-gaymarriage-decisions-factb/factbox-major-supreme-court-decisions-on-gay-rights-idUSBRE95P19D20130626.

35 *See, e.g.*, Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

36 *See Obergefell*, 576 U.S. at 681.

37 Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

38 LEGISLATIVE ATTORNEY, CONG. RSCH. SERV., R44143, OBERGEFELL V. HODGES: SAME-SEX MARRIAGE LEGALIZED 3-4 (2015).

39 *Id.*

Substantive Due Process protects unwritten rights from unwarranted government intrusion.[40] As the Supreme Court expressed in *Fletcher v. Peck*, "certain great principles of justice, whose authority is universally acknowledged," but which are not expressly written into the text of the U.S. Constitution, should be judicially protected against government invasion.[41]

There are two questions to consider when the Court analyzes a potential fundamental right under Substantive Due Process.[42] The first question is whether there is a fundamental liberty interest being infringed.[43] A fundamental liberty interest is one that is deeply rooted in history and tradition and implicit in the concept of ordered liberty.[44] This test was employed in both *Loving v. Virginia* and *Obergefell v. Hodges*.[45] However, this might be the crutch of *Obergefell*, and it could lead to its demise.[46] This test suggests only rights deeply rooted in history are protected.[47] Since same-sex marriage was criminalized in all states until 2015, it cannot reasonably be said to be deeply rooted in history.[48] The Court acknowledges this departure but states that "rights come not from ancient sources alone."[49] The entire premise *Obergefell* rests on is a deeply flawed and convoluted notion that same-sex marriage is deeply rooted when it was banned across the world until 2000.[50] *Loving* is not under attack in the Court's analysis under both Substantive Due Process and Equal Protection.[51] There is an argument that *Obergefell* should have been ruled under Equal Protection and this debate might be unfounded.[52] However, because it was not ruled under both Substantive Due Process and Equal Protection the analysis is exceptionally weak.[53]

In *Obergefell*, the Court glanced over the history and tradition of same-sex marriage.[54] The case is premised on same-sex marriages and not marriages as a whole.[55] The Court wrote very little about the history of same-sex marriage besides assuming the laws against same-sex marriage are rooted

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40 CALVIN MASSEY & BRANNON P. DENNING, AMERICAN CONSTITUTIONAL LAW 461 (Wolters Kluwer, 6th ed. 2019).

41 Fletcher v. Peck, 10 U.S. 87, 133 (1810).

42 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235-36 (2022).

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 U.S. v. Windsor, 570 U.S. 744, 808 (2013) (Alito, J., dissenting).

49 Obergefell v. Hodges, 576 U.S. 644, 671 (2015).

50 *Windsor*, 570 U.S. at 808 (Alito, J., dissenting) ("No country allowed same-sex couples to marry until the Netherlands did so in 2000.").

51 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235-36 (2022).

52 *Id.*

53 *See Obergefell*, 576 U.S. at 713 (Roberts, C.J., dissenting).

54 *Id.* at 656-58.

55 Obergefell v. Hodges, 576 U.S. 644, 671 (2015).

on religious and philosophical grounds.[56] As for ordered liberty, the Court articulated that the Fourteenth Amendment did not cover every single fundamental right.[57] The drafters of the Fourteenth Amendment did not presume to know the values of future generations and what liberty interests would deserve protection.[58] However, after reflecting, the Court announced that the Constitution's central protections would encompass same-sex marriage.[59] The right to marry is deeply rooted in our nation's history while same-sex marriage is not.[60] Specifically, there is no point in history when the Fourteenth Amendment was curated to have envisioned same-sex marriage.[61] Therefore, it cannot be assumed that same-sex marriage would pass that part of the Substantive Due Process analysis.[62]

However, if Due Process encompasses practically any marriage, it is not in our concept of ordered liberty.[63] The concept of ordered liberty, for example in *Lawrence v. Texas*, was preventing the states from coming into the most private parts of our lives: the bedroom.[64] However, *Lawrence* can be distinguished from *Obergefell*.[65] While many commentators have contended that *Lawrence*, which outlawed all statutes against sodomy, was a stepping stone for same-sex marriage advocates,[66] this cannot be the case. *Lawrence* is an example of telling the states they cannot do something.[67] *Obergefell* requires an affirmative act by the states to recognize a marriage license.[68] One case is affirmative action while the other case is inaction.[69]

This distinct difference makes the point that instead of the Supreme Court playing a judicial role, they were legislating from the bench.[70] *Obergefell* would have been better suited being ruled under the Equal Protection Clause.[71] The Equal Protection Clause would provide far greater protection than the Due Process Clause.[72] A state's refusal to recognize a marriage that was validly acquired in one state and denied in a neighboring

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56 *Id.* at 672-73.
57 *Id.* at 672.
58 *Id.*
59 *Id.*
60 *Id.* at 690 (Roberts, C.J., dissenting).
61 Obergefell v. Hodges, 576 U.S. 644, 690 (2015) (Roberts, C.J., dissenting).
62 *Id.*
63 *Id.* at 701.
64 *Id.*
65 *Id.*
66 *Id.*
67 Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).
68 Obergefell v. Hodges, 576 U.S. 644, 701 (2015) (Roberts, C.J., dissenting).
69 *Id.*
70 *Id.* at 712.
71 HELEN M. ALVARE ET AL., WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S SAME-SEX DECISION 112 (Yale Univ. Press 2020).
72 *Obergefell v. Hodges*, ACLU OHIO (Jan. 16, 2014), https://www.acluohio.org/en/cases/obergefell-v-hodges.

state runs afoul of the Equal Protection Clause.[73] The inconsistent treatment between the states would not be justified for the unequal treatment by any rational or legitimate basis.[74] Applying the Equal Protection analysis would allow the Court to acknowledge that the applicable level of scrutiny for laws regulating sexual orientation would be held to the highest level of scrutiny.[75] This analysis would allow the Court to determine the classification of sexual orientation as a suspect class.[76] Given the increased level of scrutiny, it is less likely that a court would find government action constitutional.[77] However, *Obergefell* left courts with ambiguity and did not resolve the broader impact on the rights of the LGBTQIA+ community because the court neglected classifying sexual orientation as a suspect class.[78]

III. THE EVOLUTION OF MARRIAGE RIGHTS IN THE SUPREME COURT'S JURISPRUDENCE

> "If marriage has any meaning at all, it is that when you collapse from a stroke, there will be another person whose "job" is to drop everything and come to your aid . . . . To be married is to know there is someone out there for whom you are always first in line."[79]

The controversy over defining marriage illuminates the absence of a clear boundary of what constitutes and defines a marriage.[80] Same-sex couples plead their case in courts to assert their right to marry with arguments rooted in equality and liberty.[81] This shows a strong desire for their relationship to be given the same respect and dignity as any heterosexual couple receives without having to fight.[82]

The Supreme Court's decision in *Loving* which invalidated anti-miscegenation laws, or those which enforce racial segmentation at the level of marriage and intimate relationships,[83] was the starting point of the change

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73 *Id.*

74 *Id.*

75 LEGISLATIVE ATTORNEY, CONG. RSCH. SERV., R44143, OBERGEFELL V. HODGES: SAME-SEX MARRIAGE LEGALIZED 1-2 (2015).

76 *Id.*

77 *Id.*

78 *Id.*

79 JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 22 (Holt Paperbacks, 2005).

80 *See* Loving v. Virginia, 388 U.S. 1, 7 (1967); Obergefell v. Hodges, 576 U.S. 644, 658 (2015).

