

# RAINBOW LOVING

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*[I would prefer to] see less mixed marriages. But if one doesn't know any better than to mess up, let them have it.*

—Georgia Governor Lester Maddox, on interracial marriage<sup>1</sup>

*It's like in golf. . . . A lot of people—I don't want this to sound trivial—but a lot of people are switching to these really long putters, very unattractive. . . . It's weird. You see these great players with these really long putters, because they can't sink three-footers anymore. And, I hate it. I am a traditionalist. I have so many fabulous friends who happen to be gay, but I am a traditionalist.*

—Donald Trump, on marriage equality<sup>2</sup>

*We're a rainbow made of children  
We're an army singing a song  
There's no weapon that can stop us  
Rainbow love is much too strong*

—Song sung in scout camps across the land<sup>3</sup>

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## INTRODUCTION

Before 1967, there was no recognized right to marry. States had long been the jealous guardians of marriage law. There had been battles in court over the meaning of state marriage laws, about how to reconcile conflicting

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<sup>1</sup> *Court Kills Mixed Marriage Laws, Upholds King Contempt Conviction*, ATLANTA CONST., June 13, 1967, at 1 (quoting Georgia Governor Lester Maddox in the wake of the Supreme Court's ruling in *Loving v. Virginia*).

<sup>2</sup> Michael Barbaro, *After Roasting, Trump Reacts in Character*, N.Y. TIMES, May 2, 2011, at A17.

<sup>3</sup> LYNN BAKER, *A Rainbow Made of Children*, on ORIGINAL SOUND TRACK MUSIC FROM THE MOTION PICTURE "BILLY JACK" (Warner Bros. Records 1971).

marriage laws across different states, and about whether federal courts had jurisdiction to weigh in on marriage disputes. But the Supreme Court had never been asked a simple question: Does the Constitution protect the right to marry?<sup>4</sup>

In *Loving v. Virginia*, Chief Justice Earl Warren wrote, for a unanimous court, that Virginia's ban on interracial marriage violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>5</sup> The law had been challenged by Richard Loving, a white man, and Mildred Loving, a woman with African and Cherokee blood. They were born and raised in Virginia, but fled to neighboring Washington D.C. to marry in 1958 because their home state barred a variety of racial pairings, including white/colored.<sup>6</sup> The state's law also prohibited so-called marriage evasion, leaving one's home state to contract a prohibited marriage.<sup>7</sup> It was this aspect of the law that the Lovings had violated with their D.C. marriage. The strong arm of the law was brought to bear on them when they returned to Virginia and tried to set up house. In an infamous scene, now depicted on the big screen in the 2016 movie *Loving*,<sup>8</sup> three law enforcement officers appeared early one morning in the Lovings' bedroom, shining a flashlight on them, and demanding of Richard: "What are you doing in bed with this lady?"<sup>9</sup> Richard pointed to the marriage certificate they had proudly hung on the bedroom wall, but was told by Sheriff R. Garnett Brooks: "That's no good here."<sup>10</sup>

The Lovings were charged and convicted under the evasion law. They were sentenced to one year in prison, but the sentence was suspended as long as the couple agreed to leave Virginia and not return together for twenty-five years (long enough to outlast their reproductive years, conveniently). They did relocate to D.C. for a period of time and tried to build a life there. They had not personally been much interested in civil rights, but contacted Attorney General Robert Kennedy to ask for help with this particular, personal situation. He referred them to the ACLU, which took their case.<sup>11</sup> With the ACLU at their backs, they boldly crossed back

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<sup>4</sup> 388 U.S. 1, 2 (1967).

<sup>5</sup> *Id.* at 1–2.

<sup>6</sup> *Id.* at 2–4.

<sup>7</sup> *Id.* at 4 (excerpting relevant Virginia statutes). Marriage evasion laws played a small but significant role in marriage law history, peaking after the enactment in 1912 of the Uniform Marriage Evasion Act. See Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 103–04 (2004).

<sup>8</sup> *LOVING* (Raindog Films 2016).

<sup>9</sup> David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. TIMES, June 12, 1992, at B20 (recounting the July 1958 arrest of the Lovings).

<sup>10</sup> *Id.*

<sup>11</sup> See Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal*

over the Potomac River and made their return home known. They then filed motions to vacate their convictions on federal constitutional grounds.<sup>12</sup>

The aptly-named Lovings won their gamble. The Supreme Court ruled in their favor, paving the way for their return home to raise three multiracial children spared the stigma of illegitimacy. But it was not a sure bet. Prior to the ruling in this case, the Supreme Court had never articulated a substantive principle about the right to marry. It had told us, as a side note, in an 1888 case about the validity of legislative divorce, that marriage created “the most important relation in life” and had “more to do with the morals and civilization of a people than any other institution.”<sup>13</sup> But in that same sentence, it reminded us that marriage “has always been subject to the control of the legislature.”<sup>14</sup>

## I

### LOVING AND THE RIGHT TO MARRY

The Supreme Court was no doubt interested in the *Loving* case because of the racial implications. The Warren Court was systematically building a wall against race discrimination, and this presented the opportunity for placing another significant brick. The Court reached three important conclusions in its analysis of the Lovings’ claim. First, it rejected the notion that state power to regulate marriage was unlimited. Although earlier opinions had spoken broadly of state control, they did so outside of a federal constitutional challenge. Clearly, the Court wrote in *Loving*, state laws must always conform to federal constitutional standards,<sup>15</sup> a principle that had been confirmed in an important parental rights case, *Meyer v. Nebraska*,<sup>16</sup> and a landmark reproductive rights case, *Skinner v. Oklahoma*.<sup>17</sup>

Second, the Court concluded that Virginia’s miscegenation ban violated the Equal Protection Clause even though, as Virginia argued, the statutes “punish equally both the white and the Negro participants in an interracial marriage.”<sup>18</sup> (The rejection of this “equal application” theory of discrimination would prove relevant and helpful decades later in the fight

*Narrative of Loving v. Virginia*, 41 HOW. L.J. 229, 237–38 (1998).

