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THE RIGHTS OF MARRIAGE: *OBERGEFELL*, *DIN*, AND THE FUTURE OF CONSTITUTIONAL FAMILY LAW

Kerry Abrams†

In the summer of 2015 the United States Supreme Court handed down two groundbreaking constitutional family law decisions. One decision became famous overnight: Obergefell v. Hodges *declared that same-sex couples have the constitutional right to marry. The other,* Kerry v. Din, *went largely overlooked. That later case concerned not the right to marry but the rights of marriage. In particular, it asked whether a person has a constitutional liberty interest in living with his or her spouse. This case is suddenly of paramount importance: executive orders targeting particular groups of immigrants implicate directly this right to family reunification.*

This Article argues that neither Obergefell *nor* Din *can be understood fully without the other. The constitutional issues in the cases—the right to marry and the rights of marriage—stem from the same text and doctrines, implicate the same relationships, and reflect cultural understandings of the meaning of marriage and family. Read together, the two cases suggest that the rights of unmarried couples and LGBTQ people will be expanded—but only somewhat—by* Obergefell *and that the right to family reunification qualifies as a "right of marriage" under the Constitution.*

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INTRODUCTION

In the summer of 2015, the United States Supreme Court handed down two groundbreaking constitutional family law decisions. In one, *Obergefell v. Hodges*, a majority of the Supreme Court declared that same-sex couples have the constitutional right to marry.[1] Those who celebrated the decision, as well as those who derided it, recognized it as a major event in the history of constitutional law. Newspapers and media outlets around the world covered it, advocates on both sides of the issue rallied outside the Supreme Court, and legal scholars produced thousands of pages of commentary.[2]

Just eleven days before the Supreme Court handed down *Obergefell*, however, it issued an opinion in *Kerry v. Din*.[3] Unlike *Obergefell*, this decision went largely unnoticed by the press, courts, lawyers, and the public. *Din* concerned not the right *to* marry but the rights *of* marriage. In particular, it asked whether a person has a constitutional liberty interest in living with his or her spouse. In *Din*, a United States citizen claimed that the federal government's arbitrary denial of a visa to her husband violated procedural due process.[4] Although Din lost her case—Justice Anthony Kennedy's concurrence held that she had been given a good enough reason for her husband's

1 135 S. Ct. 2584 (2015).

2 *See, e.g.*, Adam Liptak, '*Equal Dignity*', N.Y. TIMES, June 27, 2015, at A1 (reporting on the *Obergefell* ruling and the Justices' varying viewpoints on the decision).

3 135 S. Ct. 2128 (2015) (plurality opinion).

4 *Id.* at 2133.

exclusion—six of the Justices assumed for purposes of the case that a U.S. citizen *does* have a due process liberty interest in his or her marriage to a noncitizen.[5] Put differently, the right to marry means little if individuals cannot enjoy the benefits of marriage.

When the Supreme Court issued the *Din* decision, few noticed. Its brief mentions in the press were soon eclipsed by the decision in *Obergefell* a few days later. Now, however, *Din* is having a rebirth. President Donald J. Trump has issued executive orders suspending immigration from certain countries and broadening deportations.[6] Although these orders continue to be rescinded and supplanted with new versions, they share a common characteristic—they directly implicate the marriage rights at issue in *Din*. The family reunification claims articulated in *Din* are relatively uncharted waters for constitutional family law, and ones that many people, citizens and noncitizens alike, are mobilizing in suits challenging President Trump's orders.[7] In time, *Din* may emerge as a constitutional precedent equal to *Obergefell* in historical and legal importance.

So far, however, *Obergefell* has been the decision that litigants, lawyers, legislators, and judges have turned to in adjudicating family constitutional cases. Scholars, too, have focused on *Obergefell*: since the Court issued its *Obergefell* decision, over one thousand law review articles and notes have discussed the case.[8] Given this enormous volume, it is difficult to do justice to the range of responses, but much of the scholarship falls roughly into two camps—scholars who see in *Obergefell* hope for the expansion of constitutional family rights and LGBTQ rights more broadly[9] and those who see

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5 *Id.* at 2139 (Alito, J., concurring) (holding that Din's husband's visa denial satisfied due process).

6 *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

7 *See, e.g.*, Amicus Curiae Brief of Law Professors of Constitutional Law, Federal Court Jurisdiction, Immigration, National Security, and Citizenship in Support of Petitioners at 12, Darweesh v. Trump, Case 1-17-cv-00480-CBA (E.D.N.Y. Feb. 16, 2017) (discussing *Kerry v. Din*).

8 As of this writing, 1415 articles available on Westlaw cite to *Obergefell*.

9 *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2357–59 (2017) (arguing that *Obergefell* will lead to the expansion of parental rights for gays and lesbians); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 158 (2016) (arguing that *Obergefell* "might give the Court cause to reconsider precedents that harshly confined the promise of equal protection in the race, sex, class, and disability contexts"); Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1739–41 (2016) (arguing that the government has an

Obergefell's valorization of marriage as potentially harmful for unmarried or otherwise nonconforming people or groups.[10] The attribute shared by most of these readings, however, is that the *Obergefell* opinion is *the* definitive statement of constitutional marriage rights. Reading *Obergefell* with *Din* undercuts this assumption.

In contrast, so far, *Din* has been cited primarily in the litigation concerning President Trump's recent executive orders suspending immigration from several predominantly Muslim countries.[11] Courts and lawyers understand *Din* as an opinion about the role of the "plenary power doctrine" in immigration cases, and that doctrine's relationship to procedural due process—and so it is.[12] It is also, however, an opinion about marriage rights, and those rights must be understood within the context of the expansion and constitutionalization of family rights in the last fifty years.[13] Reading *Din* with *Obergefell* reveals this broader meaning.

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affirmative obligation to provide recognition of adult intimate relationships as supported in *Obergefell*); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 17 (2015) (arguing that the concept of "equal dignity" in Justice Kennedy's opinion "lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality"); Kenji Yoshino, *A New Birth of Freedom?*: Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015) (arguing that *Obergefell* is a "game changer for substantive due process").

10 *See, e.g.*, June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-*Obergefell, 84 UMKC L. REV. 663, 670–73 (predicting that parenthood will continue to be a battleground for the recognition of families established by same-sex parents); Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1112–17 (2015) (arguing that *Obergefell*'s emphasis on conformity will make it difficult to extend to other areas of discrimination law); Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM. L. REV. 23, 29–30 (2015) (arguing that *Obergefell* undervalues nonmarital families); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1212–16 (2016) (predicting that *Obergefell* will justify discrimination against nonmarital families).

11 *See, e.g.*, Washington v. Trump, 847 F.3d 1151, 1166 (9th Cir. 2017) (per curiam) (noting that, even if green card holders were not covered by the executive order, "applicants who have a relationship with a U.S. resident" might have claims to assert and citing to Justice Kennedy's concurrence and Justice Breyer's dissent in *Kerry v. Din*); *see also* Brief of Amici Curiae Immigration, Family, and Constitutional Law Professors in Support of Respondents at 10–11, Trump v. Int'l Refugee Assistance Project, 2017 WL 4518553 (Sept. 18, 2017) (No. 16-1436), http://www.scotusblog.com/wp-content/uploads/2017/09/16_1436_16_1540_bsac_Immigration_Family_and_Constitutional_Law_Professors.pdf [https://perma.cc/RJ7U-T6DC].

12 *See* Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 277–79 (2017) (analyzing the plenary power doctrine and its relation to *Din*).

13 *See generally* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 531–51 (2008) (describing evolution of constitutional family rights).

This Article argues that neither *Obergefell* nor *Din* can be understood fully without the other. The constitutional issues in the cases—the right to marry and the rights of marriage—stem from the same text and doctrines, implicate the same relationships, and reflect cultural understandings of the meaning of marriage and family. The Justices were presumably circulating drafts of both opinions during the spring of 2015, and, indeed, traces of the rhetoric and reasoning in each case appear in the other.

Two aspects of *Obergefell* and *Din* are foregrounded through this synthesized reading. First, Justice Kennedy's *Obergefell* opinion reads differently alongside *Din* and comes off as simultaneously broader in application and narrower in scope. Reading his *Obergefell* majority alongside his *Din* concurrence calls into question the scope of the family rights he would consider protected as a constitutional liberty interest. Reading Kennedy's *Obergefell* majority alone could lead a reader to assume—wrongly—that his views of marriage rights are expansive; reading *Din* alone could lead a reader to believe —again, wrongly—that they are stingy. Read together, Justice Kennedy's decisions in *Obergefell* and *Din* reveal an understanding of marriage as a form of self-expression and an exercise of responsible citizenship, an institution that the government has an interest in fostering because of the service it does for society. Given that Justice Kennedy remains, at least for now, the Court's "swing vote" and is likely to play an important role in constitutional litigation in cases involving everything from family reunification to family-based citizenship to religious exemptions to LGBTQ-protective laws, understanding the scope of his theory is critical for litigants, scholars, and courts alike.

Second, reading *Din* and *Obergefell* together better elucidates the positions of the other Justices who wrote in those cases, enabling a better understanding of how they will approach future constitutional family claims. Justice Stephen Breyer's *Din* dissent, for example, is markedly dissimilar from the majority opinion he joined in *Obergefell*, in ways that suggest a very different constitutional status for marriage that is simultaneously broader than the right protected in *Obergefell* and yet less historically embedded. Similarly, Justices Scalia, Thomas, Alito, and Roberts each wrote dissents in *Obergefell* but divided in their reasoning for denying the family reunification claim at issue in *Din*. In that case, Justices Scalia, Thomas, and Roberts resisted any recognition of a due process

interest in family reunification, but Justice Alito joined Justice Kennedy's concurrence, which assumed that such a right existed. Read together, these two cases identify different fault lines between the Justices than those that are visible in either case alone.

At first glance, this Article may appear to be making a pedestrian, even obvious, point—that cases must be read together, and no single Supreme Court case adequately describes the law. *Obergefell*, however, has been read by most scholars in light of Justice Kennedy's other LGBTQ rights opinions, including *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor*, but not in light of *Din*.[14] In fact, most family law and constitutional law scholars have completely ignored *Din*,[15] or treated it as a specialized immigration case.[16] The argument

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14 517 U.S. 620 (1996); 539 U.S. 558 (2003); 133 S. Ct. 2675 (2013).

15 As of this writing, of the 1,415 articles written so far on *Obergefell* published on Westlaw, 31 cite to *Din*. For examples of those that do cite to *Din*, see Erin B. Corcoran, *#Love Wins* *But Only if You Marry One of Us*, 2015 UTAH L. REV. ONLAW 77, 84–88 (2015) (arguing that the Court is less protective of noncitizens' marriages than citizens' marriages); Kari E. Hong, Obergefell's *Sword: The Liberal State Interest in Marriage*, 2016 U. ILL. L. REV. 1417, 1417, 1440–41 (arguing that *Obergefell*'s recognition of a new state interest in the dignity of marriage "paves the way for state intervention as a welcomed and needed benefit of marriage" and using *Din* as an example); Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1344–46 (2016) (suggesting that *Din* indicates that a constitutional challenge to the "no-fly list" would be difficult); Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L. Q. 811, 855–59 (2016) (using *Din* to develop a taxonomy of procedural due process categories); Mary Ziegler, *The Conservative Magna Carta*, 94 N.C. L. REV. 1653, 1664, 1670–71 (2016) (arguing that the conservative Justices use Magna Carta as an alternative to the progressive vision offered by the Reconstruction Amendments and using Justice Scalia's *Din* plurality opinion as an example).

16 *See, e.g.*, Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 83 (2016) (using *Din* as an "illustration of the force of minimal process in immigration law"); Kevin R. Johnson, *Immigration "Disaggregation" and the Mainstreaming of Immigration Law*, 68 FLA. L. REV. FORUM 38, 43–44 (2016) (noting that the *Din* Court "avoided addressing the question of the continued vitality of the doctrine of consular nonreviewability, a close cousin of the plenary power doctrine, which immunizes from judicial review the visa decisions of State Department consular officers"); Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 26–28 (2015) (reading *Din* to reveal a dismantling of the plenary power doctrine around procedural due process rights but a continuation of the doctrine around substantive rights); Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech under the First Amendment*, 57 B.C. L. REV. 1237, 1283 (2016) (citing *Din* as an example of the Court's "reluctance to review substantive immigration decisions"); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 50 n.59 (2015) (characterizing *Din* as a "golden opportunity" to make inroads into the plenary power doctrine); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1893 (2016) (citing Kennedy's *Din* concurrence as an admirable example of judicial restraint and deference to agency determinations of what process is due).

this Article makes is not that cases in general must be read together, but that reading *Obergefell* and *Din* together is particularly crucial for understanding constitutional family law in this moment, both because of the salience of family reunification claims in the present political climate and because the Justices who wrote it did so while they were simultaneously drafting their opinions in *Obergefell*. Scholars of constitutional family law who treat *Din* as external to their field miss its important contribution to the Court's constitutional family jurisprudence; scholars of immigration who ignore *Obergefell* will miss the nuances of the positions the Justices each took in *Din*.

This synthesized reading of *Obergefell* and *Din* produces two practical results. First, *Obergefell*'s approval of marriage over non-marriage may be limited to the facts of that case, and may not lead to increased discrimination against the unmarried, or against LGBTQ people in other contexts. Second, the Supreme Court may be close to recognizing expressly one particular "right of marriage"—the right to family reunification.

This Article proceeds as follows. Part I tells the stories of *Obergefell v. Hodges* and *Kerry v. Din*, highlighting the facts that are important to understanding the constitutional import of the opinions. Part II works through the opinions of the Justices in *Obergefell*, and Part III does the same for *Din*, illuminating the Justices' theories of constitutional family law and showing how the *Din* opinions undercut some of the apparent implications of *Obergefell*. Part IV offers some observations about how these two opinions, taken together, point a different way forward for both the scope of constitutional family rights generally and the right to family reunification in particular.

I
OBERGEFELL AND *DIN*

Obergefell and *Din* both involved petitioners who claimed rights under the constitution based on their intimate relationships. In *Obergefell*, the petitioners were sixteen people in same-sex relationships who either wanted their marriages recognized by their home states or wanted to be able to marry in their home states.[17] In *Din*, the petitioner was a U.S. citizen who had attempted to secure a visa for her foreign husband so that he could join her in the United States, and who wanted to better understand why her petition had been denied, presumably so that she could attempt to rebut the government's posi-

17 Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

tion.[18] The contours of constitutional family law doctrine were at the heart of each case, but the factual contexts meant that each case foregrounded different aspects of the petitioners' constitutional claims.

A. *Obergefell v. Hodges*

The case known as *Obergefell v. Hodges* was, in actuality, a group of cases from several district courts consolidated by the Sixth Circuit Court of Appeals.[19] The cases involved a variety of petitioners. The lead petitioner, Jim Obergefell, had a particularly compelling story. He and his partner of over twenty years, John Arthur, were residents of Ohio.[20] Because Ohio did not recognize same-sex marriage, they could not marry there.[21] John had been diagnosed with amyotrophic lateral sclerosis, otherwise known as ALS or Lou Gehrig's disease, a progressive neurodegenerative disease that affects nerve cells in the brain and spinal cord.[22] In 2013, the U.S. Supreme Court issued its decision in *United States v. Windsor*, in which it invalidated the federal Defense of Marriage Act.[23] Under *Windsor*, the federal government could no longer refuse to recognize same-sex marriages.[24] Obergefell and Arthur decided they wanted to marry, and, as they could not in Ohio, they rented a medically equipped plane, flew to BWI Airport in Maryland, and were married on the tarmac because Arthur was too ill to leave the plane.[25]

A few weeks later, Obergefell filed a lawsuit in federal court challenging Ohio's refusal to recognize the couple's marriage.[26] In particular, they wanted Obergefell to be listed as Arthur's spouse on the last official document of his life—his death certificate. On that form, the state insisted it needed to refer to Arthur as "single," leaving blank the line for surviving spouse.

Obergefell and Arthur made particularly sympathetic and compelling plaintiffs, but so were many of the other petitioners in the case. Michael DeLeon and Greg Bourke, for example, had been a couple since 1981, raised two children together,

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18 *See* Kerry v. Din, 135 S. Ct. 2128, 2131 (2015).

19 *Obergefell*, 135 S. Ct. at 2593.

20 *Id.* at 2594.

21 *Id.*

22 *Just What is ALS?*, ALS ASSOC'N, http://www.alsa.org/about-als/ [https://perma.cc/KCY3-JZCU].

23 133 S. Ct. 2675, 2682 (2013).

24 *See id.* at 2695–96.

25 *Obergefell*, 135 S. Ct. at 2594.