81 *See* Brief for Respondents at 1, Hollingsworth v. Perry, No. 12-144 (9th Cir. Feb. 28, 2013) ("This case is about marriage… [T]his case is also about equality.").

82 Murray Dry, *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, The Separation of Powers, and Individual Rights*, 39 VT. L. REV. 275, 278 (2014).

83 *Anti-miscegenation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/anti-miscegenation (last visited Sept. 14, 2023) ("opposing or prohibiting miscegenation");

in how marriage is defined.[84] In 2015, same-sex couples were given the same protection with the Supreme Court recognizing their right to marry.[85] Only seven years later, some of the Supreme Court Justices, including Justice Alito, Thomas, and Barrett, have already taken a stance by questioning the very ruling that establishes same-sex couples' right to marry.[86]

Throughout a long-heated battle for Civil Rights, it was not until 1967 in *Loving v. Virginia* that the right to interracial marriage was finally accepted.[87] Throughout American history, interracial marriage in the United States has endured a challenging history.[88] Beginning with the adoption of slavery laws in Maryland in 1661, Virginia enacted laws prohibiting interracial marriage.[89] These anti-miscegenation laws were prominent throughout the South, with thirty-eight states passing laws prohibiting interracial marriages.[90] However, these laws did not prevent unions between Whites and Black people.[91]

As societal norms and expectations of love changed, the Supreme Court's involvement finally put an end to this type of discrimination.[92] Thus, the *Loving* Court affirmed that the right to interracially marry was constitutionally protected and found that states could no longer discriminate on the basis of race when determining whether a marriage license would be granted.[93]

A. The Right to Same-Sex Marriage

For most of the Nation's history, states enacted statutes defining marriage to encompass only a union of one man and one woman.[94] In 1942, the Supreme Court ruled in *Skinner v. Oklahoma* that the Constitution guarantees a fundamental right to marry.[95] The Court held that "[m]arriage and procreation are fundamental to the very existence and survival of the

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Miscegenation, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/miscegenation (last visited Sept. 14, 2023) ("mixture of races").

84 *Loving*, 388 U.S. at 2.

85 *Obergefell*, 576 U.S. at 681-82.

86 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring).

87 Loving v. Virginia, 388 U.S. 1, 12 (1967).

88 *Interracial Relationships and Marriage in the USA*, STUDYCORGI (Nov. 5, 2021), https://studycorgi.com/interracial-relationships-and-marriage-in-the-usa/.

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 Loving v. Virginia, 388 U.S. 1, 12 (1967).

94 Jessica Pfisterer & Tiffany V. Wynn, *Legal Recognition of Same-Sex Relationships*, 11 GEO. J. GENDER & L. 1, 2 (2010).

95 Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); *see also Loving*, 388 U.S. at 12.

race."[96] Then, in *Loving v. Virginia*, the Court stated, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[97] In *Loving*, the Court also continued to impress that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[98]

This issue of same-sex marriage did not come into the state court system until *Baker v. Nelson*.[99] In *Baker*, the Minnesota courts denied a marriage license to a couple solely because they were of the same sex.[100] The Minnesota Supreme Court upheld the denial, explaining that their case was distinguishable from *Loving v. Virginia* because "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[101] For twenty years after *Baker*, nobody challenged the court's stance on same-sex marriage.[102]

Following the twenty-year period, three same-sex couples filed suit in *Baehr v. Lewin*.[103] There, a Hawaii statute prohibited all same-sex marriages.[104] The state argued that their interest was legitimate because the protection of children and other people is crucial to fostering procreation in the marital framework.[105] However, the Hawaii Supreme Court failed to rule on the case and, instead, remanded it to allow the state to prove it had such a compelling interest.[106] These compelling interests included the right to privacy, freedom to marry, and freedom of equal treatment.[107] In response to this ruling, the voters of Hawaii amended the legislative power to encompass same-sex marriage in their definition of marriage.[108] This inevitably made the case moot, and the court never expressly ruled on marriage protection for same-sex couples.[109] This case prompted other states to pass constitutional amendments in their states to strictly define marriage to encompass only a man and a woman.[110]

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96 *Skinner*, 316 U.S. at 541.

97 *Loving*, 388 U.S. at 12.

98 *Id.* (quoting, in part, the Court in *Skinner*).

99 Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).

100 *Id.* at 185-86.

101 *Id.* at 187.

102 Pfisterer & Wynn, *supra* note 94, at 3.

103 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

104 HAW. REV. STAT. ANN. § 572-1 (holding that "marriage . . . shall be only between a man and a woman . . . ").

105 *See Baehr*, 852 P.2d at 60-61.

106 *Id.* at 67.

107 *Id.* at 52, 60.

108 *See* HAW. CONST. art. 1, § 23.

109 *Id.*

110 Haeyoun Park, *Gay Marriage State by State: From a Few States to the Whole Nation*, THE N.Y. TIMES (June 26, 2015), https://www.nytimes.com/interactive/2015/03/04/us/gay-marriage-state-by-state.html; *see also* Pfisterer & Wynn, *supra* note 94, at 4.

In 1996, President Clinton signed into law the Defense of Marriage Act (DOMA).[111] DOMA solidified Congress's priorities of defining marriage in the most traditional manner.[112] Congress had two primary objectives in DOMA: (1) defending heterosexual marriage for federal purposes and (2) protecting states that deny same-sex couples marriage licenses under the Constitution's Full Faith and Credit Clause.[113]

The Supreme Court reached a landmark decision when deciding *Lawrence v. Texas*.[114] There, the Court decided, among other issues, whether the Due Process Clause protected governmental intrusion into a couple's private affairs.[115] The Supreme Court struck down a Texas sodomy statute,[116] explaining that the LGBTQIA+ community is "entitled to respect for their private lives."[117] They also explained that the State could not "demean [petitioners'] existence or control their destiny by making their private sexual conduct a crime."[118] They went on to further explain, "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[119]

In *Lawrence*, Justices Scalia and Thomas both stated,

> Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.[120]

Justice Thomas joined Justice Scalia in the dissent because of their similar stances on sodomy and the way the Court's precedent depicted Substantive Due Process, in limited circumstances, to expand the scope of who is guaranteed this fundamental right.[121] This joint dissent was made in part because their view is there is not a fundamental right under the Due Process Clause that establishes the right to sodomy.[122] One explanation behind the dissent could be that Justice Thomas and Scalia engaged in a strict reading of the Constitution, which adhered to an originalist judicial

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111 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).
112 H.R. REP. NO. 104-664, at 2 (1996).
113 *Id.*
114 Lawrence v. Texas, 539 U.S. 558 (2003).
115 *Id.* at 564.
116 Specifically, the Court struck down TEX. PENAL CODE ANN. § 21.06(a) (2007 Reg. Sess. of 80th legislature).
117 *Lawrence*, 539 U.S. at 578.
118 *Id.*
119 *Id.*
120 Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).
121 *Id.* at 586.
122 *See id.* at 593–98.

philosophy.[123] If the right is not deeply rooted in history, it is a right, according to Justices Scalia and Thomas, that would not be entitled to constitutional protection from the federal government, but is instead reserved to the states to regulate.[124] Further, sodomy was a criminal offense at the time the Bill of Rights was ratified.[125] However, this line of reasoning seems contradictory when it can be assumed interracial marriage would be looked down upon at that time as well.[126] It is contradictory because both interracial marriage and sodomy were looked down upon when looking to history and tradition; however, the Court has seemingly decided to favor one issue over the other.

In addition, the Justices compared sodomy with criminal laws against fornication, bigamy, adultery, adult incest, and bestiality and further claimed these sexual behaviors were "immoral and unacceptable."[127] The dissenting Justices advocated that same-sex couples should use the traditional method of the democratic process by convincing others to repeal laws when it is deemed socially acceptable to change old laws to reflect the views of modern society.[128] One may argue this is a well-intended option for anyone but it is not a quick or effective process for every issue.[129] Although the case was not expressly directed at same-sex marriages, Justice Scalia warned Americans that "[t]oday's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[130]

In 2003, several years after the decision in *Baehr*, seven same-sex couples in Massachusetts filed suit again when the state failed to issue those couples marriage licenses.[131] In a close vote, the Massachusetts Supreme Court ruled that the Department of Health's practice of denying marriage licenses was "incompatible with the constitutional principles of respect for individual autonomy and equality."[132] The court solidified the right to marriage as "the voluntary union of two persons as spouses, to the exclusion of all others" which sustained the right to marry the same sex.[133]

The State made three arguments in support of the ban.[134] First, the goal of marriage is to provide a "favorable setting for procreation," however, the

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123 *See id.* at 588.
124 *See id.* at 593.
125 *See id.* at 594 (quoting Bowers v. Hardwick, 478 U.S. 186, 192 (1986)).
126 *See, e.g.*, Naim v. Naim, 87 S.E.2d 749, 755-56 (1955).
127 Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).
128 *Id.* at 603-04.
129 *How long does it take to pass and enact Bills?*, PARLIAMENTARY MONITORING GRP., https://pmg.org.za/page/How%20long (last visited Jan. 11, 2023).
130 *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).
131 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949–50 (Mass. 2003).
132 *Id.* at 949.
133 *Id.* at 969.
134 *See* MASS. GEN. LAWS ANN. ch. 207. §§ 19-20.

court stated this was inconsistent according to the statute when the state legislature granted marriage rights between infertile and terminally ill individuals.[135] Second, the State argued that heterosexual marriages ensured "the optimal setting for child rearing," and again, the court found single-parent and non-traditional families raised children in conformity with the court's requirements and that there is no evidence same-sex couples would not do the same or be capable of the same.[136] Finally, the State argued it had scarce resources, which it must preserve and extending the right to marriage to same-sex couples would depreciate those resources.[137] Again, the court did not find this reasoning persuasive because it was an over-generalization about the financial abilities of same-sex and heterosexual couples.[138]

A decade later in *Obergefell*, Michigan, Kentucky, Ohio, and Tennessee all defined marriage as a union between one man and one woman.[139] Fourteen same-sex couples, along with two men whose same-sex partners had since deceased, came forward claiming that these statutes violated their Fourteenth Amendment Due Process right by denying them the right for their marriage to be recognized in those states.[140] The Court provided a history of the evolution of marriage, explaining that marriage used to be viewed as an arrangement by an individual's parents based on a variety of factors, including but not limited to political, religious, or financial reasons.[141] Then, marriage deemed a woman as property owned and controlled by her husband.[142] The Court stated a wife's existence merged with her husband such that she was no longer a separate individual.[143] The majority concluded that the right to same-sex marriage is fundamental under the Constitution because the Court's past precedents, such as *Loving*, are based upon the fundamental principle of individual autonomy, which guarantees the right to marry whomever one chooses.[144] Views on marriage evolve over time; while same-sex marriage might have once been frowned upon, today, those feelings are not prevalent nationwide and the laws in the United States should reflect the people.[145]

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135 *Goodridge*, 798 N.E.2d at 961.

136 *Id.* at 961-64.

137 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003).

138 *Id.* (explaining that the state argued that since same-sex couples are on average less financially dependent on each other than opposite-sex couples, they are less in need of the various financial benefits attendant to marriage).

139 Obergefell v. Hodges, 576 U.S. 644, 653 (2015).

140 *Id.*

141 *Id.* at 657-59.

142 *Id.*

143 *Id.*

144 *Id.* at 665.

145 *Overview – Rule of Law*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last visited Apr. 8, 2023).

In Justice Thomas' dissent, he stated, "[t]hey ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation."[146] It is critical to notice a difference that over thirty states still opted for the traditional definition of marriage of one man and one woman.[147] Thus, this is a stronger overreach than in *Loving*.[148] According to Justice Thomas, *Loving* is distinct from *Obergefell*, partly due to this judicial overreach.[149]

In addition, *Loving* removed racial barriers to marriage, which did not inherently change the definition of marriage.[150] Justice Thomas joined Justice Roberts by focusing his reasoning on the belief that fundamental rights announced by the Supreme Court must be rooted in history and tradition.[151] History would dictate a plural marriage would be more accepted by the dissenters than a same-sex marriage would.[152] Plural marriage is also known as polygamy, which is the practice of having more than one spouse at one time.[153] The reasoning being because plural marriages are more established in cultures and religions around the world.[154]

The experience of growing up profoundly different, whether that be emotionally or psychologically, inevitably alters a person's self-perception, tends to make them more wary and distant, more attuned to appearance and its foibles, more self-conscious and perhaps more reflective of things that are foreign to one's own life experiences.[155] The presence of the LGBTQIA+ community in the arts, literature, architecture, design, and fashion could be understood, as some have, as a simple response to oppression.[156] Therefore, because the state's arguments against same-sex marriages reflect religious and moral doctrines, those arguments cannot have a place in our form of government.[157] Biblical scripture is not recognized in the United States as legally binding law and cannot be a source of resolution to this controversy.[158]

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146 Obergefell v. Hodges, 576 U.S. 644, 722 (2015) (Thomas, J., dissenting).
147 *Id*.
148 *Id*. at 732.
149 *Id*.
150 *Id*. at 733.
151 *Id*. at 686.
152 Obergefell v. Hodges, 576 U.S. 644, 704 (2015) (Roberts, C.J., dissenting).
153 *Polygamy*, DICTIONARY.COM, https://www.dictionary.com/browse/polygamy (last visited Apr. 8, 2023).
154 *Obergefell*, 576 U.S. at 704 (Roberts, C.J., dissenting).
155 ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 179, 197 (photo. reprt. 1996) (1996).
156 *Id*.
157 JOHN RAWLS, POLITICAL LIBERALISM 22 (Columbia Univ. Press expanded ed., 2005).
158 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

B. The Right to Interracial Marriage

The right to interracial marriage was first examined in *Naim v. Naim*, where an interracial couple married in North Carolina and then returned home to Virginia to live as husband and wife.[159] Virginia would not recognize their marriage and further wanted to incarcerate this couple for leaving the state solely for the purpose of getting married.[160] The Virginia statute read as follows, "[i]t shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian."[161]