26 *See id.* at 2594–95.

and married in Canada in 2004, but their home state of Kentucky would not recognize their marriage.[27] They wanted their marriage recognized so that Bourke's name could be added to the birth certificates of their children. Similarly, Kim Franklin and Tammy Boyd had lived in a committed relationship for eight years before the litigation began. They had married on the beach in Connecticut in 2010, returned to Kentucky, and wanted Kentucky to recognize their out-of-state marriage.[28] Although the facts varied from case to case, the connecting link between all of the couples was their claim that the state should recognize their relationships so that they could be eligible for the benefits or other forms of recognition granted by the state to married couples alone. It was not the stigma of being refused marital status that was the basis of their injury—although surely this contributed to their sense that the law was unjust. Nor were the couples asking to be *permitted* to have a same-sex relationship; previous cases, most notably *Lawrence v. Texas*, had established that private same-sex intimacy was constitutionally protected.[29] Instead, it was the public recognition of their relationship and the particular public benefits accompanying that recognition that the petitioners sought.

The claims made by the *Obergefell* petitioners can be understood as the last step of a long series of cases leading up to it. Constitutional family law had existed for decades, beginning perhaps with the establishment of state authority over family law in *Maynard v. Hill*.[30] Subsequent constitutional family case law has also imposed a norm of gender neutrality on the allocation of marriage-based benefits and family law rules,[31]

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27 Bourke v. Beshear & Love v. Beshear – *Plaintiff Profiles*, ACLU, https://www.aclu.org/other/bourke-v-beshear-love-v-beshear-plaintiff-profiles [https://perma.cc/U6YY-AG66].

28 *Id.*

29 539 U.S. 558, 578 (2003); *cf.* McLaughlin v. Florida, 379 U.S. 184, 184 (1964) (finding a Florida statute unconstitutional because it prohibited unmarried, interracial couples from sharing a bedroom).

30 125 U.S. 190, 208–09 (1888) (holding that U.S. territory has legislative power to dissolve a marriage against the wishes of a spouse).

31 *Compare* Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981) (holding that Louisiana's law allowing a husband to unilaterally dispose of property that was jointly owned with his wife violated the Equal Protection Clause), *and* Frontiero v. Richardson, 411 U.S. 677, 689–91 (1973) (Brennan, J., plurality opinion) (holding that a statute which required a female officer to provide proof of the dependency of her husband before she could access dependency benefits, when a male officer did not have to prove his wife's dependency, violated the Due Process Clause), *with* Orr v. Orr, 440 U.S. 268, 278–79 (1979) (explaining in regard to the Alabama law which requires alimony from the husband but not the wife, "[t]he fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny" under the Equal Protection Clause), *and* Kahn v. Shevin,

curtailed discrimination against nonmarital children,[32] and articulated a zone of privacy around decisions regarding reproduction.[33] Most importantly for the *Obergefell* petitioners, the Court established marriage as a fundamental right, striking down statutes that abridged the right of marriage in various ways, from requiring parents to demonstrate that they were current on their child support payments before marrying to denying female prison inmates the right to marry to banning interracial marriage.[34] These cases, however, did not articulate the definitional question posed by *Obergefell*—marriage is a fundamental right, but is same-sex marriage really marriage? *Obergefell*, like *Windsor* before it, built on these established right-to-marry precedents by knitting them together with the

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416 U.S. 351, 351–55 (1974) (holding that a state tax law that favors women may be permissible "if the discrimination is founded upon a reasonable distinction, or difference in state policy." *Id.* at 355. (quoting Allied Stores v. Bowers, 358 U.S. 522, 528 (1959)). "The challenged tax law [here] is reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden," i.e., women. As such, it may pass scrutiny. *Id.* at 351).

32 *See* Trimble v. Gordon, 430 U.S. 762, 776 (1977) (holding that an Illinois law that allowed illegitimate children to only be able to inherit from their mother in intestate succession, while legitimate children could inherit from both mother and father, violated the Equal Protection Clause); King v. Smith, 392 U.S. 309, 311 (1968) (striking down Alabama law that prevented aid from going to fatherless children whose mothers were cohabiting with "any single or married able-bodied man"); Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (holding that it was "invidious discrimination" to deny damages to illegitimate children for the wrongful death of their mother, as their illegitimacy had nothing to do with the wrongful death).

33 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992) (reaffirming the essential holding from Roe v. Wade, 410 U.S. 113 (1973)); Carey v. Population Servs. Int'l, 431 U.S. 678, 681–82 (1977) (holding that the prohibition against advertising contraceptives was unconstitutional); Roe v. Wade, 410 U.S. 113, 117–18, 164 (1973) (finding Texas abortion statutes permitting abortions only if the life of the mother was threatened to be unconstitutional); Eisenstadt v. Baird, 405 U.S. 438, 442–43 (1972) (finding Massachusetts statute banning the distribution of contraceptives to unmarried individuals unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding as unconstitutional a Connecticut statute punishing the use of contraceptives in married couples); Poe v. Ullman, 367 U.S. 497, 520–21 (1961) (Douglas, J., dissenting) (arguing, in a case about contraceptive information and devices being withheld from married couples, that "when the State makes '[contraceptive] use' a crime and applies the criminal sanction to man and wife, the State has entered the innermost sanctum of the home. . . . That is an invasion of the privacy that is implicit in a free society."); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (holding that marriage and procreation are "one of the basic civil rights of man" and any sterilization law's classifications should thus be given strict scrutiny).

34 *See* Turner v. Safley, 482 U.S. 78, 81 (1987) (female prison inmates); Zablocki v. Redhail, 434 U.S. 374, 375 (1978) (child support payments); Loving v. Virginia, 388 U.S. 1, 2 (1967) (interracial marriage).

antidiscrimination principle used in many of the other constitutional family law cases.

There is an important line of constitutional family law cases, however, that articulates a different facet of marriage—what one might call the "rights of marriage" rather than "the right to marry." This line of cases concerns the household or the lived experience of families. The most relevant here is *Moore v. City of East Cleveland*, a case in which a grandmother challenged a zoning law that prohibited her from living with her two grandsons, each of whom had different parents.[35] A plurality of the Court found that this regulation was impermissible because it chose to regulate "by slicing deeply into the family itself."[36] Although *Moore* involved a woman and her grandchildren, not a married couple, its fundamental concern was with the right of family members to cohabit with one another. This concern is distinct from the right to enter into a legal relationship, such as marriage. Instead, it focuses on what freedoms the familial relationship affords to the members of the family. This concern lies at the heart of the Supreme Court's other 2015 constitutional family law case, *Kerry v. Din*.

B. *Kerry v. Din*

Unlike Jim Obergefell, Fauzia Din has not become a household name, nor did the case bearing her name garner the continuous world-wide media coverage and intense, sustained scholarly attention heaped on *Obergefell*. Din's case, however, also had a compelling factual story and resulted in opinions that likely contain the seeds of the Court's future constitutional family jurisprudence.

Fauzia Din, a naturalized U.S. citizen, originally came to the United States as an asylum-seeker from Afghanistan.[37] Political asylum is granted to an individual who can demonstrate past persecution or a "well-founded fear" of suffering persecution should she be returned to her home country.[38] Ms. Din

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35 431 U.S. 494, 496–97 (1977).

36 *Id.* at 498; *see also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973) (striking down Food Stamp eligibility rules that prohibited people who lived with non-relatives from receiving aid); *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 1, 4 (1974) (upholding zoning law that allowed unmarried couples or families to share a residence but prohibited "lodging, boarding, fraternity, or multiple-dwelling houses"); Lyng v. Castillo, 477 U.S. 635, 636 (1986) (upholding statute requiring nonrelatives or distant relatives to demonstrate that they "customarily purchase food and prepare meals together" in order to demonstrate food stamp eligibility).

37 Kerry v. Din, 135 S. Ct. 2128, 2132 (2015).

38 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2012).

was granted asylum in the United States[39] after demonstrating a well-founded fear of persecution. Once she obtained asylum, she was eligible to apply to become a citizen after residing continuously in the United States for a minimum of five years.[40] After obtaining her U.S. citizenship, she married Kanishka Berashk, a man also from Afghanistan whom she had known since childhood.[41]

One of the privileges of U.S. citizenship is the ability to petition for a visa for an immediate relative (a spouse, child, or parent).[42] This visa allows the relative to travel to the United States and live there with "permanent resident" status (and, eventually, apply for U.S. citizenship).[43] When Fauzia Din initially petitioned for an immediate relative visa for Berashk, the petition was granted.[44] The next step was for Berashk to travel to the nearest U.S. consulate (the consulate in Islamabad, Pakistan).[45] Berashk had his interview at the consulate and then waited. He heard nothing back from the State Department for almost a year.[46]

Din contacted her congressman, who, in turn, demanded an explanation from the State Department.[47] It sent a denial letter, stating that Berashk was inadmissible under 8 U.S.C. § 1182 (a). The statute in question is the piece of the Immigration and Nationality Act that lists every category of person who is inadmissible to (prohibited from entering) the United States. At twenty-four pages long, the statute is detailed, convoluted, and wide-ranging, including as inadmissible everyone from people who have not had required vaccines, to money launderers, to persons who are "likely . . . to become a public charge."[48] It would be impossible to know, based on a mere reference to the statute, which subsection the government believed was applicable to Berashk.

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39 Brief in Opposition at 3, *Din*, 135 S. Ct. 2128 (No. 13-1402), 2014 WL 4216035, at *3.

40 8 C.F.R. § 316.2(a)(3) (2011).

41 Brief of Appellant at 6, Din v. Clinton, 718 F.3d 856 (2013) (No. 10-16772), 2010 WL 6753384, at *6.

42 *Din*, 135 S. Ct. at 2131 ("The INA creates a special visa-application process for aliens sponsored by 'immediate relatives' in the United States.") (citing 8 U.S.C. §§ 1151(b), 1153(a) (2012)).

43 8 U.S.C. § 1430(a) (2012).

44 *Din*, 135 S. Ct. at 2132.

45 *Id.*

46 Brief of Appellant, *supra* note 41, at 8–9.

47 *See id.*

48 8 U.S.C. §§ 1182(a)(1)(A)(ii), (a)(2)(I), (a)(4)(A) (2012).

Din's congressman continued to press the State Department, which then provided more information, via email.[49] Now it identified a particular subpart of the statute—this time only a page and a half long—as the grounds for inadmissibility. The section it identified, 8 U.S.C. § 1182(a)(3)(B), states that individuals involved in terrorist activity are inadmissible. At first glance, this level of specificity might seem to be enough. But like the inadmissibility statute in general, the anti-terrorism provisions are extremely broad and difficult to understand. A person can be inadmissible for having actually engaged in what would be commonly understood as terrorist activity, for example, hijacking an airplane or bombing a public place, but could also be inadmissible for giving a terrorist a place to stay, providing him with money or food, or passing on a message from one terrorist to another. To make things even more confusing, a "terrorist organization" includes, under the statute, a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in [terrorist activity]."[50] A person can be inadmissible for aiding such a group even if he did not know that he was aiding terrorists, if he "reasonably should [have] know[n]."[51] In short, the "what" of "terrorist activity" can include seemingly innocuous activity, the "who" of "terrorist organization" can include two unorganized individuals, and the "how" can include no actual knowledge of terrorism. Given the broad swath of activities that could lead to a finding of inadmissibility, a visa applicant who was erroneously found to have engaged in "terrorist activity" might very well have no way to guess as to the basis of the finding.

If the statute the State Department identified as making Berashk inadmissible was broad, the discretion afforded to the consular officer reviewing his case was even broader. Consular officers are granted extraordinarily wide berth when making decisions about whom to admit to the United States. The statute in question in Berashk's case, for example, states that a person is inadmissible if the consular officer "has reasonable ground to believe" that the person "is engaged in or is likely to engage after entry in any terrorist activity."[52] Berashk may have been excluded not because the consular officer knew of prior terrorist activity (defined in the very broad way outlined

49 *See* Brief of Appellant, *supra* note 41, at 9.

50 8 U.S.C. § 1182(a)(3)(B)(vi).

51 *Id.* § 1182(a)(3)(B)(iv).

52 *Id.* § 1182(a)(3)(B)(i)(II).

above), but because the officer suspected that Berashk was *likely* to engage in such activity. The law provides no mechanism for appealing a consular decision.[53] The absence of an appeal process makes it impossible for a person whose visa is denied to effectively contest the denial, or, often, to even discover the reason for it.

In Berashk's case, neither he nor Din knew the reason for the denial.[54] Berashk had been employed as a postal clerk for the Afghan government, including during the time when the Taliban was in power.[55] It is possible that the consular officer understood paid employment by the Taliban to constitute "terrorist activity."[56] The State Department, however, refused to offer any factual explanation for the denial, pointing simply to the text of the statute itself.

Din responded by suing the State Department. Her claim was an interesting one: she did not demand that Berashk be admitted to the United States, but rather that the State Department provide her with a more detailed explanation of why he could not be, presumably so that she could rebut it if the government had inaccurate information.

Fauzia Din, like Jim Obergefell and the other *Obergefell* petitioners, framed her case as one about marriage rights. But the focus of her claim was different. Where Obergefell and his co-petitioners invoked the right to marry in order to access certain benefits, Din invoked the right to exercise the benefits of marriage. Jim Obergefell was seeking entry into a status relationship that brings with it certain rights, including the right to petition for a foreign spouse's visa. In contrast, Fauzia Din had already exercised the right to marry; she wanted the government to not stand in the way of her enjoyment of the relationship it already recognized. Because Ms. Din (or her lawyers) understood that the right to live in the same place as one's spouse could not be absolute (prisoners, for example, are separated from their spouses by walls; soldiers by war), she articulated her claim as a procedural one. It flowed from a substantive right to the companionship of one's spouse, but the remedy she sought was due process—procedural protections to ensure that this right would not be infringed upon without good reason and fair consideration.

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53 Brief for the Petitioners at 7, Kerry v. Din, 135 S. Ct. 2128 (2015) (No. 13-1402), 2014 WL 6706838, at *7.

54 *See Din*, 135 S. Ct. at 2132; *id.* at 2139 (Kennedy, J., concurring).

55 Brief in Opposition, *supra* note 39, at 4.

56 *See Din*, 135 S. Ct. at 2146 (Breyer, J., dissenting).

Obergefell was a directly analogous case to the previous right-to-marry cases, such as *Zablocki*, *Loving*, and *Turner*; the only new question was whether same-sex marriage "counted" as marriage. In contrast, *Din* could not be decided purely by extending the logic of prior cases to a new class of plaintiffs. The cases most analogous to *Din* were cases about parents or other caretakers and children, not spouses, and custody and zoning, not admission as a permanent resident. Constitutional family law has established the right of parents to the care, custody, and control of their children[57] and clarified the scope of rights enjoyed by fathers to relationships with their nonmarital children.[58] These cases, taken together, support

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57 *See* Troxel v. Granville, 530 U.S. 57, 72–73 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 846–47 (1977) ("Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."); Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972) (holding that it was unconstitutional to compel Amish parents to send their children to high school until the age of sixteen under Wisconsin's compulsory education law, due to parental interest in raising their children in accordance with their religious beliefs); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding that while the rights of parents are not beyond limitation, "[i]t is cardinal with [the Court] that the custody, care and nurture of the child reside first in the parents . . . [in a] private realm of family life which the state cannot enter."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (affirming lower court's decision to enjoin enforcement of the Oregon Compulsory Education Act because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (holding it unconstitutional to prohibit teaching in languages other than English until the student passes the eighth grade. The Court recognized the right to "establish a home and bring up children" as one which "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some [state] purpose.").

58 *See* M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996) (finding that due process requires a state to waive judicial transcript fees for indigent appellants in parental termination cases); Michael H. v. Gerald D., 491 U.S. 110, 129–31 (1989) (Scalia, J., plurality opinion) (holding that a natural father did not have visitation rights under California's statute which presumes a child born to a married couple is the couple's natural child, even when there is a potential biological father outside of the marriage); Lehr v. Robertson, 463 U.S. 248, 261 (1983) (holding that "mere existence of a biological link does not merit equivalent constitutional protection," and a putative father is not guaranteed "substantial protection under the Due Process Clause" unless he participates in raising the child); Caban v. Mohammed, 441 U.S. 380, 386–87, 393–94 (1979) (deeming unconstitutional a New York provision which only needs the unwed mother's lack of consent to halt adoption, but places a higher burden on the unwed father, who must show the adoption is against the child's interest); Stanley v. Illinois, 405 U.S. 645, 649–50; 657–58 (1972) (finding it unconstitutional for Illinois law to allow fitness hearings for all parents, except unmarried men, who want to retain custody of their children after the death of a partner or spouse. This presumption of fitness extended to married

"the general claim that parents' child-rearing choices are entitled to strong protection,"[59] and that parents, especially biological mothers, have a strong interest in retaining legal custody and parentage of their children.[60] *Moore v. City of East Cleveland*, discussed above, expanded the protection of caretaker-parent relationships to include not just parents but grandparents, and expanded the context in which the relationship can require constitutional protection from custody and parentage claims to zoning law and criminal punishment.[61] None of these cases, however, addressed adult relationships. The cases that have concerned adult relationships have focused on the right to engage in intimate sexual behavior, but none of these cases addressed the question of whether adults have an interest in sharing a home and a citizenship.[62] Finally, the Court has recognized that the interest of adults in the right to divorce is so strong that filing fees must be waived for indigent people seeking divorce.[63] No U.S. Supreme Court case, however, has taken on the issue of whether adults—married or not—have a right to cohabit with whom they please, or under what circumstances the government may justifiably stand in their way.

There have been previous Supreme Court cases addressing the rights of immigrants who were the spouses of U.S. citizens. These cases, however, were decided before the Court developed its modern constitutional family doctrine, and many of the justices did not recognize the interests of the parties as ones involving constitutional family rights.[64] In *Knauff v. Shaughnessy*, for instance, the United States excluded the German-born wife of a naturalized citizen without a hearing on the ground that her admission would be "prejudicial to the inter-

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or divorced couples as well as unwed women, with only unmarried men being singled out.).

59 Emily Buss, *Adrift in the Middle: Parental Rights after* Troxel v. Granville, 2000 SUP. CT. REV. 279, 318.

60 *See* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 308–12 (1988) (exploring, and critiquing, the Supreme Court's rights-based approach to understanding mother-child relationship).

61 431 U.S. 494, 504–06 (1977).

62 Lawrence v. Texas, 539 U.S. 558, 562–64 (2003) (striking down a statute that prohibited adults from engaging in private, consensual, same sex intimacy); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (finding that marital privacy protects the right to contraceptive use); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (addressing the issue of marital privacy in the context of contraceptive use).

63 Boddie v. Connecticut, 401 U.S. 371, 375 (1971).

64 *See* Abrams, *Family Reunification and the Security State*, *supra* note 12, at 259–65 (describing Cold War immigration cases and identifying them as predating the development of modern constitutional family law).

ests of the United States."[65] As in *Din*, the government claimed in *Knauff* that national security interests were paramount—in Knauff's case, due to "the national emergency of World War II."[66] Unlike Ms. Din, however, Ms. Knauff did not claim a constitutional interest in her marriage. Instead, she made a structural constitutional claim and argued that the regulations used were not "reasonable."[67] Justice Robert Jackson, however, joined in dissent by Justices Hugo Black and Felix Frankfurter, articulated a family reunification rationale for Knauff's claims. Congress, he argued, has the power to exclude aliens. But it does not have the power to authorize "an abrupt and brutal exclusion of the wife of an American citizen without a hearing."[68]

Similarly, in *Shaughnessy v. Mezei*, the Supreme Court upheld the exclusion of another noncitizen, also the spouse of a U.S. citizen.[69] Both *Knauff* and *Mezei* were decided during the Cold War, during an era of heightened suspicion against Eastern Europeans and suspected communists. Both were also decided prior to the line of cases decided in the 1970s that established a procedural due process right in expectancy interests. Under these cases, even if an entitlement is not a fundamental right, if the government has created an expectancy to the entitlement, it must provide procedural due process when denying it.[70] *Knauff* and *Mezei* were also decided prior to the right-to-marry cases, such as *Loving*, *Zablocki*, and *Turner*, as well as the cases involving families living together, such as *Moore* and *Moreno*.

When the Court heard *Kerry v. Din*, then, it was perfectly positioned to ask again the question it had ignored in *Knauff* and *Mezei*—do U.S. citizens have a constitutional interest in living with their spouses?—in light of an expanded understanding of the constitutional protection afforded to marriage. Put differently, now that interracial couples, prisoners, and men who owe child support all have a right *to* marry, what is the scope of the rights *of* marriage?

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65 338 U.S. 537, 540 (1950).

66 *Id.* at 544.

67 *Id.* at 542 (discussing plaintiff's claim that the statute in question and accompanying regulations contained unconstitutional delegations of legislative power).

68 *Id.* at 550 (Jackson, J., dissenting).

69 345 U.S. 206, 217 (Black, J., dissenting) (stating that "[h]e wanted to go to his wife and home in Buffalo").

70 *See* Kerry v. Din, 135 S. Ct. 2128, 2142–43 (2015) (Breyer, J., dissenting) (first citing Wilkinson v. Austin, 545 U.S. 209 (2005); then citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

C. Overlapping Constitutional Family Theories

In both *Obergefell* and *Din*, the Court was faced with the question of whether it should expand its existing constitutional family law jurisprudence to include new factual scenarios. *Obergefell* required the Court to decide whether same-sex marriage fell within the definition of "marriage" for constitutional purposes, and whether discrimination in access to marriage based on sexual orientation was constitutionally permissible. *Din*, on the other hand, demanded that the Court decide whether existing precedents regarding the right to live with one's biological family members should be expanded to include the right to live with one's spouse, and whether the right to marry and procedural due process cases of the 1960s, 1970s, and 1980s called into question the harsh approach taken by the Court with regard to immigrant spouses during the Cold War. Both cases required the Justices to articulate their understanding of *why* marriage is constitutionally protected—in other words, to develop a legal theory of marriage.

Despite their different postures, *Obergefell* and *Din* concerned overlapping legal claims. Admittedly, they have different emphases. *Obergefell* is about the right to enter into a status, and *Din* is about the right to access certain benefits based on that status. The lines between status and benefits, however, are murky, and when pressed, the subject areas of the two cases blur.

Consider, for example, the claims the *Obergefell* plaintiffs, as well as the plaintiffs in many other marriage rights cases, were making. These claims were for marital recognition for its own sake, but also for the tangible benefits marriage provides. Indeed, prior to *Obergefell*, many states had attempted to accommodate same-sex couples' demands for access to benefits by creating other, non-marital statuses, such as domestic partnerships or civil unions, that would provide some or all of the benefits of marriage.[71] The right at issue in *Din*—to live in the same country as one's spouse—is, like the rights at issue in the marriage equality cases, a right that flows from marital status. Thus, another way of understanding *Din* is as a case that focuses on *one* of the particular rights that have been bundled

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[71] *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) (describing California domestic partnership act, which gave domestic partners "the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses" (quoting Cal. Fam. Code § 297.5(a) (West 2004)).

into the status of marriage, rather than the entire bundle.[72] No court has ever determined which rights, bundled into the status of marriage, are necessary to make marriage "marriage." Surely, if the right to access health insurance through one's spouse were taken away, or if spouses could no longer refuse to testify against one another, their "right to marry" would not have been abridged.

If one right were to be found fundamental to the exercise of the right to marry, however, it would likely be the right to live with one's spouse. Certainly, this right is sometimes overridden by other, more pressing needs, as when one spouse is incarcerated or deployed in the armed services, but for most spouses, marriage would mean little if there was no physical proximity. As in *Moore*, abridging the right of married people to live with one another would regulate "by slicing deeply into the family itself."[73] Thus, even though *Obergefell* and *Din* sometimes draw from different lines of cases, the theories underlying them, and their significance for constitutional family rights, are intertwined.

In *Obergefell*, Justice Kennedy wrote for the majority. Four other Justices—Breyer, Ginsburg, Kagan, and Sotomayor—joined his opinion. None of these other Justices wrote separately. We cannot know for certain if they agreed with Justice Kennedy's reasoning or had other reasons for joining the opinion, although Justice Ginsburg has stated that she thought "it was more powerful" for the Court to speak with one voice.[74] Some scholars have speculated about how the opinion might had been different had it been authored by one of the other four joining Justices.[75] Four Justices dissented—Roberts, Alito, Scalia, and Thomas. In contrast to the unified majority, each of the dissenters wrote his own, sometimes quite lengthy, opinion.

Din, although it produced fewer opinions than *Obergefell*, was in one respect more complex. Unlike *Obergefell*, *Din* did

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72 *See* James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 31 (2003) (observing that "[m]arriage is emerging as a 'bundle' of legal benefits and burdens"); *cf.* Strauss, *supra* note 9, at 1732 (arguing that the right to marry cannot be understood as a "[b]undle of [s]imple [c]laim [r]ights").

73 Moore v. City of E. Cleveland, 431 U.S. 494, 498 (1977) (plurality opinion).

74 *Justice Ginsburg Addresses Alumni and Summer Institute in Wide-Ranging Conversation with Siegel*, DUKE L. NEWS (Aug. 7, 2015), https://law.duke.edu/news/justice-ginsburg-addresses-alumni-and-summer-institute-wide-ranging-conversation-siegel/ [https://perma.cc/8SPY-H87H].

75 *See, e.g.*, Ruthann Robson, *Justice Ginsburg's* Obergefell v. Hodges, 84 UMKC L. REV. 837 (2016) (reimagining the *Obergefell* opinion had Justice Ginsburg wrote it).

not produce a majority opinion. Although five justices agreed on an outcome (Din lost her case), they could not agree on the reasoning. Justice Scalia's plurality opinion garnered only two additional votes, from Justices Thomas and Roberts. Justice Kennedy's concurrence was signed by Justice Alito.[76] The precedential value of *Din* is therefore more speculative.

Din also presents something *Obergefell* did not—an opinion by Justice Breyer, one of the silent Justices in *Obergefell*. This dissenting opinion, joined by Justices Ginsburg, Kagan, and Sotomayor, is notable because its theory of marriage differs greatly from Kennedy's *Obergefell* majority. Reading *Obergefell* and *Din* together produces a very different impression than reading *Obergefell* alone. *Din* provides a window into how at least one of those Justices who remained silent in *Obergefell* understands marriage, provides differentiation between the Justices who dissented in *Obergefell*, and also underscores the limits of Justice Kennedy's approach.

II
OBERGEFELL'S THEORIES OF CONSTITUTIONAL FAMILY LAW

Each of the opinions in *Obergefell* demonstrates a particular judicial theory of constitutional family law. Understanding these theories—and especially, the differences between them—will help us to read *Obergefell* in light of *Din*.

A. Marriage as an Exercise of Citizenship

Justice Kennedy has long been the "swing vote" on the Supreme Court in many categories of controversial constitutional cases.[77] In the areas of family constitutional rights, gender discrimination, and sexual orientation discrimination, his decisive role has been particularly noticeable.[78]

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76 Richard Lazarus has argued that *Din* was likely originally assigned to Justice Kennedy "after fragmented voting at conference with the expectation that he was best positioned to produce an opinion of the Court, but he was subsequently unable to secure the necessary majority for his draft opinion." Richard J. Lazarus, *Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts*, 129 HARV. L. REV. FORUM 33, 52 n.120 (2015).

77 *See* Jack M. Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 513 (2006) (stating that "Justice Anthony Kennedy is now the Court's swing vote").

78 *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 132–33 (2007) (writing an opinion for a five-Justice majority upholding a statute that prohibits "intact" dilation and evacuation (D & E) abortion procedure); Nguyen v. INS, 533 U.S. 53, 56–57 (2001) (writing an opinion for a five-Justice majority upholding citizenship-acquisition law that treats men and women differently).

To understand Justice Kennedy's opinion in *Obergefell*, it is important to consider it in the context of his other opinions. In constitutional family law cases, Justice Kennedy has largely hewn to a middle path, neither being greatly expansive in his reading of rights nor seeking to curtail them.[79] In one particular class of cases, however, Justice Kennedy has been expansive in his rethinking of the law. He was the author not only of the majority opinion in *Obergefell* but of every majority opinion in significant Supreme Court cases siding with LGBTQ parties since *Romer v. Evans* in 1996.[80] In each of these opinions, Justice Kennedy deviates from traditional constitutional analysis in many ways, sometimes by not identifying the suspect class at issue, sometimes by failing to state clearly the applicable level of scrutiny (strict scrutiny, intermediate scrutiny, or rational basis review), and sometimes by avoiding the question of *which* constitutional provision has been violated.[81] Instead, Justice Kennedy's opinions ask whether the legislation at issue reflects animus toward a particular group; for Justice Kennedy, animus, or "a bare desire to harm" is an illegitimate legislative purpose.[82] Whether Kennedy's unique approach has repre-

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79 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 93–95 (2000) (Kennedy, J., dissenting) (dissenting from majority opinion striking down state child visitation statute on its face where statute could be read to give visitation to third parties with a substantial relationship to the child); M.L.B. v. S.L.J., 519 U.S. 102, 128–29 (1996) (Kennedy, J., concurring) (concurring with Justice Ginsburg's majority opinion holding that a state may not deny access to the transcript of the hearing terminating parental rights to a parent too poor to pay the transcript fee, but doing so on narrower grounds than the majority); Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., concurring in part) (joining Justice Scalia's plurality opinion that denies visitation to the unmarried, genetic father of a child, but refusing to join Scalia's footnote 6 that "sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area").

80 *See* 517 U.S. 620, 623 (1996) (striking down Colorado Constitutional Amendment 2, which banned the state and its municipalities from treating sexual orientation as a protected class); *see also* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013) (holding that the Defense of Marriage Act violated same sex couples' Fifth Amendment rights to equal protection); Lawrence v. Texas, 539 U.S. 558, 562 (2003) (striking down a Texas statute that prohibited same-sex individuals from engaging in certain sexual acts in private).

81 *See* Robinson, *supra* note 9, at 161–63 (describing Kennedy's approach to equal protection analysis in *Windsor* and *Obergefell*). *See also* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1334–45 (2017) (describing Kennedy's approach as an "intersectional rights" analysis).

82 *E.g.*, *Windsor*, 133 S. Ct. at 2693 (holding that the Constitution's guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group) (quoting Dept. of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)); *Romer*, 517 U.S.

sented a failure of precision, leading to constitutional disarray, or is a strength of the opinions, allowing them to be read narrowly going forward, has been the source of much scholarly debate.[83]

This line of Kennedy opinions has also been notable for its valorization, and, some might say, domestication, of intimate relationships.[84] In *Lawrence v. Texas*, for example, the question before the Court was whether Texas's Homosexual Conduct Law, which allowed the state to criminally convict the petitioners for consensual, private sexual activity, violated the petitioners' constitutional rights.[85] But Justice Kennedy's reasoning in striking down the statute characterized the petitioners' sexual encounter as valuable not for itself but because it might lead to a longer-term relationship. "When sexuality finds overt expression in intimate conduct with another person," Justice Kennedy wrote, "the conduct can be but one element in a personal bond that is more enduring"—perhaps an "enduring" personal bond such as marriage?[86] In fact, in *Lawrence*, Justice Kennedy expressly repudiated the idea that sex alone is worthy of protection. In overruling *Bowers v. Hardwick*, the 1986 case that had upheld criminal bans on sexual activity similar to those at issue in *Lawrence*,[87] Justice Kennedy held that the Court in *Bowers* had misapprehended the question at hand. "To say that the issue in *Bowers* was simply the right to

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at 632 (holding that the law in question's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests").

83 *See, e.g.*, Abrams & Garrett, *supra* note 81, at 1348 (observing that the approach adopted by Justice Kennedy in the LGBTQ rights cases may result in a form of "constitutional minimalism"); Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L.J. 1, 18–19 (2008) (arguing that Justice Kennedy's opinion in *Lawrence* suggests that sex without intimacy lacks dignity); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 830 (2010) (arguing that there is support in Lawrence for a narrow reading of the opinion—one that protects sexual conduct only in the context of emotionally intimate relationships); Teemu Ruskola, *Gay Rights Versus Queer Theory: What Is Left of Sodomy After* Lawrence v. Texas*?*, 23 SOC. TEXT 235, 238–45 (2005) ("The Supreme Court's decision in *Lawrence v. Texas* is easy to read, but difficult to pin down." (quoting Nan Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1103 (2004))).

84 *See, e.g.*, Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1408–10 (2004) (observing that "gay men are portrayed as domesticated creatures, settling down into marital-like relationships in which they can both cultivate and nurture desires for exclusivity, fidelity, and longevity in place of other more explicitly erotic desires").

85 539 U.S. at 564.

86 *Id.* at 567.

87 478 U.S. 186 (1986).

engage in certain sexual contact demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[88] As Professor Libby Adler has argued, Justice Kennedy's opinion implies that sex, standing alone, lacks dignity. It is the context in which it occurs—a committed relationship, or even the *potential* for a committed relationship—in which it becomes worthy of protection.[89] *Lawrence* provides an early hint of Kennedy's linkage of marriage to responsible citizenship in *Obergefell*.