The Virginia court further articulated, "it is for the peace and happiness of the colored race, as well as of the white, that laws prohibiting intermarriage of the races should exist . . . ."[162] This case serves as a prime example of this Nation's antiquated attitudes toward interracial marriage.[163]

However, since *Naim* came before *Loving*, it displays the strong aversion for interracial marriage that has since been disfavored.[164] It further provides an example of how far society changed from this case in 1955 to *Loving* in 1967.[165] Moreover, it reveals that at one point in history, marriage was viewed as a state's right, which the Supreme Court later overruled.[166] The *Loving* Court recognized there are no legitimate reasons for states to deny the recognition of marriages between and among the races.[167]

In addition, *Perez v. Sharp* is a case that arose in Los Angeles when a county clerk denied a marriage license to a Latina woman, Andrea Perez, who was classified as white under the California state law, and Sylvester Davis, who was an African American man.[168] The California statute voided all interracial marriages, but did not induce criminal penalties as seen in other states.[169] The California Supreme Court quickly dismissed the case, but noted the statute violated the Equal Protection Clause by setting up the doctrinal

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159 Naim v. Naim, 87 S.E.2d 749, 755-56 (1955) (providing this case was decided a decade before *Loving v. Virginia*).

160 *Id.* at 755.

161 *Id.* at 756.

162 *Id.* at 759.

163 *Id.* at 756.

164 *See* Loving v. Virginia, 388 U.S. 1, 5 (1967).

165 *See id.* at 12.

166 *See id.*

167 *Id.* at 5.

168 Perez v. Sharp, 198 P.2d 17, 17-18 (Cal. 1948) (explaining to avoid possible confusion, the decision in *Perez v. Sharp* was reported in the unofficial regional reporter as Perez *v. Lippold* 32 Cal.2d 711, 198 P.2d 17 (1948), and judicial decisions in other states sometimes have referred to the decision by that title. In this note it shall be referred to the decision under its correct official title of *Perez v. Sharp).*

169 *Id.*

approach later restated in the Supreme Court's opinion of *Loving*.[170] Judge Traynor stated,

> Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution.[171]

The State's arguments, each being arguably more racist than the next, were "the prohibition of intermarriage between Caucasions [sic] and members of the specified races prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians," that statistics prove "physical inferiority of certain races," and "persons wishing to marry in contravention of race barriers come from the 'dregs of society.'"[172] Unsurprisingly, the State did not legitimately fit between the means and the ends for this arbitrary racial restriction on marriage licenses.[173]

Finally, the groundbreaking case came up to the Supreme Court in *Loving*, when a white man and a black woman were married in the District of Columbia and returned to their home state of Virginia.[174] Virginia had a statute in place that banned interracial marriage.[175] This statute provided:

> If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished . . . and the marriage shall be governed by the same law as if it had been solemnized in this State.[176]

The trial judge went on to say,

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his

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170 *Id.* at 17-19*;* Loving v. Virginia, 388 U.S. 1, 11 (1967).
171 *Perez*, 198 P.2d at 19.
172 *Id.* at 23-25.
173 Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1164 (2009).
174 *Id.* at 1153-54.
175 *Id.* at 1158.
176 Loving v. Virginia, 388 U.S. 1, 4 (1967).

> arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[177]

Mildred Delores Jeter and Richard Perry Loving excited the entire country once this case was accepted and decided.[178] This case ended 300-year-long anti-miscegenation laws that made interracial marriages a crime across the country.[179] To Mildred and Richard, this case was more than a stance on politics or laws, it was about love.[180] On the anniversary of the Supreme Court's decision, Mildred stated, "[w]e were in love, and we wanted to be married."[181] *Loving* shows exactly how far marriage jurisprudence has come in America.[182] However, the Lovings would not enjoy this right themselves.[183] While the Lovings admired their marriage license on the dresser in their bedroom, the police barged into the couple's bedroom and revealed to them their marriage was invalid.[184] The Lovings fought legal battles the majority of their lives, facing jail and banishment from their homes.[185] The sheriff viewed their marriage as "no good here."[186] The Virginia legislature saw their marriage as "sociological, psychological, evil[]."[187]

Marriage is a personal right every free person should be able to enjoy.[188] Notably, only sixteen states had anti-interracial marriage statutes on their books when *Loving* was decided.[189] It seems as though since *Loving*, more American people have accepted and embraced marrying other races.[190] Chief Justice Earl Warren simply declared to the country the law violated the

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177 *Id.* at 3.

178 Leah Ward Sears & Sasha N. Greenberg, *The Love in Loving: Overcoming Artificial Racial Barriers*, 94 NOTRE DAME L. REV. 28, 29 (2018).

179 *Id.*

180 *Id.*

181 *Id.*; Mildred Loving, *40 Years Later*, ATLANTIC (June 18, 2007), https://www.theatlantic.com/daily-dish/archive/2007/06/mildred-loving-40-years-later/227582/.

182 *See* Naim v. Naim, 197 Va. 80, 81 (1955); *see also* Loving v. Virginia, 388 U.S. 1 (1967).

183 Sears & Greenberg, *supra* note 178, at 30.

184 Arica L. Coleman, *What You Didn't Know About Loving v. Virginia*, TIME (June 10, 2016), http://time.com/4362508/loving-v-virginia-personas/.

185 Sears & Greenberg, *supra* note 178, at 30.

186 David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. TIMES (June 12, 1992), http://www.nytimes.com/1992/06/12/news/a-mixed-marriage-s-25th-anniversary-of-legality.html?pagewanted=all.

187 Marisa Penaloza, *'Illicit Cohabitation': Listen to 6 Stunning Moments from Loving v. Virginia,* NPR (June 12, 2017), http://www.npr.org/2017/06/12/532123349/illicit-cohabitiation-listen-to-6-stunning-moments-from-loving-v-virginia.

188 *Id.*

189 Loving v. Virginia, 388 U.S. 1, 6 (1967). *But see* Obergefell v. Hodges, 576 U.S. 644, 732-33 (2015) (Thomas, J., dissenting) (stating 32 of 50 States still retain a traditional form of marriage undermining the political process).

190 *But see id.*

central meaning of the Equal Protection Clause and the Due Process Clause because the statute deprived the Lovings of their liberty.[191]

The removal of racial barriers to marriage is apparent in today's society.[192] People in America have integrated, and more than two million people turn to ancestry websites to identify their ancestry, making those websites billion-dollar companies.[193] Although the Judge in *Loving* could inexcusably dilute the races into five different colors, racial divides are deteriorating and that is not the world we live in today.[194]

IV. *OBERGEFELL* AND *LOVING* IN THE ABSENCE OF *ROE*

In *Dobbs*, it is clear from the majority opinion that the decision focused narrowly on abortion rights.[195] However, upon closer examination of how the majority overruled a fifty-year precedent, concerns arise that other individual rights may be overturned as easily as abortion was.[196]

It is axiomatic that the United States Supreme Court rarely overturns one of its own decisions.[197] The Supreme Court has passed down over 25,500 decisions since the Court was created in 1789.[198] Of those decisions, the Court has only reversed its precedent 146 times, accounting for less than half of one percent of all its decisions.[199] This striking number is due to the Court's adherence to *stare decisis*.[200]

David Schultz stated, "[p]recedent says that like cases should be decided alike. It appeals to our notions of justice and fairness."[201] Judges resort to precedent because it encourages uniformity, consistency, and

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191 Sears & Greenberg, *supra* note 178, at 28.