This linkage is also evident in Justice Kennedy's attention in *Windsor* to marriage as the preferred social and legal space for the raising of children. In *Windsor*, Justice Kennedy's majority opinion critiqued the Defense of Marriage Act because it "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."[90] Just as in *Lawrence*, where Justice Kennedy transformed a case about casual sex into one about a potential long-term relationship, in *Windsor*, he took a case about two women who never had children and reached a holding based, in part, on the imagined effect of DOMA on "tens of thousands" of children.[91] As Professor Deborah Widiss has observed, "[n]otably absent from the Court's analysis was any recognition that in any given classroom, there would likely be many children who have *un*married, *different-sex* parents."[92]

Justice Kennedy's concern for same-sex couples' access to both the burdens and obligations of marriage and his concern for the stability of children's family relationships are underscored by an implicit theory regarding marriage's role in the exercise of responsible citizenship. His *Windsor* opinion discusses at length the historical tradition of state, not federal

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88 *Lawrence*, 539 U.S. at 567.

89 *See* Adler, *supra* note 83, at 18–19.

90 United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

91 *See* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 275 (2014) ("Despite the fact that Edith and Thea never had children, the children of same-sex couples are a key presence throughout the Windsor decision." (footnote omitted)).

92 Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 555 (2015). She also notes that this argument is "deeply in tension with efforts made a generation ago to lessen the importance—both symbolic and substantive—of whether a child was born to a legal marriage." *Id.*

law, governing marriage. Because his discussion occurs in the context of a dispute over federalism principles—can federal law override state marriage law?—it is easy to overlook the extent to which Justice Kennedy understands marriage as an exercise of citizenship. The community of which one is a member, for purposes of *Windsor*, is the state, not the nation, but citizenship is nevertheless the operating principle. Consider, for example, Justice Kennedy's characterization of New York's decision to recognize Ms. Windsor's marriage:

> Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class *in their own community*.[93]

For Justice Kennedy, marriage is not only the most privileged form of adult relationship, it is also the means by which states confer legal protection and status on their citizens.

Justice Kennedy's *Obergefell* opinion builds on the rhetoric begun in *Lawrence* and *Windsor*, making marriage the preferred social and legal space for sexual intimacy and childrearing. It starts from the principle established in *Loving*, *Zablocki*, and *Turner* that marriage is a fundamental right.[94] Much of the opinion is then devoted to explaining the principles underlying the right and how those principles and traditions apply to same-sex couples.[95]

The first principle or tradition set forth in Kennedy's opinion is one of choice and self-definition: "[P]ersonal choice regarding marriage is inherent in the concept of individual autonomy."[96] Justice Kennedy compares choice in marriage to other "intimate" choices, such as "choices concerning contraception, family relationships, procreation, and childrearing."[97] He then cites the language from *Zablocki* that sets marriage apart as the preferred family form: "Indeed, the Court has noted 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

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93 *Windsor*, 133 S. Ct. at 2692 (emphasis added).

94 135 S. Ct. 2584, 2598 (2015).

95 *See id.* at 2599–600 (applying the principle that "the right to marry is fundamental because it supports a two-person union unlike any other" to the relationship of same-sex couples).

96 *Id.* at 2599.

97 *Id.*

of the family in our society.'"[98] Marriage, for Justice Kennedy, is the legal space that makes intimacy possible: "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[99] This notion harkens back to the associational approach to marriage taken by Justice William Douglas in his *Griswold* opinion.[100] Quoting the Supreme Court of Massachusetts' opinion in *Goodridge*, the opinion argues that marriage "fulfills yearnings for security, safe haven, and connection that express our common humanity" and that "civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."[101] This principle can be understood as an autonomy principle, or a self-expression principle.

It is worth taking a minute to observe just how simultaneously modern and regressive this theory of marriage is. Historically, marriage was less about self-definition than it was about survival and the creation of alliances between families for self-preservation and the consolidation of private property.[102] Justice Kennedy's version, in which marriage can help to facilitate a person's "expression, intimacy, and spirituality"[103] is highly individualistic, focused on the personal needs of the two parties to the marriage and not on the well-being of the extended family or community. Yet his opinion simultaneously revives the strand of *Zablocki*'s thinking in which marriage is the approved, proper space for intimate and reproductive activities, superior to other, lesser relationship statuses. His opinion is liberal, rather than communitarian, yet he still understands marriage as a disciplinary institution.

Justice Kennedy's second principle is one of companionship: "[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[104] It is in discussing this principle

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98 *Id.* (citing Zablocki v. Redhail, 434 U.S. 374, 386 (1978)).

99 *Id.*

100 *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (explaining that there is an associational right to privacy and, in this case, "[w]e deal with a right to privacy older than the Bill of Rights . . . . Marriage is . . . intimate to the degree of being sacred.").

101 135 S. Ct. 2599 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

102 For a discussion of the history of marriage, see Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 7–13 (2009).

103 *Obergefell*, 135 S. Ct. at 2599.

104 *Id.*

that Justice Kennedy makes what is perhaps the most celebrated and derided claim in his opinion: "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[105] This claim stands in stark contrast to his opinion in *Din*, as we shall see.

Justice Kennedy's third principle is that marriage is protected because it is good for children. Marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[106] This claim hinges on two premises: that marital children have more legal and financial security than nonmarital children (which is often true) and that nonmarital children are emotionally harmed because their family form is not as good as a marital family. "Without the recognition, stability, and predictability marriage offers," the opinion explains, "[same-sex couples'] children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."[107] This claim, which echoes the claim in Kennedy's majority opinion in *Windsor* that nonrecognition of same-sex marriage "humiliates" the children of those couples,[108] has generated extensive criticism that the opinion has the potential to roll back the rights of nonmarital children.[109]

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105 *Id.* at 2600. For representative characterizations of this quotation, see Michelle Goldberg, *Why the Same-Sex Marriage Decision Is a Victory for Romance*, NATION (June 29, 2015), https://www.thenation.com/article/why-the-same-sex-marriage-decision-is-a-victory-for-romance/ [https://perma.cc/FNW3-ZKHB] (describing the opinion and this quotation in particular as an example of "schmaltzy sentimentality," stating that people who get married "empty savings accounts and go into debt to stage elaborate pageants to the ideal that Kennedy describes" and citing to a tweet from another NATION editor referring to the opinion as "sentimental" and "barfy").

106 *Obergefell*, 135 S. Ct. at 2600 (first citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); then citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

107 *Id.* at 2600–01 (stating that the "marriage laws at issue here thus harm and humiliate the children of same-sex couples").

108 United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

109 *See, e.g.*, Huntington, *supra* note 10, at 28 ("Justice Kennedy's opinion is . . . an affront . . . to individuals outside the institution [of marriage]."); Murray, *supra* note 10, at 1258 ("[A] victory for marriage equality comes at the expense of the unmarried and nonmarriage."); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1191 (2016) ("[S]ame-sex marriage has the capacity to further the erosion . . . between martial and nonmarital parental recognition).

Finally, and most curiously from a constitutional law perspective, Justice Kennedy's opinion asserts that marriage is constitutionally protected because of the disciplinary control it exerts on the citizenry. "[T]his Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."[110] The claim is curious because it relies on a rationale that one would expect to find in the portion of constitutional analysis devoted to assessing the *state's* interest in restricting a right.[111] Instead, here the state's interest blends with the interest in the petitioner in seeking out the disciplinary institution of marriage.[112] Justice Kennedy describes this disciplinary function as peculiarly American, reaching back to *Maynard v. Hill* ("the foundation of the family and of society, without which there would be neither civilization nor progress")[113] and Alexis de Tocqueville:

> There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . . . [H]e afterwards carries [that image] with him into public affairs.[114]

It is because "[m]arriage remains a building block of our national community" that the states have "throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities."[115] The opinion thus comes full circle: marriage is protected *because* it is the bedrock of society, and people should be entitled to be able to *choose* to enter into this societally-important relationship in a way that maximizes their own self-expression.[116]

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110 *Obergefell*, 135 S. Ct. at 2601.

111 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 84 (1987) (discussing the prison's interest in preventing unhealthy and abusive relationships between female inmates and male criminals); Zablocki v. Redhail, 434 U.S. 374, 394 (1978) (discussing the state of Wisconsin's interest in collecting child support).

112 For more on this theory of marriage, see generally Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 39–51 (2012) (discussing the disciplinary institution of marriage).

113 *Obergefell*, 135 S. Ct. at 2601 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

114 *Id.* (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 309 (Phillips Bradley ed., Henry Reeve transl., Vintage Books rev. ed. 1990) (1945)).

115 *Id.*

116 For a more extended analysis of the relationship between marriage and citizenship, see generally Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 419–29 (2013).

B. Marriage as a Natural Right

Unlike Justice Kennedy, the Justices who dissented in *Obergefell* were unwilling to read either due process or equal protection expansively enough to include same-sex marriage. *Obergefell* resulted in a somewhat unusual outcome: a majority opinion joined by four Justices who likely did not agree with the analysis, and four separate dissents by justices who were largely in agreement with one another. Each of the opinions laments the majority's overreaching[117] and lack of doctrinal rigor.[118] Each, however, has distinguishing characteristics, that, read with other constitutional family cases and with *Din* in particular, illuminate some important differences in the Justices' conceptions of marriage.

1. *Justice Scalia*

Because he cast such a long shadow over constitutional jurisprudence during his many years of service and was so vocal in a few particular constitutional family cases, it is sensible to begin our analysis with Justice Scalia.

Where Justice Kennedy understands family rights as important because of the social cohesion they provide, Justice Scalia understood family rights as natural rights that were pre-constitutional or extra-constitutional—extremely important, but important for legislatures, not courts, to recognize and sustain. The Justice's aversion to constitutional family rights flies below the radar in some of his opinions. Many constitutional family cases were decided long before Justice Scalia joined the Court, and he sometimes felt bound to existing case law under principles of *stare decisis*. In these cases, however, he often simply joined the opinion of another Justice, or wrote narrowly

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117 *See Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) ("[T]his Court is not a legislature. . . . [F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening."); *id.* at 2627 (Scalia, J., dissenting) ("Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. . . . This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves"); *id.* at 2631 (Thomas, J., dissenting) ("By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority.")

118 *See id.* at 2612 (Roberts, C.J., dissenting) ("The majority's decision is an act of will, not legal judgment."); *id.* at 2630 (Scalia, J., dissenting) ("The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.").

to make a particular point, making it clear that, had he to do it over again, the Court never would have started down the substantive due process path.

Consider, for example, his treatment of the two chestnuts of constitutional parental rights from the 1920s—*Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[119] In each of these cases, the Court held that parents had an interest under the Due Process Clause in the care, custody, and control of their children—in the case of *Meyer*, to decide that their children would learn German,[120] and in *Pierce*, to decide that their children would attend private religious school.[121] These cases, despite their *Lochner*-era taint, are well-established and have been relied on in dozens of Supreme Court and thousands of lower court opinions. But in *Troxel v. Granville*, in which the Court struck down a Washington State statute that allowed grandparents liberal rights to petition family courts for visitation with their grandchildren, Justice Scalia dissented.[122] In so doing, he came as close as he could to repudiating *Meyer* and *Pierce* without advocating for their overruling. *Troxel* failed to produce a majority, with six of the nine Justices publishing a plurality, concurrence, or dissent. This "sheer diversity" of opinion, Justice Scalia opined,

> persuades me that the theory of unenumerated parental rights underlying [the previous] cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.[123]

In other words, parents may retain the right to care, custody, and control of their children in the very narrow, fact-specific, educational contexts set forth in *Meyer* and *Pierce*, but these rights should not be extended by the Court to other contexts, such as visitation or child custody.[124]

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119 Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

120 *See* 262 U.S. at 400.

121 *See* 268 U.S. at 532–35.

122 530 U.S. 57, 91 (2000) (Scalia, J. dissenting).

123 *Id.* at 92 (Scalia, J., dissenting).

124 Although he did not say so in *Troxel*, Justice Scalia's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990) suggests an additional method of distinguishing previous constitutional family cases from contemporary ones. In *Smith*, Justice Scalia distinguished the case at hand—which asked whether Na-

Justice Scalia's skepticism of family constitutional rights was not confined to parental rights. In 1987, the year after he joined the Court, he quietly joined Justice O'Connor's majority opinion in *Turner v. Safley*, striking down prison regulations that denied prisoners the right to marry.[125] But in his numerous dissents in the more recent cases, he avoided any statement affirming marriage as a fundamental right. In *Lawrence v. Texas*, for example, he attempted to refute the analogy between same-sex marriage bans and antimiscegenation law by recasting *Loving v. Virginia* as a case that applied strict scrutiny solely because race was at issue.[126] *Loving* did use this logic, but it also, independently, struck down the statute in question using a substantive due process rationale based on the right to marry—a fact ignored by Justice Scalia in *Lawrence*. And in *United States v. Windsor*, Justice Scalia declined entirely in his dissent to discuss the line of right-to-marry cases, noting only in passing that the idea that *same-sex* marriage is "deeply rooted in history and tradition . . . would of course be quite absurd."[127] The Justice's hostility to the constitutionalization of LGBTQ rights is clear from passages such as this one. But more surprising and interesting is his wholesale hostility to the recognition of family constitutional rights—for anyone, including heterosexual married couples and married parents.

It is not that Justice Scalia did not approve of such families. Indeed, references in many cases not only disparaged gay and lesbian families but also treated the marital family as superior to the genetic.[128] Rather, he did not believe that the

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tive Americans had a right to ingest peyote as part of a religious ritual—from *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972), a case that had exempted Amish parents from sending their children to public school past the eighth grade. In *Smith*, Scalia argued that because the parents in *Yoder* were asserting a "hybrid" right—a combination of free exercise of religion and a liberty interest in their children—the claim there was stronger than the pure free exercise claim in *Smith*. *Smith*, 494 U.S. at 881–82. Thus, Justice Scalia used a rights doctrine he disfavored in some contexts (substantive due process) as a sword to help to circumscribe another rights doctrine (free exercise).

125 482 U.S. 78, 81 (1987).

126 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) ("In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was 'designed to maintain White Supremacy.'" (quoting Loving v. Virginia, 388 U.S. 1, 6 (1967))).

127 133 S. Ct. 2675, 2707 (2013) (internal quotation marks omitted).

128 Consider, for example, Scalia's differential treatment in parentage dispute of the child's genetic mother's husband versus the child's genetic father in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). The law, Scalia argued, must choose one father or the other, and "[o]ne of them will pay a price for asserting that 'freedom'—Michael by being unable to act as father of the child he has adulterously

Constitution was the appropriate place to seek legal protection of the family. His extensive *Troxel* dissent offers the most revealing glimpse into his ideas about the family and the Constitution, and, although it deals with parental rights, likely represented his views on marriage rights as well. "In my view," he explained, "a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men . . . are endowed by their Creator.'"[129] These rights, then, are very important, and would have been understood as such by the men who established our form of government. The Declaration of Independence was not the only place where Justice Scalia found evidence of the importance of family rights: "in my view that right is also among the othe[r] [rights] retained by the people which the Ninth Amendment says the Constitution's enumeration of rights shall not be construed to deny or disparage."[130] For Justice Scalia, however, evidence that the founders considered these rights important is emphatically *not* evidence that they provided a constitutional mechanism for their protection:

> The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.[131]

Dean David Meyer has described Scalia's treatment of the Ninth Amendment in this passage as "a sort of constitutional black hole, a gateway into a vacuum of nonlegal, unenforceable rights."[132] The Justice would likely have countered this accu-

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begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established." *Id.* at 130.

129 Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (alteration in original).

130 *Id.* (alteration in original) (internal quotation marks omitted).

131 *Id.* at 91–92.

132 David D. Meyer, Lochner *Redeemed: Family Privacy after* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1146 (2001). This position, Meyer notes, puts Scalia

sation in two ways: first, by arguing that these rights are so deeply rooted that the people would be unlikely to vote to abridge them (by, for example, voting to abolish marriage altogether) and second, by pointing to equal protection as a potential alternative mechanism for assuring equity. Consider again Justice Scalia's recasting of *Loving v. Virginia* as a case solely about race. Since the Equal Protection Clause prohibits the use of race to discriminate against individuals, the logic would go, discrimination in marriage based on race is impermissible, and there is no need to resort to an analysis of whether the right to marry is "fundamental" or not.[133]

Occasionally, Justice Scalia's constitutional family law opinions were surprising. In 2013, for example, he dissented in *Adoptive Couple v. Baby Girl*, a case in which the majority opinion, written by Justice Alito, construed the Indian Child Welfare Act to allow termination of parental rights where the genetic parent never had custody of the child.[134] Justice Scalia disagreed with Justice Alito's parsing of the statute, but also chose in his dissent to comment on the case:

> The Court's opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is 'in the best interest of the child.' It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do. This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.[135]

This statement, of course, is not a constitutional one. Here, Justice Scalia referred to the common law, and his opinions references "rights" under the common law, not the Fourteenth Amendment. Without understanding this context, the strong defense of the parent-child relationship comes as a surprise given his position in constitutional family cases.