192 *See* U.S. CONST. amend. XII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

193 Sandra Feder, *Genetic ancestry results shape race self-identification, Stanford researchers find*, STANDFORD NEWS (May 17, 2021), https://news.stanford.edu/2021/05/17/ancestry-tests-affect-race-self-identification/.

194 *Loving*, 388 U.S. at 3; *id.* (providing taking Genetic Ancestry Tests (GAT) makes people more likely to identify as multi-racial as they discover more about their ancestry. This along with new births is causing the multiracial population in this U.S. to increase).

195 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280 (2022).

196 *Id.* (Breyer, J., dissenting) ("To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception.").

197 David Schultz, *The Supreme Court rarely overturns constitutional precedent – But Roe v. Wade may be different*, THOMAS REUTERS (March 21, 2022), https://today.westlaw.com/Document/Iaa0d501ca91111ec9f24ec7b211d8087/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true.

198 *Views about same-sex marriage by state*, PEW RSCH. CTR. (May 30, 2014), https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-same-sex-marriage/by/state/.

199 *Id.*

200 *Id.*

201 *Id.*

predictability in the court system.[202] Historically, the Supreme Court would not overturn a case unless the decision proved to be unworkable in practice or the conditions of the nation changed dramatically.[203] The historical deference to precedent has decreased significantly over time, specifically in the past century.[204] The noteworthy cases include *Plessy v. Ferguson*, *Bowers v. Hardwick*, *Baker v. Nelson*, *Roe v. Wade*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[205]

Justice Alito explained the criteria the Supreme Court considers when overruling one of its previous decisions.[206] The criteria mentioned in *Dobbs* include the nature of the Court's error, the quality of the reasoning, workability, effect on other areas of the law, and reliance interests.[207] Furthermore, Justice Alito first mentioned that the nature of the Court's error will be met if there is an erroneous interpretation of the Constitution.[208] Second, the quality of reasoning is determined by looking to prior case law and if the grounds offered by the Court are sufficiently weak.[209] Third, workability is satisfied if the reasoning can lead to predictable results through the justice system.[210] Fourth, the effect on other areas of law is created when there is a distortion of many unrelated legal doctrines.[211] Lastly, the Court assesses whether overruling the decision would upend substantial reliance interests.[212] In considering the factors displayed by the Supreme Court, it poses the question of whether *Obergefell* will fit and tilt the balance for the Supreme Court to overturn its precedent regarding same-sex marriage.[213]

West Coast Hotel v. Parrish further illustrates the Court's power to overrule decisions which removes an issue from the people and the democratic process.[214] Justice White explained, "decisions that find in the Constitution principles or values that cannot fairly read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation."[215] Therefore, *Obergefell* can precisely fall into the first factor,

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202 *Id.*

203 *Id.*

204 *Views about same-sex marriage by state*, PEW RSCH. CTR. (May 30, 2014), https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-same-sex-marriage/by/state/.

205 *Id.*

206 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

207 *Id.* at 2265-75.

208 *Id.* at 2265.

209 *Id.* at 2265-66.

210 *Id.* at 2272.

211 *Id.* at 2275.

212 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022).

213 *See, e.g.*, *id.* at 2265-75.

214 *Id.* at 2265.

215 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 384 (1937).

erroneous interpretation of the Constitution.[216] In his dissent, Justice Thomas aggressively urged that erroneous interpretation is present in *Obergefell* because the democratic process is undermined in the case.[217]

The second factor may also be weighed in the Court's favor to overturn a decision.[218] This factor is defeated if there is text, history, and precedent to support its ruling.[219] The majority in *Obergefell* acknowledges that marriage has existed for millennia and across the world.[220] Throughout that time in history, "marriage" referred to only one relationship: the union of a man and a woman.[221] The Constitution does not mention marriage, and the Framers arguably entrusted the states with the entire area of domestic relations.[222] In prior case law, marriage has been consistently defined within the traditional marriage definition.[223] In *Murphy v. Ramsey*, the Court referred to marriage as "the union for life of one man and one woman . . . ."[224] Years later, the Court continued to redefine marriage, stating it is "fundamental to our very existence and survival," which could imply a presumption that there is a procreative component.[225] Recently, the Court explicitly made the connection between marriage and the "right to procreate."[226] Again, this factor has sufficient evidence to tilt toward overruling.

The third factor is whether the decision is still workable and creates predictability among future cases.[227] Society has long recognized the bond of marriage.[228] A marriage creates a respected status and benefits enjoyed by married couples.[229] These benefits encourage people to enter into a marriage.[230] However, the original constitutional proposition is that courts do not substitute their personal beliefs for the judgment of legislative bodies.[231] Rather, the people elect legislatures to pass those very laws, which are reflective of their own personal beliefs.[232] The Court is repeating Lochner's[233] error of converting personal beliefs into constitutional

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216 Obergefell v. Hodges, 576 U.S. 644, 722 (2015) (Thomas, J., dissenting).
217 *Id.*
218 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265-75 (2022).
219 *Id.* at 2266.
220 *Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting).
221 *Id.*
222 Obergefell v. Hodges, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).
223 *Id.*
224 Murphy v. Ramsey, 114 U.S. 15, 45 (1885).
225 Loving v. Virginia, 388 U.S. 1, 12, (1967).
226 Zablocki v. Redhail, 434 U.S. 374, 386 (1978).
227 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265-75 (2022).
228 Obergefell v. Hodges, 576 U.S. 644, 705 (2015) (Roberts, C.J., dissenting).
229 *Id.*
230 *Id.*
231 *See id.*
232 *See id.*
233 Lochner v. New York, 198 U.S. 45 (1905). David A. Strauss provides a criticism of the Court in *Lochner*, arguing that the Court was ". . . enforcing a right not found in the Constitution. Freedom

mandates.[234] The Substantive Due Process in modern days stresses judicial restraint.[235] The dissenting justices in Obergefell convey how easily it can be argued that Obergefell is unworkable in light of respecting other branches and upholding federalism principles.[236]

Fourth, the Court considers the effects on other areas of law.[237] The Constitution places restraint on self-rule by allowing the people of the United States to adopt amendments to the Constitution.[238] There are limitations like denying the Full Faith and Credit Clause, abridging the freedom of speech, and infringing on the right to bear arms, but aside from those powers, everything else is left up to the states respectively.[239] *Obergefell* decided that a limitation that requires states to license and recognize same-sex marriages is embedded in the Fourteenth Amendment.[240] At the time of ratification, the Fourteenth Amendment limited the definition of marriage.[241] The debate over same-sex marriage continued, and because there is no doubt the people of the United States have never decided to prohibit the limitation of marriage, the public debate should continue to be fostered until legislatures of each state decide to change their laws.[242] The dissenters' opinions in *Obergefell* depict this factor can again tilt towards overruling.[243]

Lastly, the Court weighs reliance on the decision established in the case.[244] The Petitioners in *Obergefell* relied on liberty to carry into the discussion of past precedents by the Court.[245] The fundamental right of liberty includes identifying the right to marry, however, not one of those cases expanded the established concept of liberty.[246] The precedents were absolute bans on private actions that touched upon marriage.[247]

In *Loving*, a couple was criminally prosecuted for marrying.[248] In *Zablocki v. Redhail*, a man was prohibited from marrying in Wisconsin or

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of contract, unlike freedom of speech, for example, is not mentioned in the text of the Constitution. Its textual basis was the oxymoronic notion of "substantive due process." There is no problem, on this account, when courts enforce rights that are in the Constitution; the problem arises when they enforce rights that they have just made up themselves." David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 378-79 (2003).