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in "diametric opposition" to that taken by Justice Thomas, who would have given the mother in *Troxel* the maximum protection offered by strict scrutiny to protect her fundamental right to care, custody, and control of her child. Meyer, *supra* note 13, at 552 n.135 (2008).

133 *See also* Planned Parenthood v. Casey, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in the judgment in part, dissenting in part) (arguing that there was no need to inquire into whether a ban on interracial marriages was supported by "tradition" because it violated the text of the Equal Protection Clause).

134 133 S. Ct. 2552, 2557 (2013).

135 *Id.* at 2572 (Scalia, J., dissenting).

There is an "on/off" quality to Justice Scalia's characterization of fundamental rights not always shared by the other Justices. For Scalia, the bogeyman of constitutional law was the idea that once something has been declared a "fundamental right" it takes on a tremendously powerful status, and can trump even very important state interests.[136] It is this fear that appears to animate his hostility toward procedural due process claims. In *Michael H. v. Gerald D.*, for example, he recast a procedural claim as a substantive one, and once it was substantive, it was easy to conclude that the petitioner had no such right.[137] Procedural claims are more incremental, and more contestable in specific cases. If a court recognizes a claim, for example, that someone has a "constitutional liberty interest" in marriage or parenting, it does not necessarily follow that the interest is absolute.[138] Many of the other *Troxel* concurrences and dissents understood this well, arguing that a parent's liberty interest needed to be balanced with other interests, such as the interests of the child.[139] Understanding Scalia's extreme hostility requires understanding that for him, the stakes seemed very high indeed.

Justice Scalia's attitude toward constitutional marriage rights in *Obergefell* is not particularly surprising given the positions he took in other constitutional family law cases.[140] His consistent position in all of these cases has been that there simply is no constitutional right to the protection of the family—despite the family's important traditional role in American society.[141] Thus, his position in *Obergefell* is not simply that LGBTQ people have no right to marry—although he would agree with that statement—but rather that there *is no constitutional right to marry*—for anyone, gay or straight.[142]

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136 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2621–22 (2015) (Scalia, J., dissenting) (questioning the reasoning of the majority opinion by asking why the same logic would not authorize marriage of more than two people).

137 491 U.S. 110, 116–27 (1989).

138 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 81 (1987) (striking down prison regulations in a particular context for a particular class of plaintiffs).

139 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 76–77 (2000) (Souter, J., dissenting) (discussing a parent's right to direct the upbringing of children); *id.* at 80 (Thomas, J., concurring) (same); *id.* at 100 (Kennedy, J., dissenting) (same).

140 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); *Michael H.*, 491 U.S. at 113; *Troxel*, 530 U.S. at 91 (Scalia J., dissenting).

141 *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting); *Michael H.*, 491 U.S. at 113; *Troxel*, 530 U.S. at 91 (Scalia J., dissenting).

142 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2629–30 (2015) (Scalia, J., dissenting); *see also Troxel*, 530 U.S. at 92–93 (Scalia, J., dissenting) (arguing that the Constitution does not guarantee an enumerated parental right as prescribed by the majority of the Court).

Where Justice Kennedy's opinion reaches to find unifying themes justifying its holding, Justice Scalia's stretches to repudiate established Supreme Court precedents to limit fundamental rights to those he believed were anticipated by the framers of the Constitution. The opinion reaches new levels of sarcasm even for the Justice most known for taking a derisive tone in his opinions.[143] For example, in response to the majority's claim that "[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality," the Justice remarked, "Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say."[144]

Many others have commented on the extraordinary "vitriol" employed by Justice Scalia in *Obergefell*.[145] What has sometimes been lost in these analyses is that the target of his vitriol is not LGBTQ people—although, as the people whose rights are at issue in the case, it would be difficult not to take the rancor personally—but the recognition of family constitutional rights *per se*, and the particular, seemingly unmoored, legal construction of these rights by Justice Kennedy. Justice Scalia probably really would have wanted to "hide his head in a bag"[146] for joining such an opinion, because his view of the Constitution is that it addresses only a very narrow class of

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143 *See* Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 117–18 (stating that "[i]n the entire history of the Supreme Court, there is nothing that rivals it for petulance, name calling, and disrespect").

144 *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting) (alteration in original).

145 *See* Seidman, *supra* note 143, at 117; *see, e.g.*, Brian Christopher Jones, *Disparaging the Supreme Court, Part II: Questioning Institutional Legitimacy*, 2016 WIS. L. REV. 239, 252 (arguing that "the harshness of the language used in the *Obergefell* dissents taints the Court's authentic constitutional discourse, making it appear abundantly and overtly political"); Paula Stamps Duston, Letter to the Editor, *Antonin Scalia's Sarcasm Unbecoming of a Supreme Court Justice*, BOS. GLOBE (July 4, 2015), https://www.bostonglobe.com/opinion/letters/2015/07/03/scalia-sarcasm-unbecoming-supreme-court-justice/LdYUSbQC6m5Pn6CNWZlbcL/story.html [https://perma.cc/9SQN-APHU] (arguing that the Justice should step down); *see also* Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2d 215 (2015) (arguing, prior to *Obergefell*, that Justice Scalia was, as an empirical matter, the most sarcastic justice on the Court).

146 *Obergefell*, 135 S. Ct. at 2630 n.22 (Scalia, J., dissenting).

questions and that the answers to these questions are unchanging.

2. *Justice Thomas*

Similarly, Justice Thomas adopts an originalist methodology in his *Obergefell* dissent, one that does not disparage marriage but instead the idea that family rights are constitutional rights. Justice Thomas's dissent focuses more specifically on the notion of "liberty" as it is used in the Fourteenth Amendment. For Justice Thomas, the "liberty" referred to in the Due Process Clause is the same "liberty" protected by Magna Carta, a "liberty from physical restraint."[147] Even if, Justice Thomas then argues, the framers might have recognized a "natural right" to marriage that fell within their concept of "liberty," this right "would not have included a right to governmental recognition and benefits."[148] All this right would have entailed would be the private right to engage in activity unencumbered by the state: "making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse . . . . At the founding, such conduct was understood to predate government, not to flow from it."[149]

Justice Thomas's libertarian view of marriage understands it as a negative right, not a positive one.[150] For Justice Thomas, Jim Obergefell and the other plaintiffs had not been denied their right to liberty because "they have been able to cohabitate and raise their children in peace . . . [and t]hey have been able to travel freely around the country, making their homes where they please."[151] He notes:

> [The petitioners] do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise

147 *Id.* at 2633 (Thomas, J., dissenting).

148 *Id.* at 2636.

149 *Id.*

150 For a contrasting view, see Strauss, *supra* note 9, at 1694 (arguing that marriage is an example of a "power right"—a right to create legal duties).

151 135 S. Ct. at 2635. Justice Thomas's opinion here seems to conflict with his dissent in *Lawrence v. Texas*, in which he observed that "punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources" but declined to find the law an infringement on the plaintiffs' liberty. 539 U.S. 558, 605 (2003) (Thomas, J., dissenting).

> children. . . . Instead, the States have refused to grant them governmental entitlements.[152]

Professor Louis Michael Seidman, writing in the wake of *Obergefell*, noted that this position is typical for Justice Thomas and,

> If adopted . . . would lead to wholesale overruling of scores of cases extending over almost a century, on subjects ranging from incorporation of Bill of Rights protections against the states, to procedural due process cases, to decisions protecting against government prohibitions on contraception, abortion, private schooling, and family living arrangements.[153]

Despite its radical departure from the Court's constitutional doctrine, Thomas's dissent is notable for its understanding of marriage as a pre-constitutional, natural right—very similar to the "right to parent" articulated by Justice Scalia in *Troxel*. "Petitioners misunderstand the institution of marriage when they say that it would 'mean little' absent governmental recognition";[154] for Thomas, marriage is *outside* government recognition entirely.

3. *Chief Justice Roberts*

Although Chief Justice Roberts wrote the lengthiest of the *Obergefell* dissents, his is the least interesting for our purposes. The Chief Justice carries the water for the dissenting team by setting forth in great detail the constitutional view that substantive due process is dangerous, with the usual analysis of *Dred Scott* and *Lochner*.[155] He also spends several pages lamenting the Court's intrusion into what he views as a fundamentally political decision.[156] There is one moment, however, in the opinion that seems anomalous. In his critique of the majority's equal protection analysis, he notes that the claims brought by petitioners in the case "target the laws defining marriage generally rather than those allocating benefits specifically."[157] He then goes on to say that "the equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits," or, perhaps, to a particular class of noncitizens denied admission.[158] This sentence suggests that the Chief Jus-

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152 *Obergefell*, 135 S. Ct. at 2635.
153 Seidman, *supra* note 143, at 119 (footnotes omitted).
154 *Obergefell*, 135 S. Ct. at 2636.
155 *Id.* at 2615–17 (Roberts, C.J., dissenting).
156 *Id.* at 2624–26.
157 *Id.* at 2623.
158 *Id.*

tice might be open to claims of discrimination made by LGBT plaintiffs over specific benefits.[159] Professor Melissa Murray has also argued that the Chief Justice's dissent suggests that marital status discrimination could violate the Equal Protection Clause.[160]

4. *Justice Alito*

Professor Neil Siegel has argued that Justice Alito's approach to constitutional cases is that of a "traditional conservative": unlike Justices Scalia and Thomas, who are both originalists, Justice Alito's methodology varies from case to case, but his conclusions support traditionally conservative ends.[161] In Professor Siegel's words, "in light of Justice Scalia's passing, Justice Alito has become the primary judicial voice of the many millions of Americans who appear to be losing the culture wars, including in battles over gay rights, women's access to reproductive healthcare, affirmative action, and religious exemptions."[162] Justice Alito's privileging of conservative values stands in sharp contrast to Justice Scalia, a conservative who nonetheless sometimes wrote or joined opinions with "liberal" outcomes due to his originalist methodology.[163]

Indeed, Justice Alito's *Obergefell* dissent follows this trajectory. Justice Alito reiterates the dominant rationale used by states in defending same-sex marriage bans throughout much of the early 2000s—that the purpose of marriage is to support responsible procreation by heterosexual couples.[164] For the majority, Justice Alito notes, the purpose of marriage is that it "provides emotional fulfillment and the promise of support in

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159 *See* Ronny Hamed-Troyansky, *Erasing "Gay" From the Blackboard: The Unconstitutionality of "No Promo Homo" Education Laws*, 20 U.C. DAVIS J. JUV. L. & POL'Y 85, 113 (2016) (stating that Roberts's dissent "may reinforce the legal argument against [certain] education laws").

160 Murray, *supra* note 10, at 1251.

161 Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. FORUM 164, 166 (2016).

162 *Id.* at 165.

163 For an extended comparison, see Brianne J. Gorod, *Sam Alito: The Court's Most Consistent Conservative*, 126 YALE L.J. FORUM 362, 371–72 (2017), quoting Justice Scalia as saying: "I'm a law-and-order type, . . . but I ought to be the pin-up for the criminal defense bar, because my originalist philosophy leads me to defend rigorously the right to jury trial, to defend the original meaning of the confrontation clause—all of which benefits criminal defendants, who I would rather see put away. But once you show me the original thinking, I am handcuffed. I cannot do the nasty conservative things I would like to do to the country.").

164 *See* Abrams & Brooks, *supra* note 102 (discussing history of "accidental procreation" argument in same-sex marriage litigation).

times of need."[165] He then observes that the governmental interest in Kennedy's view of marriage is that "by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens."[166] He then contrasts his own view that marriage is not about "the happiness of persons who choose to marry" but instead was "[f]or millennia . . . inextricably linked to the one thing that only an opposite-sex couple can do: procreate."[167] There are, he argues, "reasonable secular grounds for restricting marriage to opposite-sex couples," because only they need legal encouragement to engage in "potentially procreative conduct . . . within a lasting unit that has long been thought to provide the best atmosphere for raising children."[168]

The dissent's last section also melds together two familiar conservative arguments—first, the argument that the *Obergefell* majority is usurping authority from the political branches, and second, that the opinion itself will cause harm to Americans with traditional values. The opinion, Justice Alito warns,

> [W]ill be used to vilify Americans who are unwilling to assent to the new orthodoxy. . . . I assume that those who cling to the old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat these views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.[169]

Perhaps the most important aspect of Justice Alito's opinion for future cases is that he does not repudiate the line of cases that articulate the right to marry (*Loving*, *Zablocki*, *Turner*) and right of families to live together (*Moore*). In fact, he is the only one of the dissenters to not join Chief Justice Robert's dissent, with its long, cautionary history of *Lochner* and its progeny.[170] It appears that Justice Alito *does* believe in a constitutional right to marry, and perhaps not simply based on *stare decisis* grounds. He simply does not believe that the right protects what the majority thinks it does—the right to personal fulfillment and the exercise of citizenship. Instead, for Justice Alito, the right to marry is the right to engage in an institution

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165 *Obergefell*, 135 S. Ct. at 2641 (Alito, J., dissenting).

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.* at 2642–43.

170 *Id.* at 2611, 2640.

intended to cabin procreative sex and channel it into a stable, long-term relationship.[171] It is, fundamentally, a right for heterosexuals, but a right, nevertheless.

5. *Distinguishing the Dissenters*

With the four dissenting Justices in *Obergefell*, then, we see four different articulations of a natural, pre-constitutional right to marry. Justice Scalia and Justice Thomas both view this right as both pre- and extra- constitutional; not only did the right predate the Constitution, but it also was never incorporated into the Constitution. The main difference between the two seems to lie in whether there is a negative right to marry. Justice Scalia would leave this issue completely to the democratic process; Justice Thomas intimates that some deprivations of liberty might create cognizable constitutional harm. Each of them, given the opportunity, would happily overturn many constitutional precedents (Justice Thomas, perhaps, *all* of them). Chief Justice Roberts, in contrast, would find such a move destabilizing, but is very cautious about further ballooning substantive due process rights beyond what he views as already dangerously extended. Justice Alito stands alone as a dissenter who really does dissent against same-sex marriage itself, rather than the constitutional method used by the majority. His notion of marriage as a "fundamental" right does not mean that it exists outside the Constitution.[172] Rather, the "fundamental" for Justice Alito can be enshrined *in* the Constitution,[173] because it reflects the truth of human experience. This distinction between Justice Alito and other *Obergefell* dissenters becomes clearer, as we shall see, when read alongside *Din*.

III
DIN'S THEORIES OF CONSTITUTIONAL FAMILY LAW

Read alone, *Obergefell* appears to create a sharp contrast between five Justices who believe that the right of same-sex couples to marry can be comfortably lodged in substantive due process, equal protection, or both, and four sharply dissenting Justices who object to the extension of the law. But as we have

171 For the classic exposition of family law's "channeling function," see Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992) (arguing that "in the channeling function the law creates or (more often) supports social institutions which are thought to serve desirable ends").

172 *Obergefell*, 135 S. Ct. at 2641 (Alito, J., dissenting)

173 *Id.*

seen, the dissenting opinions are more nuanced than that caricature, and differ from each other in important ways. Too, most scholars are skeptical that the four Justices who joined Justice Kennedy's opinion were entirely comfortable with its analysis.[174] Nevertheless, *Obergefell* is fairly easy to read in a way that creates sharp divisions between two sets of politically and methodologically divided Justices.

Read alongside *Din*, however, the *Obergefell* opinions take on a different cast. The extreme originalist views of Justices Scalia and Thomas are more sharply foregrounded. Justice Scalia's plurality opinion in *Din*, joined by Chief Justice Roberts and Justice Alito, uses history selectively to paint a picture of the past that, while technically accurate, misses the larger picture.[175] This plurality, read with *Obergefell*, highlights the ways in which originalist methodology can be used to undercut even rights that were firmly established at the founding. Justice Kennedy's *Din* concurrence appears at face value to contradict much of his soaring rhetoric in *Obergefell*, but reading *Obergefell* with close attention to Justice Kennedy's emphasis on citizenship helps to reconcile the cases. Justice Alito's decision to join Justice Kennedy's *Din* concurrence makes sense, given his non-originalist dissent in *Obergefell*, and provides a clue as to what he might do in future cases. Finally, Justice Breyer's *Din* dissent, joined by Justices Ginsburg, Kagan, and Sotomayor, offers a justification for constitutional protection of marriage that stands in stark contrast to *Obergefell*'s paean to the institution.[176] The dissent may tell us more about what at least one of the Justices who remained silent in *Obergefell* thinks about marriage rights and LGBTQ rights more broadly than the *Obergefell* majority itself.

A. Marriage as a Natural Right in *Din*

Kerry v. Din begins with a plurality opinion written by Justice Scalia and joined by Justice Thomas and Chief Justice Roberts.[177] So far, we have established that Justice Scalia's stance toward constitutional family rights was that under a proper reading of the Constitution, they did not exist, but that the Court had (unfortunately) recognized them in the past, and

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174 *See, e.g.*, Robson, *supra* note 75, *passim* (arguing that if Justice Ginsburg had instead wrote the *Obergefell* opinion the holding would have been grounded in the Equal Protection Clause, rather than the Due Process Clause, and would have been less sentimental and more doctrinally rigorous).

175 Kerry v. Din, 135 S. Ct. 2128, 2131 (2015).

176 *Id.* at 2142 (Breyer, J., dissenting).

177 *Id.* at 2131 (opinion of Scalia, J.).

the Court should go no further.[178] These arguments took full bloom in the late Justice's plurality opinion in *Din*.

Recall that *Din* put the question before the Court of whether Fauzia Din had a procedural due process interest in her marriage to Kanishka Berashk such that she was entitled to an explanation for his visa denial. Justice Scalia understood this claim more expansively than she articulated it—in line with his usual impulse to understand due process claims as claims about "fundamental rights" that can trump important state interests rather than as narrower questions of procedural justice. For Scalia, Din's claim was that the denial of her husband's visa was a "depriv[ation] . . . of her constitutional right to live in the United States with her spouse."[179]

Justice Scalia's opinion then followed the logic one would expect based on his prior opinions and those he joined. Just as Justice Thomas would ground "liberty" in Magna Carta ten days later in his *Obergefell* dissent,[180] Justice Scalia here argued that neither Din nor Berashk had experienced a "deprivation of liberty" as understood by Magna Carta or the treatise writers read by the founders, which would have required physical restraint ("keeping [her] against h[er] will in a private house, putting h[er] in the stocks, arresting or forcibly detaining h[er] in the street").[181] Of course, the Court *has* recognized liberty interests in the family context that go far beyond physical restraint, and so the opinion focused on demonstrating why the particular claims made by Din were beyond the scope of the rights already articulated by the Court in previous constitutional family cases.[182] In making this case, the Justice again took swipes at *Meyer* and *Pierce* without expressly calling for their overrule ("[d]espite this historical evidence, this Court has seen fit on several occasions to expand the meaning of 'liberty' under the Due Process Clause"; "I think it worth explaining why, *even if* one accepts the textually unsupportable doctrine of implied fundamental rights, Din's arguments would fail").[183]

In order for Din's claim to be recognized as a constitutional right, for Justice Scalia, she would need to show that the right she had articulated was "deeply rooted in [the] Nation's history

178 *See id.* at 2131.

179 *Id.*

180 Obergefell v. Hodges, 135 S. Ct. 2584, 2632–33 (2015) (Thomas, J., dissenting).

181 *Din*, 135 S. Ct. at 2133 (first citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125 (1769); and then quoting *id.* at 132).

182 *See id.* at 2133–34.

183 *Id.* at 2133.

and tradition."[184] To demonstrate the lack of such a history, Justice Scalia made the astonishing claim that "a long practice of regulating spousal immigration" belied any such history.[185] Although he was correct that spousal immigration had been "regulated," the historical record clearly shows a strong preference for spousal immigration over other types, with judges often interpreting statutes to allow for spousal immigration even when those very statutes seemed designed to curtail it.[186]

In his characterization of the history of family reunification claims, Justice Scalia's opinion is remarkable for its careful cherry-picking of the historical record. I am probably in a better position than many to notice this, as the Justice relied in part on my publications to create his alternative history.[187] Carefully choosing one of the most xenophobic moments in American history as his example, Justice Scalia observed that in the 1920s, when Congress first imposed national origins quotas, there were often not enough spots to accommodate all of the immigrants who wished to join their spouses in the United States.[188] In focusing on this narrow, three-year window, he quickly brushed aside decades during which immigration was not regulated at all ("[a]lthough immigration was effectively unregulated prior to 1875") and ignored the copious historical evidence that even after Congress attempted to limit spousal immigration, courts often ignored these prescriptions, finding ways to construe statutes to protect the marital relationship,[189] as well as the evidence that exceptions to the gen-

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184 *Id.*

185 *Id.* at 2135.

186 *Id.* at 2133.

187 *Id.* at 2136 (citing Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 13 (2013) [hereinafter Abrams, *What Makes the Family Special?*]).

188 *Id.*

189 *Id.* at 2135; *see* Abrams, *What Makes the Family Special?*, *supra* note 187, at 10 (noting that "[m]ost immigration was unrestricted, but even when Congress *did* restrict immigration—such as through the various Chinese exclusion acts—these acts were notably enforced in ways that still allowed a woman to enter if she was married to a man who was eligible for admission" (footnote omitted)); *see also* MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965, at 93 (2005) (demonstrating how married women were admitted but single women labeled "likely to become a public charge" or "LPC"); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1403 (2009) (arguing that laws such as the Homestead Act were intended to facilitate the immigration of wives); Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 159–60 (2012) (showing how courts liberally construed immigration quota laws to facilitate immigration of wives) [hereinafter Abrams, *Peaceful Penetration*]; *id.* at 163–64 (showing how courts construed proxy marriages as valid for immigration purposes even after Congress banned them); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 687

erally expansive rule of spousal reunification were almost always advancing a white supremacist agenda.[190]

Justice Scalia next attempted to explain away the strong history of deference to the marital relationship by rooting this deference in coverture, the legal doctrine under which women lost their separate identity upon marriage. Citing to the Expatriation Act of 1907, which provided that "any American woman who marries a foreigner shall take the nationality of her husband,"[191] the Justice argued that "a woman in Din's position not only lacked a liberty interest that might be affected by the Government's disposition of her husband's visa application, she lost her *own* rights as a citizen upon marriage."[192] In other words, because marriage was an institution that made gender-based distinctions and protected the relationship rights of men but not women, there is no general "deeply rooted" practice of protection for the marital relationship. The Justice

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(2005) (showing how courts allowed entrance of Chinese wives of merchants in contrast to text of law); Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924*, 27 LAW & SOC. INQUIRY 271, 273–74 (2002) (showing that courts construed statutes to exempt wives of American citizens of Chinese ancestry from certificate requirement because husbands had the right to the "care and comfort" of their wives).

190 *See, e.g.*, Abrams, *What Makes the Family Special?*, *supra* note 187, at 13 (stating that the "family preferences developed as a side note in a raging debate over the quotas themselves—which census should determine the quotas and, accordingly, what the *racial* makeup of the country would be. The institutional design questions that lawmakers were grappling with were primarily racial and cultural questions; the family preference aspects of these questions appear to have been decided reflexively, based on common understandings of family function and gender roles within the family, without much thought or discussion"); *see also* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP *passim* (1998) (tracing history of derivative citizenship and demonstrating how changes to derivative citizenship rules persisted in racially restricting immigration); Abrams, *Peaceful Penetration*, *supra* note 189, at 154 (describing purposes of National Origins Act of 1924); Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage*, 53 UCLA L. REV. 405, 482 (2005) (arguing that the history of dependent citizenship and marital expatriation shows how notions of incapacity were foundational to "racial and gendered disenfranchisement from formal citizenship"); *cf.* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 703–04 (2014) (showing how preferences for marital and genetic relationships have racialized consequences); Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2137 (2014) (arguing that an important yet overlooked reason for the development of gender- and marriage-based derivative citizenship law was that officials' felt the need to enforce racially nativist policies).

191 *Din*, 135 S. Ct. at 2135 (citing Expatriation Act of 1907, Pub. L. No. 59-193, Ch. 2534, 34 Stat. 1228 (1907)).

192 *Id.*

acknowledged that this type of discrimination is no longer acceptable ("[m]odern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order"), but concluded that because there was a *recent* practice of preferring the relationship rights of men over those of women that there could be no general, deeply rooted practice.[193]

Imagine for a moment an alternative, but still originalist, opinion. Justice Scalia could have found, using the same historical record he mined to support his argument, that family reunification has long been considered a fundamental right, "deeply rooted in history and tradition." There was far more evidence in favor of this proposition than against it. He then could have found that, in the 1970s, the Court began to recognize gender discrimination as covered by the Fourteenth Amendment, and that principles of *stare decisis* require the Court to continue to recognize it as such.[194] He then could have concluded that the fundamental right to family reunification had to be applied in a gender-neutral way.

Like his opinion in *Obergefell*, however, the *Din* plurality is consistent with Justice Scalia's understanding of marriage and family rights as pre-constitutional, extra-constitutional, natural rights. Equal protection is of no help under his theory, because equality is a one-way ratchet, used to justify the curtailing of what was once understood as a right of husbands and fathers rather than the extension of that right to all. As many other scholars have previously noted, there are many unfortunate practices in our nation's history that are "deeply rooted."[195]

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193 *Id.* at 2136.

194 In other cases, the Justice was skeptical that gender discrimination should receive intermediate scrutiny at all, and appears to have applied the rule solely out of deference to precedent, but he did nevertheless advocate applying the rule. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (remarking that "[w]e have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice"); *id.* at 570 ("To reject the Court's disposition today, however, it is not necessary to accept my view that the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades.").

195 *See* David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1713 (1991) (arguing that gender discrimination, school prayer, and malapportioned legislatures are "deeply rooted" traditions); *see also* Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Thought*, 1995 WIS. L. REV. 303, 328 ("Scalia's view of tradition is . . . a jurisprudence of domi-

How do we understand Justice Thomas's and Chief Justice Roberts's decision to join Justice Scalia's plurality opinion? The opinion is certainly consistent with Justice Thomas's views of "liberty," and as discussed above, even draws upon the same argument in Thomas's *Obergefell* dissent to root the concept of "liberty" in Magna Carta. In addition, the opinion is consistent with Chief Justice Roberts's *Obergefell* dissent in its reluctance to enunciate "new" fundamental rights under substantive due process. The decision to join the plurality in *Din* highlights just how leery of substantive due process the Chief Justice is. His admonitions in *Obergefell* that, regardless of one's personal stance on LGBTQ rights, the expansion of doctrine in the Kennedy majority is disturbing, seem even more sincere read in light of *Din*. He would consistently refuse to expand the rights the Court has recognized under substantive due process to a variety of cases, involving many different categories of people, not just gays and lesbians.

B. Marriage as an Exercise of Citizenship in *Din*

Let us turn now to Justice Kennedy's concurrence in *Din*, joined only by Justice Alito. The contrast between Justice Kennedy's *Obergefell* majority opinion and his concurrence in *Din* is arguably the most incongruous in all of these opinions. The Justice Kennedy of *Obergefell* is broadly protective of the couple's desire to marry, to choose whom to marry, to be with that person of choice, to protect children through the marital bond, and to be a responsible citizen through participation in society's most venerated institution. In contrast, Justice Kennedy's concurrence in *Din* has remarkably little to say about the importance of marriage for the individual or for society.

Recall that the central claim in *Din* was whether Fauzia Din was entitled to a better reason than "anti-terrorism" for the government's refusal to grant her husband a spousal visa to live in the United States.[196] One could imagine the Justice Kennedy of *Obergefell* discussing the right to spousal reunification in the same terms as he did there, something like this: Din had the right to choose whom she married; living with her husband would offer her "companionship and understanding and assurance that while both still live there will be someone to care for the other";[197] having their father in their lives would

nance and submission, in which decisionmakers of the present are required to respect a prior authority and [are] denied active collaboration in reshaping it.").

196 *See Din*, 135 S. Ct. at 2131–32.

197 Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

protect any children they had from suffering "the stigma of knowing their families are somehow lesser"; and living as a marital unit would envelop Din and Berashk in the protection of the "social order."[198] His *Obergefell* theory of marriage implies that married couples should be together ("[m]arriage responds to the universal fear that a lonely person might call out only to find no one there"[199]) and that marriage is an important part of cultural assimilation and civic participation—an important step, in the case of a naturalized citizen like Din and potential immigrant like Berashk, in the couple's integration into the American polity.

But Justice Kennedy's *Din* concurrence does no such thing. Instead, the opinion barely mentions marriage at all. The concurrence finds it unnecessary to decide "whether a citizen has a protected liberty interest in the visa application of her alien spouse" because, "even assuming she has such an interest, the Government satisfied due process when it notified Din's husband that his visa was denied under the immigration statute's terrorism bar."[200] Kennedy's opinion then compares Din's request for process to a similar request made by American professors who wished to meet in person with a communist sympathizer in the 1972 case of *Kleindienst v. Mandel*.[201]

Mandel concerned Ernest Mandel, a Belgian citizen, professional journalist and editor-in-chief of *La Gauche*, the literally-named Belgian Left Socialist weekly.[202] Mandel published a two-volume Marxist Economic Theory book in 1969.[203] Although he claimed he was not a member of the Communist Party, Mandel freely admitted that he was an advocate of the economic, governmental, and international doctrines of world communism. Mandel intended to visit the United States to speak at a conference on Technology and the Third World at Stanford University.[204] When news of the conference became public, he also received invitations to speak at Princeton, Amherst, Columbia, and Vassar.[205] U.S. immigration authorities denied his visa request on the grounds that he previously violated the terms of his visa.[206]

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198 *Id.* at 2590.
199 *Id.* at 2600.
200 *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring).
201 *See* Kleindienst v. Mandel, 408 U.S. 753, 759–62 (1972).
202 *Id.* at 756.
203 *Id.*
204 *Id.* at 757.
205 *Id.*
206 *Id.* at 755.

The claim at issue in the portion of the case that ultimately reached the Supreme Court was brought not by Mandel but by the U.S. citizen professors who wished to hear him speak. The professors claimed that their First Amendment right to association was abridged by their inability to meet Mandel in person (ultimately, he gave his lecture over the phone).[207] The Court agreed that, all things being equal, it is easier to communicate and "associate" with someone in person. But scholarly exchange can occur through reading translations of papers and books or through a phone conversation.[208] In *Din*, Justice Kennedy expressly analogizes the two cases: "Like the professors who sought an audience with Dr. Mandel, Din claims her constitutional rights were burdened by the denial of a visa to a noncitizen, namely her husband. And as in Mandel, the Government provided a reason for the visa denial: It concluded Din's husband was inadmissible under [the statute's] terrorism bar."[209] But although scholarly exchange can happen over the phone, it is difficult to imagine that marriage—at least, Justice Kennedy's *Obergefell* image of marriage—can work well that way. What happened to the idea that marriage "responds to the universal fear that a lonely person might call out only to find no one there"?[210]

Contrasted with the soaring prose of *Obergefell*, the *Din* concurrence is surprisingly miserly. It seems inconceivable that Justice Kennedy could really believe that the desire to be with one's spouse is equivalent to the desire to engage in face-to-face academic debate. His *Obergefell* opinion describes marriage as so unique, special, and exalted in comparison with other very significant relationships that the move in *Din* to compare marriage to a scholarly exchange is jarring. And yet, Justice Kennedy was likely drafting his opinions in *Obergefell* and *Din* nearly simultaneously.

The clearest way to reconcile the two Kennedy opinions is to understand them both as conceiving of the individual as a responsible citizen of the state. The virtue of marriage, according to the fourth principle outlined in the *Obergefell* opinion, is that marriage is the "building block of our national community";[211] by subjecting one's most personal relationship to the control of the state, the individual furthers the state's projects

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207 *Id.* at 760.

208 *See id.* at 765 (noting the Government's argument that books, speeches, and technological advancements may supplant physical presence).

209 Kerry v. Din, 135 S. Ct. 2128, 2139–40 (2015).

210 Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

211 *Id.* at 2601.

and contributes to the stability and security of all. Read this way, the fourth principle of *Obergefell* is the most important, and the other three are simply supported by it. *Din* in turn is about the security of the national community but in a very different way: national security could be threatened by the penetration of the citizenry through the marriage of a citizen to a terrorist.[212] Marriage, then, is an important exercise of self-expression and personal choice, but always within the context of its greater purpose—to provide stability and structure through the social and legal control of a benign but powerful sovereign.

Indeed, Justice Kennedy's *Din* concurrence goes out of its way to confine its holding to the counter-terrorism context. The opinion notes the exceptionalism of the statute under which Berashk was found inadmissible: only the counter-terrorism statute does not require the government to state with specificity which provision of law made an alien inadmissible.[213] The implication is that more process would be due if the government interests were weaker. Terrorism alone stands as a ground for exclusion without a specific explanation.[214] Marriage supports good citizenship, but not at the expense of public safety.