234 *See* Obergefell v. Hodges, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting).

235 *Id.* at 706.

236 *See id.* at 687.

237 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

238 *Obergefell*, 576 U.S. at 714-17 (Scalia, J., dissenting).

239 *Id.*

240 Obergefell v. Hodges, 576 U.S. 644, 714-17 (2015) (Scalia, J., dissenting).

241 *Id.*

242 *Id.*

243 *See id.*

244 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

245 *Obergefell*, 576 U.S. at 722-24 (Thomas, J., dissenting).

246 Obergefell v. Hodges, 576 U.S. 644, 722-24 (2015) (Thomas, J., dissenting).

247 *Id.*

248 Loving v. Virginia, 388 U.S. 1, 12 (1967).

elsewhere because of outstanding child support payments.[249] In *Turner*, state inmates were prohibited from entering marriages without permission, which could be denied for any compelling reason.[250] These cases did not deny individuals solely on governmental recognition and benefits associated with marriages.[251] Again, by the dissenters' explanation, the last and final factor may tilt the scale to overturning Obergefell.[252]

Now, it is interestingly enough *Obergefell* can fit that same bill.[253] This meticulous depiction explains the volatile nature of this particular area of law.[254] While the Supreme Court, the House, and the Senate have recognized the importance both interracial marriage and same-sex marriage, this does not mean it is as solidified as one might think.[255] After seeing how, arguably, either case could be overturned, a constitutional amendment is needed even more.[256]

A federal act, while it carries significant weight, is not as strong as some suggest.[257] If a newly elected Congress shifts in the party alignment, the new Congress could easily repeal the act and marriage would not be any more protected than before the act.[258] This is why it is necessary to protect marriage at the highest level through the United States Constitution.[259]

V. THE RESPECT FOR MARRIAGE ACT AND A NEED FOR A CONSTITUTIONAL AMENDMENT

This Part discusses the need for a new amendment. Only then will the right to marriage be solidified. The Court is on a devastating path," argues

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249 Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

250 Turner v. Safley, 482 U.S. 78, 82 (1987).

251 *Obergefell*, 576 U.S. at 722-24 (Thomas, J., dissenting).

252 *See* Obergefell v. Hodges, 576 U.S. 644, 722-24 (2015) (Thomas, J., dissenting).

253 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

254 *Id.* at 2265-75.

255 *Obergefell*, 576 U.S. at 681; Loving v. Virginia, 388 U.S. 1, 12 (1967); Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

256 Jasmine Aguilera, *What Will Happen to Same-Sex Marriage Around the Country if Obergefell Falls*, TIME (Sep. 4, 2023), https://time.com/6240497/same-sex-marriage-rights-us-obergefell/.

257 *See* Caleb Nelson & Kermit Roosevelt, *The Supremacy Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-vi/clauses/31 (last visited Sep. 4, 2023).

258 *See* Jordan M. Ragusa & Nathaniel A. Birkhead, *Understanding when and why Congress repeals laws is as important as looking at how it makes them*, LONDON SCH. OF ECON. & POL. SCI., https://blogs.lse.ac.uk/usappblog/2015/10/16/understanding-when-and-why-congress-repeals-laws-is-as-important-as-looking-at-how-it-makes-them/ (last visited Sep. 4, 2023).

259 *See* Caleb Nelson & Kermit Roosevelt, *The Supremacy Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-vi/clauses/31 (last visited Sep. 4, 2023).

Professor of Constitutional Law at Harvard Laurence Tribe.[260] He further contends the *Dobbs* opinion "is likely to jeopardize literally all of the basic bodily integrity rights that people have come to rely on."[261] The right to choose who one marries is a right that needs the utmost constitutional protection.[262]

While the states traditionally have the power to regulate marriage, this tradition must be dissipated.[263] Since the beginning of the founding of America, the states have given up rights to ensure every American is protected across the fifty states.[264] The rights reserved to the federal government should include the right of marriage.[265] A constitutional amendment would solidify this right and give it the strongest authority out of the reach of activist politicians.[266] However, constitutional amendments are not as easy to pass.[267]

The proposed constitutional amendment will ensure no American will ever face the day *Obergefell* or *Loving* get overturned on the same premise as *Roe v. Wade* did.[268] The states have no legitimate interest in regulating two consenting adults choosing to get married.[269] Our obligation is to define the liberty of all, not to mandate our own moral code.[270] Justice O'Connor's concurrence in *Lawrence* rejected the state's argument that Texas had a legitimate governmental interest in the "promotion of morality," stating that "the Court has never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of people."[271]

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260 Madeleine Carlisle & Julia Zorthian, *Clarence Thomas Signals Same-Sex Marriage and Contraception Rights at Risk After Overturing Roe v. Wade*, TIME (June 24, 2022), https://time.com/6191044/clarence-thomas-same-sex-marriage-contraception-abortion/.

261 *Id.*

262 Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

263 Williams v. State of N.C., 317 U.S. 287, 300 (1942) ("most perplexing and distressing complication in the domestic relations of many citizens in the different states.").

264 *See The Constitution*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ (last visited Jan. 7, 2023).

265 *Contra* Richard Kelsey, *There is No Constitutional Right to Marriage . . . Of Any Kind*, JURIST (Oct. 28, 2014), https://www.jurist.org/commentary/2014/10/richard-kelsey-samesex-marriage/.

266 Stephanie Jurkowski, *Supremacy Clause*, CORNELL L. SCH. (June 2017), https://www.law.cornell.edu/wex/supremacy_clause.

267 *The Amendment Process: Adding a New Amendment to the Constitution Not an Easy Task!*, HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/education/three-branches/amendment-process (last visited Sept. 3, 2023).

268 Jasmine Aguilera, *What Will Happen to Same-Sex Marriage Around the Country if Obergefell Falls*, TIME (Dec. 14, 2022, 10:26 AM), https://time.com/6240497/same-sex-marriage-rights-us-obergefell/.

269 Obergefell v. Hodges, 576 U.S. 644, 679 (2015).

270 Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

271 Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring).