This reading is strengthened by turning to Justice Kennedy's majority opinion in *Tuan Anh Nguyen v. United States*, a 2001 case concerning derivative citizenship.[215] In holding gender-discriminatory citizenship transmission laws constitutional, Justice Kennedy emphasized the importance of national cohesion and membership, and the facilitation of this tie through the parent-child bond.[216] For mothers, "the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth," but "[g]iven the 9–month interval between conception and birth, it is not always certain that a father will know that a child was conceived,

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212 Ruthann Robson suggests that this interest in maintaining national borders may also be an interest in maintaining racial purity. *See* Robson, *supra* note 75, at 855 ("This almost complete deference occurs not only in the context of executive power but also with reference to the racialized subjects in this immigration case, albeit without explicit references to race, only nationality."). For analysis of an historical analogue in the form of Japanese "picture brides," see Abrams, *Peaceful Penetration*, *supra* note 189, at 143–54; for an analysis of similar restrictions on Japanese war brides, see Villazor, *supra* note 190, at 1405–15.

213 135 S. Ct. at 2140.

214 I explore this aspect of *Din* in more detail in Abrams, *Family Reunification and the Security State*, *supra* note 12, at 274–79.

215 533 U.S. 53 (2001).

216 *Id.* at 63–65.

nor is it always clear that even the mother will be sure of the father's identity."[217] Citizenship is transmitted and experienced, for Justice Kennedy, through relationships that shape and sustain the citizen. The government's interest in a loyal and acculturated citizenry is "too profound to be satisfied merely by conducting a DNA test."[218] Justice Kennedy ties family rights inextricably to the responsibilities of citizenship, whether it be citizenship in a community, a state, or a nation.

Why does Justice Alito join Kennedy's concurrence in *Din*? Although we should not read too much into the Justice's decision to join one opinion rather than another when we have no opinion of his own to consider, it does seem that there was either something attractive to Justice Alito about Justice Kennedy's concurrence or something repugnant about Justice Scalia's plurality. Recall that Justice Alito was the only dissenter in *Obergefell* who did not object to substantive due process in general, nor the "right to marry" articulated as a substantive due process liberty interest in particular.[219] In contrast to the other "conservative" Justices, Justice Alito's conservatism appears to be about conservative values rather than a methodology—originalism—often associated with conservatism.[220] Indeed, one amicus brief filed in *Din* on behalf of Fauzia Din was filed by several religious organizations, who leveraged the constitutional family law canon, including *Meyer*, *Pierce*, and *Moore*, to support the notion that the traditional family is protected both because of fundamental rights but also because it is of "societal value."[221] Paying close attention to Justice Alito's dissent in *Obergefell* helps to identify the theoretical commonalities with Kennedy's majority in that case. They come together in *Din* to simultaneously affirm the importance of family while emphasizing duty to country and the exercise of responsible citizenship.

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217 *Id.* at 65.

218 *Id.* at 67.

219 135 S. Ct. 2584, 2640–43 (2015).

220 Justice Alito's conservatism appears to transcend subject areas. *See, e.g.*, Gorod, *supra* note 163, at 369–72 (arguing that Justice Alito is more consistently conservative than Chief Justice Roberts); Michael McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2014–15 United States Supreme Court Term*, 61 S.D. L. REV. 242, 250 n.55 (2016) (stating that "Justice Alito has the most conservative voting record in criminal justice cases over the course of the Roberts Court era to date").

221 Brief of Amici Curiae National Justice for Our Neighbors et al. at 2–3, Kerry v. Din, 135 S. Ct. 2128 (2015) (No. 13-1402) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." (quoting Moore v. City of Cleveland, 431 U.S. 494, 503 (1977))).

C. Marriage as an Expectancy Interest in *Din*

Unlike Justices Kennedy and Scalia, Justice Breyer did not write in both *Obergefell* and *Din*.[222] He, along with Justices Ginsburg, Kagan, and Sotomayor, was silent in *Obergefell*, electing to join Justice Kennedy's majority opinion.[223] But Justice Breyer did write a dissent in *Din*, joined by Justices Ginsburg, Kagan, and Sotomayor, and the theory of constitutional family law represented by that dissent stands in sharp contrast to the one at play in both Kennedy's *Obergefell* majority opinion and his *Din* concurrence.[224]

Justice Breyer's *Din* dissent is best understood in light of his more general approach to constitutional questions. Unlike Justices Scalia and Kennedy, Justice Breyer's approach to constitutional *family* law questions is difficult to ascertain. He has not written a single opinion in any of the major constitutional family law or LGBTQ rights cases, and even in cases that produced several opinions he has generally chosen to join the plurality or majority rather than join a concurrence or dissent or write one himself.[225] The closest case we have is arguably *Stenberg v. Carhart*, in which the Justice wrote the majority opinion in a case striking down a Nebraska statute that criminalized "partial birth abortion," but even this case gives us little insight into how he would address issues of first impression, as his method there was an application of the "undue burden" approach outlined in previous cases.[226] Understanding Justice Breyer's approach, then, requires taking a broader look at his jurisprudence outside the constitutional family law context.

Generally speaking, Justice Breyer's approach has been incremental, pragmatic, and comfortable with understanding

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222 *See* 135 S. Ct. at 2591; 135 S. Ct. at 2130.

223 *See* 135 S. Ct. at 2591.

224 *See* 135 S. Ct. at 2141.

225 *See* Troxel v. Granville, 530 U.S. 57, 60 (2000). *Troxel* generated one plurality opinion, two concurrences, and three dissents, but Justice Breyer signed onto Justice O'Connor's plurality opinion. *See also* United States v. Windsor, 133 S. Ct. 2675, 2681 (2013) (Justice Breyer joined Justice Kennedy's majority opinion, with dissents filed by Justices Scalia, Thomas, and Alito, and Chief Justice Roberts); Lawrence v. Texas, 539 U.S. 558, 561 (2003) (Justice Breyer joined Justice Kennedy's majority opinion, with a concurrence filed by Justice O'Connor and a dissent filed by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas); M.L.B. v. S.L.J., 519 U.S. 102, 106 (1996) (Justice Breyer signed onto Ginsburg's majority opinion, with dissents filed by Justices Rehnquist and Thomas and joined by Scalia).

226 530 U.S. 914, 945–46 (2000).

rights as principles to be balanced with other factors.[227] Although in his book *Active Liberty* the Justice advocated for an anti-originalist, open-ended approach to constitutional adjudication, his actual decisions have been marked less by expansive activism than by deep pragmatism and fact-based decision-making.[228] Facts always matter to Justice Breyer; simply saying that something is a "constitutional right," for him, begs the question of the whether the particular government activity in question violates that right.[229]

Consider, for example, Justice Breyer's deciding votes in two cases challenging public displays of the Ten Commandments. In *McCreary County v. ACLU*, Justice Breyer went with the five-Justice majority in invalidating a display of the Ten Commandments in a Kentucky county court.[230] The majority opinion rejected the displays as violations of the First Amendment's prohibition of the establishment of religion. In contrast, in *Van Orden v. Perry*, he switched sides, writing a plurality opinion comparing the history of the displays.[231] Because the Texas display had been donated by the Fraternal Order of Elks, had not been the subject of complaints or controversy for decades, and was situated among "17 monuments and 21 historical markers"[232]—including heroes of the Alamo, Confederate soldiers, and Texas schoolchildren—he found it not an establishment of religion but instead meant to convey a secular message about the history of Texas.[233]

McCreary and *Van Orden* both concerned a textual constitutional prohibition on the establishment of religion, but Justice Breyer's pragmatic approach to constitutional law can also apply to implied rights and, indeed, appears to make him much more comfortable with the idea of "proliferation" of "fundamental" rights than some of the other Justices.[234] If naming something a fundamental right means that it trumps every other

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227 Consider, for example, Zadvydas v. Davis, 533 U.S. 678, 699–702 (2001) in which Breyer reads a six-month limitation into a statute providing for indefinite detention of immigration detainees.

228 *See* STEPHEN BREYER, ACTIVE LIBERTY 116–20 (2005).

229 *See id.* at 120–24 (explaining that in judicial decision making, Justice Breyer emphasizes considerations of relevant circumstances and consequences).

230 545 U.S. 844, 881 (2005).

231 545 U.S. 677, 699–705 (2005) (Breyer, J., concurring) (Justice Breyer attached a map of the Capitol Monument to his opinion to show the context of the display).

232 *Id.* at 681.

233 *Id.* at 703–04.

234 *See* BREYER, *supra* note 228, at 132 (emphasizing that Justice Breyer views judicial advancement of fundamental rights as a goal the Constitution seeks to fulfill).

interest, then it follows that the number of fundamental rights should be small. In contrast, if, as Justice Breyer believes, designating something a fundamental right means that the government's interest in abridging it must be balanced with the individual's interest in the right, then a multitude of fundamental rights is not as threatening. They may be fundamental, but they are far from absolute. In short, Justice Breyer's positions have been notable for their focus on flexibility over formalism, paying close attention to the specific circumstances of particular situations.[235]

Justice Breyer's *Din* dissent squares with these jurisprudential tendencies. At first, Justice Breyer sounds like he might be starting to engage the same lionization of marriage as an institution that Justice Kennedy did in *Obergefell*: "[T]he institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a central role in most individuals' 'orderly pursuit of happiness.'"[236] But then the opinion turns sharply in another direction. Immigration law, Justice Breyer contends, "surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure."[237] In other words, even if marriage were not a centrally important institution, the law has made it so, and once people develop legal expectations around what marriage means, the government cannot arbitrarily deprive them of those expectations.

This vision is evident from the very way Justice Breyer characterizes Din's claim. "The liberty interest that Ms. Din seeks to protect," he opines, "consists of her freedom to live together with her husband in the United States."[238] He then highlights the relatively narrow nature of her claim: "She seeks *procedural*, not *substantive*, protection for this freedom."[239]

Unlike the *Obergefell* majority, which sets marriage over and against other adult relationships as enduring, historically-

235 *See, e.g.*, Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 740–41 (1996) (characterizing First Amendment doctrine as having adopted its principles "to the balance of competing interests and the special circumstances of each field of application").

236 Kerry v. Din, 135 S. Ct. 2128, 2142 (2015).

237 *Id.* at 2143.

238 *Id.* at 2142.

239 *Id.*

revered, and spiritually-significant institutions, the *Din* dissent understands civil marriage as a status created and recognized by the state. Having "surround[ed] marriage with a host of legal protections," Justice Breyer explains, the state has created a "strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure."[240] This emphasis on the state, rather than on the moral superiority of those who chose to marry, stands in stark contrast to the *Obergefell* majority's view of marriage as a timeless, pre-legal institution that the state must acknowledge.

The dissent adopts a version of the "equal access" argument, advocated by scholars Nelson Tebbe and Deborah Widiss, although sounding in procedural due process more than in equal protection.[241] Tebbe and Widiss argue against a fundamental right to marry on the grounds that civil marriage is a "government program that provides certain benefits and imposes certain obligations."[242] Civil marriage, they argue, is different from "other family-related liberties, such as rights that protect decisions regarding child rearing, procreation, contraception use, or termination of a pregnancy."[243] "All of those rights exist independent of government involvement, and all of them enjoy protection against state interference under substantive due process doctrine."[244]

Tebbe and Widiss advocate for the use of equal protection doctrine to realize their "equal access" theory, and in the case of same-sex marriage, that approach would make sense. In the *Din* dissent, where the problem was not obviously class-based discrimination (although the case does have racial and national-origin overtones), procedural due process is the mechanism, but equal access is still the theory. There, Justice Breyer takes the equal access argument to its logical conclusion, comparing civil marriage to other rights or privileges grants to individuals by the government, including the "right not to be suspended from school class," "a prisoner's right against involuntary commitment," "the right to welfare benefits," or the "right not to take psychotropic drugs."[245] None of these rights

240 *Id.* at 2143.

241 Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1380–1382 (2010).

242 *Id.* at 1378.

243 *Id.*

244 *Id.*

245 *Din*, 135 S. Ct. at 2143.

is a "fundamental right,"[246] protected by the Constitution. Rather, each is an example of a privilege that the government has induced people to expect.[247] Once the government promises such a privilege, it cannot arbitrarily deprive people of it. This does not mean that the government cannot restrict these rights, but it must provide "due process" in doing so. Surely, Justice Breyer argues, if the government provides procedural due process when it deprives prisoners of "'goodtime' credits" that shorten their length of incarceration, or when a school tries to suspend a student, it must provide process when it deprives a U.S. citizen of the "freedom to live together with her spouse in America."[248]

Justice Breyer's conception of procedural due process is flexible. In some cases, such as criminal prosecutions, people are entitled to extensive process, including the right to counsel and to confront the witnesses against them through cross-examination. In other cases, procedural due process rights might be minimal. In Din's case, for example, she was not asking for full-blown criminal due process rights, but something much more modest: an explanation. She wanted the government to give her more information about what her husband was accused of doing. In other words, she wanted an explanation of "*why* the government acted as it did."[249] Properly apprised of the grounds for the Government's action," Justice Breyer explains, "Ms. Din can then take appropriate action—whether this amounts to an appeal, internal agency review, or (as is likely here) an opportunity to submit additional evidence and obtain reconsideration."[250] The reason that the government did give—the terrorism grounds for inadmissibility—is not enough for Justice Breyer because it lacks specificity. He would give the government two options, either: (1) disclose the facts that support the claim that Berashk was involved in terrorist activity or (2) disclose a "sufficiently specific statutory subsection that conveys effectively the same information."[251] The issue here is not whether marriage is a fundamental right, but whether it is one of many, many interests that the government has chosen to protect. Yet, its fundamental nature has rhetoric punch: "How could a Constitution that protects individuals against the arbitrary deprivation of so diverse a set of

246 *Id.* at 2142.
247 *Id.* at 2143–44.
248 *Id.* at 2143.
249 *Id.* at 2144.
250 *Id.* at 2145.
251 *Id.* at 2143.

interests not also offer some form of procedural protection to a citizen threatened with governmental deprivation of her freedom to live together with her spouse in America?"[252]

Notice what Breyer's opinion *does not* do—it does not create a fundamental right that can then be abridged only if the government meets its burden under a strict scrutiny analysis.[253] *None* of the Justices opining in these two marriage cases argues for this traditional approach (save those Justices who, in dissent, claim that the majorities could not have met the burden such an approach would require). Justice Breyer's *Din* dissent is not the traditional, three-tiers of scrutiny, fundamental rights approach some scholars would prefer.[254] The traditional approach, so long considered the bedrock of constitutional analysis in Fourteenth Amendment cases, is indeed dying, but not solely because of Justice Kennedy's looser formulations.[255] Justice Breyer's approach is just as different in its own way.

IV
IMPLICATIONS

It is too soon to know what the long-term fallout from either of these decisions will be. Those who hoped that *Din* would sound the death knell of robust immigration power have been disappointed. Many who hoped that *Obergefell* would end discrimination against same-sex couples have been disturbed by the force of the backlash in the form of a call for religious exemptions to anti-discrimination law. Anti-minority rhetoric, during and following the 2016 presidential election, has targeted many groups, including the LGBTQ community and immigrants.[256] Despite our limited ability to predict the future

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252 *Id.* at 2145.

253 This change in approach, more commonly associated with Justice Kennedy, was presciently noticed by David Meyer in 2001 in his analysis of the fragmented decision in *Troxel*. "Through the rising smoke of this battleground," he wrote, "there emerges apparent consensus about a point of tremendous significance: The daunting complexity of family relationships commands special caution and flexibility in formulating any constitutional rules of decision. This point is important because it signals an approach to family-privacy controversies that is quite different from the rigid, heavy-handed scrutiny prescribed by conventional fundamental rights doctrine." Meyer, *supra* note 132, at 1146 (footnote omitted).

254 Compare to the analysis in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

255 Indeed, consider Justice Kennedy's very traditional approach, using tiered scrutiny, in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2016).

256 *See* Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 703 (2014) (arguing "that same-sex marriage objections lack the distinct and compelling features of conscientious objection recognized by law").

in 2018, however, reading *Obergefell* together with *Din* makes each opinion take on a different cast than it does alone, and simultaneously offers new arguments for the potential broadening and contracting of civil rights in the constitutional family context. This last Part takes up the possibility that reading *Obergefell* and *Din* in light of each other points to markedly different future outcomes than either case read alone.

A. The Scope of Civil Rights

First, the two cases read together indicate that the scope of the rights of unmarried people and the rights of LGBTQ people beyond marriage may be different from what scholars have thought. Justice Kennedy's views on the importance of marriage appear even more focused on the constraining force of responsible citizenship when read in conjunction with *Din*. But Justice Breyer's *Din* dissent provides a counterweight that may more accurately reflect the opinions of the other Justices who joined the majority in *Obergefell*.

Justice Kennedy's *Obergefell* opinion, taken alone, appears to put unmarried people and their children in jeopardy.[257] In a society in which over half of us are unmarried, and over 40% of children are born to unmarried parents, a Supreme Court opinion expressly preferring marriage to nonmarriage is of serious concern.[258] According to its critics, *Obergefell* suffers in two respects—by denigrating parents who choose not to marry, and by denigrating unmarried people, with or without children, as inferior to married people.

Scholars critiquing *Obergefell* along these lines worry that previous Supreme Court opinions that designated illegitimacy as a quasi-suspect classification for equal protection purposes will be read in ways that castigate nonmarital families. Although this line of cases protected nonmarital children from discrimination, their reasoning often included a "the sins of the parents [should] not [be] visited [upon] their innocent children" rationale.[259] Under this theory, illegitimacy could still be considered an undesirable trait, and parents, but not their children, might still be punished for it or incentivized to marry.[260]

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257 *See* Huntington, *supra* note 10, at 23; Murray, *supra* note 10, at 1210.

258 PEW RESEARCH CENTER, THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 1, 19–20 (2010), http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf [https://perma.cc/S5T3-EZ3J].

259 Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 387, 394 (2012).

260 *See* Richard L. Brown, *Disinheriting the "Legal Orphan": Inheritance Rights of Children after Termination of Parental Rights*, 70 MO. L. REV. 125, 158 (2005)

As Professor Melissa Murray has noted, Justice Kennedy's rhetoric in *Obergefell* tilts strongly in the "sins of the parents" direction, asserting that "children of nonmarital relationships 'suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.'"[261] Not only does *Obergefell* treat the choice not to marry as "utterly unimaginable," it also denigrates single people, whose "intimate lives lack the dignity, transcendence, and purpose that come with knowing that they are a part of a 'two-person union unlike any other in its importance.'"[262] Thus, for Murray, *Obergefell* portrays marriage as "the most profound, dignified, and fundamental institution into which individuals may enter" and therefore implies that alternatives to marriage are "by comparison undignified, less profound, and less valuable."[263]

Similarly, Clare Huntington has celebrated the outcome of *Obergefell* but lamented its reasoning.[264] According to Huntington, the substantive due process analysis undertaken by the *Obergefell* majority required the Court to define what marriage means and explain its social importance, and it chose to define it in a constraining and conservative way.[265] An equal protection analysis, instead, would have allowed the Court to bypass having to define marriage. Instead, the analysis could have simply been that "whatever marriage means culturally, a state cannot deny access to it without distinctions that have a *state* (as opposed to a private, cultural) interest as a basis."[266] Instead, Justice Kennedy's majority opinion, Huntington argues, is likely to further reify unfortunate aspects of family law by reinforcing the notion that the "typical" family is married.[267]

It is unclear, however, whether *Obergefell*'s more effusive descriptions, such as the infamous "call[ing] out" phrase[268] are central to the holding or mere rhetorical flourish. Even those

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(characterizing Supreme Court precedent as "impatien[t] with statutes that punish innocent children for the wrongdoing of their parents"). *But see* Murray, *supra* note 259, at 394–99 (disputing conventional "progress narrative" of a "more liberal era where the sins of the parents would not be visited upon the children").

261 Melissa Murray, *supra* note 10, at 1215 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015)).

262 *Id.* at 1215–16 (quoting *Obergefell*, 135 S. Ct. at 2599).

263 *Id.* at 1210.

264 Huntington, *supra* note 10, at 23.

265 *Id.*

266 *Id.* at 28.

267 *Id.* at 30.

268 Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) ("Marriage responds to the universal fear that a lonely person might call out only to find no one there.").

statements that clearly *are* central, such as the assertion that lack of access to marriage "humiliates" children of gay and lesbian couples, do not necessarily imply that discrimination against these couples would be constitutional were marriage available.[269] As Douglas NeJaime has observed, LGBTQ advocates have achieved increased protections for nonmarital parenting simultaneous to and in conjunction with their advocacy around marriage equality.[270] Courtney Joslin has further argued that *Obergefell*, when read in light of the decriminalization of nonmarital sex set forth in cases such as *Lawrence v. Texas*, may stand for the proposition that "our 'evolving experiences' must be considered," and that, given the large number of unmarried Americans, our "evolving experiences" are likely to include a recognition of the dignity of unmarried life.[271]

Adding *Din* complicates the equation. Justice Kennedy's *Din* plurality sharply undercuts the scope of the marital rights he affirmed in *Obergefell* by tying the enjoyment of these rights to the exercise of responsible citizenship. The act of marrying is itself revealed to be just one way an individual can exercise responsible citizenship, and a very important one. Choosing not to marry could very well be, for Justice Kennedy, an act of irresponsibility, akin to Din's marriage to a suspected terrorist, that undercuts the claim to family-based rights.

However, the Breyer dissent in *Din* suggests that the support for a fundamental right of marriage among the *Obergefell* majority Justices is more fractured and tenuous than the opinion on its face suggests. Understanding marriage as an expectancy interest puts it on much different footing then understanding it as the means by which people discover their most evolved spiritual selves. To highlight the difference, let us consider two quotations from the two opinions concerning the reason why the state supports marriage through benefits. First, Justice Kennedy:

> [J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition

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269 *See* NeJaime, *supra* note 9, at 2347 (arguing that precedent may lead courts to treat gays and lesbians as full participants in the space of nonmarital parenthood); *see also In re* Brooke S.B., 61 N.E.3d 488, 498 (N.Y. 2016) (holding that the "foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage . . . and the . . . holding in *Obergefell v. Hodges* . . . which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples").

270 NeJaime, *supra* note 109, at 1187.

271 Courtney G. Joslin, *Marriage Equality and Its Relationship to Family Law*, 129 HARV. L. REV. FORUM 197, 211 (2016).

> and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities.[272]

Now, Justice Breyer:

> [T]he law, including visa law, surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure.[273]

For Kennedy, the primary reason that the government attaches benefits of marriage is "to protect and nourish the union."[274] The government, remember, has a strong interest in social order and in preferring marriage over other social arrangements. For Breyer, the decision to tie benefits to marriage is more historically contingent: although marriage has played, and currently does play, a central role in most individuals' "orderly pursuit of happiness,"[275] it is quite possible to imagine other arrangements between individuals and the state that would foster adult welfare and stability for children.

Consider now the Chief Justice's mention in *Obergefell* of an alternative argument that might have persuaded him: "The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits."[276] This statement, while somewhat cryptic, indicates at least openness to considering equal protection claims brought by members of classes not deemed "suspect." Thus, unmarried people *themselves* and not just their children might be able to effectively bring claims of discrimination if they could show that distinctions made on the basis of marital status are arbitrary, irrational, or based in animus.

Similarly, the two cases read together point to a different outcome for the future of LGBTQ rights. During the *Obergefell* litigation and after the opinions were issued, many scholars and activists expressed concern that by reifying marriage, the *Obergefell* majority was limiting its holding to the marriage context. What about housing discrimination, employment discrimination, public harassment, hate crimes, and the many

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272 *Obergefell*, 135 S. Ct. at 2601.

273 Kerry v. Din, 135 S. Ct. 2128, 2143 (2015).

274 *Obergefell*, 135 S. Ct. at 2601.

275 *Din*, 135 S. Ct. at 2143 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

276 *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

other ways in which LGBTQ people are treated unequally? And what about plaintiffs who did not "perform" traditional marriage and traditional values as well as Jim Obergefell and the other plaintiffs in the marriage cases? As Professor Cary Franklin put it, gaining the right to marry "would benefit gays and lesbians whose foremost desire was to settle down with someone of the same sex, 'adopt[ ] kids . . . go[ ] to church, coach[ ] little league, [and] collect[ ] stamps,'" but would be less helpful and might even "stigmatize—those whose interests ran to pursuits other than monogamy and stamp-collecting."[277]

As with the question of nonmarital families, the broader question of LGBTQ rights looks different with *Din* in the mix. On a first reading, *Din* seems to strengthen *Obergefell*'s marriage exceptionalism. Justice Kennedy and Justice Alito's somewhat grudging acknowledgment of the marital rights of immigrants is an acknowledgment of marital rights, not cohabitation rights. But once Justice Breyer's dissent is taken into account, as well as Chief Justice Robert's short statement on equal protection in his *Obergefell* dissent, the future looks less bleak for LGBTQ plaintiffs. Breyer and perhaps the other three liberal Justices seem open to equal access claims that extend far beyond marriage, and even Chief Justice Roberts is open to equal protection claims brought by members of non-suspect classes. Granted, many of the claims that plaintiffs would be most eager to make will not be constitutional ones. Most employment discrimination and housing discrimination occurs through private, not state, action, making the Equal Protection clause inapplicable. But Title VII jurisprudence draws from Equal Protection jurisprudence, and a different *Obergefell*—one that held that bans on same-sex marriage were unconstitutional because they discriminated based on sex—would have had far-reaching implications for statutory anti-discrimination law.[278] Justice Breyer's gesture toward an equal access approach—even in a procedural due process, rather than equal protection, context—gives credence to the notion that the Court might apply its broad *Obergefell* holding, that discrimination against LGBTQ people is irrational and robs them of their dignity, to a variety of other contexts. Indeed, at least one

277 Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 824 (2014) (footnote omitted).

278 Cunningham-Parmeter, *supra* note 10, at 1144–45 (arguing that "the question of whether a public or private actor has intentionally discriminated against an individual because of sex remains the same" whether under the Constitution or under Title VII, Title IX, the Fair Housing Act, the Equal Pay Act, or the Equal Credit Opportunity Act).

Court has already cited *Obergefell* to support a Title VII claim. In *EEOC v. Scott Medical Health Center*, a district judge denied the defendant's motion to dismiss for failure to state a claim under Title VII, holding that Title VII's "because of sex" provision "prohibits discrimination on the basis of sexual orientation."[279] The district judge went on to observe that:

> [*Obergefell*] demonstrates a growing recognition of the illegality of discrimination on the basis of sexual orientation. That someone can be subjected to a barrage of insults, humiliation, hostility and/or changes to the terms and conditions of their employment, based upon nothing more than the aggressor's view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate.[280]

Were a case such as this one to be appealed to the current U.S. Supreme Court, Breyer's *Din* dissent suggests that at least four of the Justices would have a more expansive view of LGBTQ rights than the married-focused ones articulated by the *Obergefell* majority.

B. Family Reunification Rights

Perhaps the most salient implication of *Obergefell* and *Din* at the present is that U.S. citizens may have a cognizable constitutional claim for family reunification with their immigrant spouses and children. Prior to *Din*, this claim seemed out of reach. *Knauff*, *Mezei*, and the more recent *Fiallo v. Bell*,[281] appeared to foreclose arguments that family interests could ever outweigh federal immigration authority. *Din*, at the very least, created doubt. By holding that "even assuming she has such an interest [in family reunification], the Government satisfied due process when it notified Din's husband that his visa was denied under the immigration statute's terrorism bar,"[282] Justices Kennedy and Alito create the possibility that, under other circumstances, this interest could triumph. Context is critical to the *Din* concurrence's logic; absent the counter-terrorism context, family reunification interest might outweigh the state's interest in exclusion.

It is important not to overstate this possibility. Both Congress and the Executive typically receive far greater deference

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279 217 F. Supp. 3d 834, 839 (W.D. Pa. 2016).

280 *Id.* at 842 (citation omitted).

281 *See* Fiallo v. Bell, 430 U.S. 787 (1977). Schaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

282 Kerry v. Din, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring).

when acting under their immigration powers than in other contexts.[283] But in recent litigation over President Trump's "travel ban" executive order,[284] *Din* has begun to play a role, and might play a larger one in subsequent litigation.

The initial Executive Order, among other things, suspended immigration from seven majority-Muslim nations for ninety days.[285] It was quickly challenged in court in several states. Unlike *Din*, the Order did not respond to a particular threat by a particular person. Instead, it linked the ban to the September 11, 2001 attacks of over sixteen years before and vague statements that terrorism had not been stopped.[286]

Because so many individuals affected by the ban were already in transit, family reunification did not come to the fore: the procedural due process claims for pre-vetted visa-holders were far stronger and more-clear cut than nascent family reunification claims.[287] In addition, the President had so prominently advertised a pending "Muslim ban" during his campaign that the targeting of the seven countries in question made it easy for courts to find that litigants were likely to succeed on the merits of their First Amendment Establishment Clause claims.[288] Nonetheless, litigants did make these claims

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283 *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 158–63 (2002) (tracing history of immigration power).

284 Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

285 *Id.* ("I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).").

286 *See id.* § 1.

287 *See* Washington v. Trump, 847 F.3d. 1151, 1165–66 (9th Cir. 2017) (finding that because Executive Order stated on its face that it applied to lawful permanent residents, that the Government did not meet its burden for lifting the stay on appeal with regard to the due process claims).

288 *See, e.g.*, Aziz v. Trump, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (finding that "[t]he 'Muslim ban' was a centerpiece of the president's campaign for months, and the press release calling for it was still available on his website as of the day this Memorandum Opinion is being entered. . . . The president connected that policy to this EO when, asked last July if he had abandoned his plan for a Muslim ban, he responded 'Call it whatever you want. We'll call it territories, OK?' . . . Giuliani said two days after the EO was signed that Trump's desire for a Muslim ban was the impetus for this policy . . . . And on the same day that the president signed the EO, he lamented that under the old policy, 'If you were a Muslim you could come in, but if you were a Christian, it was almost impossible,' and said his administration was 'going to help' make persecuted Christians a priority." (cita-

in a number of cases,[289] and, as the Trump Administration refines its approach and begins to better target areas of the law that are less settled, *Din* is likely to play a pivotal role. The Ninth Circuit recently hinted at this possibility in *Washington v. Trump*. There, the Government argued that the Executive Order did not violate procedural due process because the Government was not enforcing it against lawful permanent residents ("green card" holders) and only they had such rights.[290] The Ninth Circuit panel disagreed. Noncitizens beyond green card holders might also have such rights, the court explained, including "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert."[291]

Obergefell provided the Justices of the Supreme Court an opportunity to think deeply about the meaning of marriage and whether they believed it to be constitutionally protected or not. They were then able to simultaneously apply these understandings to a different context. The robust marriage rights outlined in *Obergefell* found their way into *Din*, albeit in very different forms. Together, these two cases could provide the ammunition to overrule affirmatively *Knauff* and *Mezei*.

CONCLUSION

Today we stand on the edge of what could be a very different constitutional era. Justice Scalia has passed away; many of the Justices are of an age where death or retirement is likely imminent; a new Justice, Neil Gorsuch, has taken Justice Scalia's seat; and our new President may well make further nominations. It could be that the composition of the Court will change so much in the next five years that the constitutional family theories explored here will become less important.

The positions staked out by the Justices on the current Court, however, are largely representative of the positions that have been advocated by litigants, scholars, and *amici* in a vari-

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tions omitted)); *see also Trump*, 847 F.3d. at 1168 (finding that the state's Establishment Clause claims "raise serious allegations and present significant constitutional questions").

289 *See, e.g.*, Osman Nasreldin & Sahar Kamal Ahmed Fadul's Motion to Intervene at 1–2, *Aziz*, 234 F. Supp. 3d at 724 (No. 1:17-cv-00116), ECF No. 26 (motion to intervene in litigation to enjoin Executive Order brought by U.S. citizen and his fiancée, who was stopped by CPB agents at Dulles airport and was allegedly told, fraudulently, that her visa had been "cancelled" and was sent back to Ethiopia).

290 *Trump*, 847 F.3d at 1164–65.

291 *Id.* at 1166 (citing Kennedy's concurrence and Breyer's dissent in *Kerry v. Din*, 135 S. Ct. 2128 (2015)).

ety of constitutional family cases over the last fifteen to twenty years. Regardless of which view can marshal a majority in any given case, these theories are likely to be the ones that dominate. One important implication of this Article is that it may be an individual Justice's theory of the relationship between the constitution and the family that is most important in how he or she will decide a particular case, rather than the specific test applied. In other words, whether a Justice understands marriage as an exercise of citizenship, as a natural right, or as an expectancy interest tells us more about how that Justice will behave in future cases than whether he or she would apply the traditional tiers of scrutiny or that equal protection or substantive due process is the more appropriate doctrine. Now that family law has become constitutionalized, the Justices' personal theories of the meaning of marriage and family will be critical in the development of constitutional family doctrine. Now that the Court has determined that there is a right to marry, the next wave of cases will likely involve the rights of marriage.