A constitutional amendment is seen by many as unthinkable.[272] It is extremely difficult for one to be agreed upon.[273] The last constitutional amendment to be ratified was in 1992.[274] However, the heightened political pressure and the encouragement from across the nation might not be as unthinkable anymore.[275]

As rallies are seen on the news and marches are being conducted, marriage rights might be the issue that could make it as an amendment to the Constitution.[276] While it must be admitted that constitutional amendments are gravely difficult to execute, it is not inconceivable.[277] Clearly, by looking at the amendments already passed, there have only been 27 in our nation's history.[278] The last amendment to the Constitution was passed in 1992.[279] To prevent arbitrary changes in the United States Constitution, the process of making amendments is quite strenuous.[280]

An amendment may first be proposed by a two-thirds vote from both Houses of Congress or, if two-thirds of the states request one, by a convention called to amend the Constitution.[281] The amendment, in addition, must be ratified by three-fourths of the state legislatures or three-fourths of conventions called in each state for ratification.[282] However, in modern times, amendments have traditionally specified a time frame in which they must be accomplished through the process of several years.[283]

The Constitution specifies no amendment can essentially deny a state equal representation in the Senate without the state's consent.[284] It is worth

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272 Daniel R. Williams, *After the Gold Rush-Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere*, 113 PENN. ST. L. REV. 55, 103 (2008).

273 *Id.*

274 *Congressional Compensation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xxvii (last visited Sept. 3, 2023).

275 Laura W. Murphy & Robert A. Levy, *A Constitutional Amendment on Marriage: No restrictions should be imposed on marital freedom*, CATO INST. (Nov. 20, 2014), https://www.cato.org/commentary/constitutional-amendment-marriage.

276 *The Journey to Marriage Equality in the United States*, HUM. RTS. CAMPAIGN, https://www.hrc.org/our-work/stories/the-journey-to-marriage-equality-in-the-united-states (last visited Sept. 3, 2023).

277 Drew Desilver, *Proposed amendments to the U.S. Constitution seldom go anywhere*, PEW RSCH. CTR. (Apr. 12, 2018), https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/.

278 *All Amendments to the United States Constitution*, UNIV. OF MINN., http://hrlibrary.umn.edu/education/all_amendments_usconst.htm (last visited Sept. 3, 2023).

279 *27th Amendment: Congressional Compensation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xxvii (last visited Sept. 3, 2023).

280 Sarah Isgur, *It's Time to Amend the Constitution*, POLITICO (Jan. 8, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780.

281 *The Constitution*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ (last visited Sept. 3, 2023).

282 *Id.*

283 *Id.*

284 *Id.*

noting that none of the constitutional amendments already ratified have gone through the convention process.[285] Therefore, it is more practical that the amendment process would follow that two-thirds vote from both Houses of Congress would be needed to ensure the amendment would be ratified.[286]

The United States Congress proposes an amendment as a joint resolution.[287] The President does not partake in this process, so this joint resolution does not have to be produced before the President for signature or approval.[288] The original document is then forwarded to the NARA's Office of the Federal Register for processing and publication.[289] This group will add any legislative history notes and publish them as a slip law.[290] This process is followed in accordance with 1 U.S.C. 106(b).[291]

The Archivist then submits the proposed amendment to the states for their consideration by sending a notification letter to each state governor.[292] Upon receipt of the notifications, the Governors will formally submit the amendment to the state legislatures, or the state will call for a convention.[293] Of course, as previously stated, the convention is an unlikely result.[294] When a state decides to ratify the proposed amendment, it will send the Archivist an original or certified copy of the state action, which will be immediately sent to the Director of the Federal Register.[295] The Federal Register will retain these documents from each state until the amendment is adopted or fails.[296]

A proposed amendment automatically becomes part of the United States Constitution when three-fourths of the states (thirty-eight of fifty states) ratify it.[297] The certification is published in the Federal Register and the U.S. Statutes at Large, which will serve as official notice to Congress and to the Nation that the amendment process has been completed.[298]

While thirty-eight states may seem like a grave task for any proposed amendment to be ratified,[299] this is the only guarantee for a right to be completely protected from the polarization of the political climate in a given

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285 Off. of the Fed. Reg. (OFR), *Constitutional Amendment Process*, NAT'L ARCHIVES (Aug. 15, 2016), https://www.archives.gov/federal-register/constitution.

286 *Id.*

287 *Id.*

288 *Id.*

289 *Id.*

290 *Id.*

291 Off. of the Fed. Reg. (OFR), *Constitutional Amendment Process*, NAT'L ARCHIVES (Aug. 15, 2016), https://www.archives.gov/federal-register/constitution.

292 *Id.*

293 *Id.*

294 *See id.*

295 *Id.*

296 *Id.*

297 Off. of the Fed. Reg. (OFR), *Constitutional Amendment Process*, NAT'L ARCHIVES (Aug. 15, 2016), https://www.archives.gov/federal-register/constitution.

298 *Id.*

299 *See id.*

time period.[300] One might believe the Respect for Marriage Act is enough to further the protection of marriage rights in this country.[301] However, with a right that deserves the utmost protection, one can never take for granted a right that can quickly be changed.[302]

For instance, the next Congress could immediately repeal the Respect for Marriage Act, leaving marriage rights in this country up in the air as if the Respect for Marriage Act never existed.[303] This is why a constitutional amendment is the only "bulletproof" protection that can be afforded to Americans.[304]

The Respect for Marriage Act redefines marriage as between two individuals for purposes of federal law.[305] The Act allows the Department of Justice to bring civil actions and establishes a private right of action for violations of states not recognizing same-sex marriages or interracial marriages.[306] Any state that attempts to deny these rights, denies the full faith and credit on the basis of sex, race, ethnicity, and national origin.[307]

In sum, this Act establishes, under federal law, that a marriage constitutes any union between two individuals.[308] The two individuals are not defined as a man and woman or as a certain race amongst the two individuals, but two individuals regardless of race, sex, national origin, ethnicity, or any other distinguishing factors.[309] The Respect for Marriage Act, in essence by its supporters, enshrines marriage equality into federal law.[310] The Respect for Marriage Act creates a "backstop" to ensure that even if *Obergefell* was overturned, same-sex couples could retain protections if their own state nullified their marriage.[311] In effect, the RFMA repeals DOMA's bar against federal recognition of same-sex marriage, replacing it with a federal mandate

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300 Andrew Harnik, *It's Time to Amend the Constitution*, POLITICO (Jan. 8, 2022), https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780.

301 Caroline Anders, *The Respect for Marriage Act is progress, but LGBTQ advocates say it's no Obergefell*, THE WASH. POST (Dec. 7, 2022), https://www.washingtonpost.com/politics/2022/12/07/respect-marriage-act-is-progress-lgbtq-advocates-say-its-no-obergefell/.

302 *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

303 Caroline Anders, *The Respect for Marriage Act is progress, but LGBTQ advocates say it's no Obergefell*, THE WASH. POST (Dec. 7, 2022), https://www.washingtonpost.com/politics/2022/12/07/respect-marriage-act-is-progress-lgbtq-advocates-say-its-no-obergefell/.

304 *Judicial Independence*, JUD. LEARNING CTR., https://judiciallearningcenter.org/judicial-independence/ (last visited Aug. 23, 2023).

305 Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

306 *Id.*

307 Mark Joseph Stern, *The New Marriage Equality Bill Doesn't Just Repeal DOMA. It Does Something Better.*, SLATE (July 21, 2022, 1:51 PM), https://slate.com/news-and-politics/2022/07/respect-for-marriage-act-congress-doma-explainer.html.

308 *Id.*

309 *Id.*

310 *Id.*

311 *Id.*

that the federal government recognizes any marriage that is valid under state law when entered into.[312]

This Act may be relied upon if the Supreme Court overturns *Obergefell*.[313] Currently, thirty-five states still have laws on their books that would outlaw same-sex marriage unions, which would automatically take effect in the event *Obergefell* falls.[314] The Act compels every state to recognize a marriage license without discriminating on the basis of those individuals' sexuality.[315]

The legislation further protects interracial marriage; however, no state is seeking to outlaw those unions.[316] The RFMA relies on the Full Faith and Credit Clause in the Constitution, which gives Congress the power to require states to grant full faith and credit to the public acts, records, and judicial proceedings of other states.[317] While this clause has been read to allow states to deny full faith and credit when it contradicts the specific state's public policy,[318] this exception does not apply when Congress exercises its constitutional authority in a way that commands nationwide uniformity.[319] In other words, Congress essentially commanded that states are required to give full effect to any legal relationship created under another state's law[320] and are not permitted to invalidate a marriage license due to a person's race or sex.[321] It cannot be forgotten that if *Obergefell* is later overturned, states may resume denying marriage licenses to same-sex couples.[322] If this occurs, it would be possible for a state to nullify same-sex marriage licenses that were otherwise permitted under *Obergefell*.[323] However, couples facing discrimination in their home state may travel to another state, obtain a new license, and compel their home state to recognize it along with any privileges that come along with it.[324] Therefore, if the Supreme Court overturns

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312 *Id.*

313 Mark Joseph Stern, *The New Marriage Equality Bill Doesn't Just Repeal DOMA. It Does Something Better.*, SLATE (July 21, 2022, 1:51 PM), https://slate.com/news-and-politics/2022/07/respect-for-marriage-act-congress-doma-explainer.html.

314 *Id.*

315 *Id.*

316 *Id.*

317 *Id.*

318 *Id.*

319 Mark Joseph Stern, *The New Marriage Equality Bill Doesn't Just Repeal DOMA. It Does Something Better.*, SLATE (July 21, 2022, 1:51 PM), https://slate.com/news-and-politics/2022/07/respect-for-marriage-act-congress-doma-explainer.html.

320 *Id.*

321 *Id.*

322 *Id.*

323 *Id.*

324 *Id.*

Obergefell or *Loving*, there will be no barrier in place to prevent states from continuing to discriminate against those seeking a marriage license.[325]

In a survey conducted by Pew research regarding the support of same-sex marriage by state, in thirty-two states the majority of people (over 50%) strongly approved of same-sex marriage.[326] There are six states close behind in which 48-49% of respondents strongly approved of same-sex marriage.[327] Combining those states together would meet the thirty-eight threshold number needed to propose a constitutional amendment.[328] Understandably, these are citizens of the states and not the state legislatures who are in the position to propose a constitutional amendment.[329] However, the point being it is plausible.[330] There is an uphill showing of support that the past centuries have shown towards same-sex marriage.[331]

While a constitutional amendment poses many challenges, this would be the best path forward.[332] Currently, there are many strides to afford the same protections to other marriages besides the traditional marriage of a man and woman.[333] This just might be the time the next constitutional amendment proposed may prevail.[334] The continued support across the nation may spark a change in the Constitution.[335] This can only be done if the public knows a constitutional amendment is needed and lobbies their state representatives to create this monumental change for the future generations of America.[336] This might be amendment number twenty-eight.[337]

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325 Kate Sosin & Candice Norwood, *What Will Happen if Obergefell Is Overturned? Queer Legal Experts are Scrambling: 35 states have marriage bans, and experts doubt that Congress could codify marriage equality*, THEM (July 12, 2022), https://www.them.us/story/obergefell-legal-experts-lgbtq-marriage-protection.

326 *Views about same-sex marriage by state*, PEW RSCH. CTR. (May 30, 2014), https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-same-sex-marriage/by/state/.

327 *Id.*

328 *Id.*

329 *Id.*

330 *See, e.g.*, Seth Lewis, *Proposed Constitutional amendment seeks to define traditional marriage*, BAPTIST PRESS (July 13, 2001), https://www.baptistpress.com/resource-library/news/proposed-constitutional-amendment-seeks-to-define-traditional-marriage/.

331 Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx.

332 *See The Right to Marry*, EXPLORING CONST. CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/righttomarry.htm (last visited Sept. 10, 2023).

333 *See* Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx.

334 *See* M. Isabel Medina, *Of Constitutional Amendments, Human Rights, and Same-Sex Marriages*, 64 LA. L. REV. 459, 463-64 (2004).

335 *Contra id.* at 471.

336 *See id.* at 464-65.

337 *See, e.g.*, Stephanie Lai, *House Moves to Protect Same-Sex Marriage From Supreme Court Reversal*, N.Y. TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/us/politics/house-gay-marriage-bill.html.

VI. CONCLUSION

The heightened tension around marriage rights, combined with the Supreme Court's willingness to increase states' rights, creates the need for a constitutional amendment to protect marriage beyond the reach of states' right to regulate marriage.[338] Discussing the urgency of this issue and stressing the uncertainty of same-sex marriage rights will ensure that marriage will be protected at the federal and state levels; through these actions, a vast number of Americans will surely benefit from this protection.[339]

While maintaining a strong desire for federalism in our nation, the priority of establishing families in our society cannot be forgotten.[340] The rights of individuals to make choices for themselves and protecting them constitutionally could be construed as over-reaching and infringing on states' rights.[341] However, these rights are of utmost importance in our society.[342] This should be a right the states give up for the betterment of their own constituents.[343] The consequences of marriages being stripped away creates an enormous determinant to families who rely on the economic benefits marriages provide, amongst many others.[344]

An all-encompassing marriage definition will avoid the destruction of millions of families.[345] It will enable more families to be bonded together, move more children out of the foster care system, and promote Americans who are proud of a country that remains inclusive of all walks of life.[346] The protection a traditional marriage receives should be the same protection all other marriages should receive as well.[347]

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338 *See, e.g*., Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022).

339 *See* Lina Guillen, *Marriage Rights and Benefits*, NOLO, https://www.nolo.com/legal-encyclopedia/marriage-rights-benefits-30190.html (last visited Sept. 10, 2023).

340 *See* ELLIOT BULMER, FEDERALISM 3 (Int'l Institute for Democracy and Electoral Assistance 2nd ed. 2017).

341 Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/701 (last visited Sept. 10, 2022).

342 *Id*.

343 *Contra* David Davenport, *The Supreme Court Should Leave How We Marry To The States*, FORBES (March 25, 2013), https://www.forbes.com/sites/daviddavenport/2013/03/25/the-supreme-court-should-leave-how-we-marry-to-the-states/?sh=2453c09d4a79.

344 *See* Carrie Schwab-Pomerantz, *Does Marriage Bring Financial Benefits?*, CHARLES SCHWAB (Aug. 2, 2020), https://www.schwab.com/learn/story/does-marriage-bring-financial-benefits.

345 *See* Patty Funaro, *Legislative Guide to Marriage Law*, IOWA LEGIS. SERV. AGENCY, Dec. 2005, at 1-3.

346 *See id.*

347 *See generally* Obergefell v. Hodges, 576 U.S. 644, 646 (2015).