<sup>12</sup> *Loving*, 388 U.S. at 3.

<sup>13</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

<sup>14</sup> *Id.*

<sup>15</sup> 388 U.S. at 7 (“[T]he State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so . . .”).

<sup>16</sup> 262 U.S. 390, 402–03 (1923) (invalidating state law restricting parents from teaching their children foreign languages in the home before the eighth grade).

<sup>17</sup> 316 U.S. 535, 541–43 (1942) (vacating state law mandating that certain classes of habitual criminals be sterilized).

<sup>18</sup> *Loving*, 388 U.S. at 8.

for gay marriage equality.) The heart of the equal protection violation, according to the Court, was that the miscegenation laws, which only prohibited marriages involving white persons (people of all other races were free to marry out of their races), were “measures designed to maintain White Supremacy.”<sup>19</sup> (The name of the law, *The Racial Integrity Act*, says it all.)<sup>20</sup> The race-based classifications were “invidious” and were not justified by any sufficiently compelling purpose.<sup>21</sup>

Third, and finally, the Court held that the Virginia ban also violated the Due Process Clause.<sup>22</sup> An unnecessary step, given that the Court had already identified a sufficient basis for invalidating the challenged statutes, this aspect of the ruling launched the constitutional right to marry. As the Court wrote, “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>23</sup> Thus, the Court concluded, “[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>24</sup>

It was not immediately clear after *Loving* whether the racial classification, and the Warren Court’s robust commitment to racial equality, were the driving forces behind the ruling. But the Court followed up several times with rulings that reinforced the idea of a constitutional right to marry, embodied in the concept of privacy under the Fourteenth Amendment that had also brought us rights related to abortion, contraception, parenting, and so on.<sup>25</sup> In *Zablocki v. Redhail*, the Supreme Court invalidated a Wisconsin law that required noncustodial parents with child support arrearages to get court approval before marrying.<sup>26</sup> The Court cited *Loving* in this 1978 case for the principle that marriage is a right “of fundamental importance” that cannot be directly or substantially infringed without a compelling justification.<sup>27</sup> Any suggestion that *Loving* was only about race was put to rest here. Then, in 1987, the Court invalidated a Missouri prison regulation that permitted inmates to marry only with permission of the prison superintendent, which was to be granted only for

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<sup>19</sup> *Id.* at 11–12.

<sup>20</sup> *Id.* at 6, 11 n.11.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.* at 12.

<sup>23</sup> *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

<sup>24</sup> *Id.*

<sup>25</sup> *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (first citing *Roe v. Wade*, 410 U.S. 113 (1973); then citing *Trimble v. Gordon*, 430 U.S. 762, 768–70, 768 n.13 (1977); and then citing *Weber v. Aetna Cas. & Sur. Co.*, 460 U.S. 164, 175–76 (1972)).

<sup>26</sup> *Id.* at 374.

<sup>27</sup> *Id.* at 384.

“compelling reasons.”<sup>28</sup> The right to marry was deemed so obvious in that case it was conceded by the State of Missouri; the only question in *Turner v. Safley* was whether inmates were part of the group entitled to enjoy the right (answer: yes).<sup>29</sup>

*Loving* ended an era—states could no longer prohibit marriage on the basis of race—and salvaged the marriage of Richard and Mildred Loving. Mildred told a reporter “I feel free now . . . it was a great burden.”<sup>30</sup> Richard said that the ruling meant that, “[f]or the first time, I could put my arm around her and publicly call her my wife.”<sup>31</sup> According to Richard, most of his and Mildred’s community had rooted for them to win,<sup>32</sup> but that did not stop the “hostile stares” when they ventured outward. They stood strong until 1975, when Richard was killed by a drunk driver.<sup>33</sup> Mildred lived until 2008.<sup>34</sup>

Twenty-five years after the ruling in *Loving*, the sheriff who had arrested them remained unapologetic. “I was acting according to the law at the time,” he told David Margolick of the *New York Times* in 1992, “and I still think it should be on the books . . . I don’t think a white person should marry a black person. I’m from the old school. The Lord made sparrows and robins, not to mix with one another.”<sup>35</sup> The world, however, had mostly passed him by. In that quarter-century, attitudes about interracial marriage had shifted considerably. Behavior was slower to change, but formal obstacles to mixed-race marriage fell not only in state code books, but also in other institutions in civil society like churches and workplaces. As Rachel Moran concludes, while the Court could not “instantly undo the informal assumptions and practices that developed during three centuries of a ‘separate but equal’ principle in sex, marriage, and family,” the Court did give “ordinary Americans the freedom to rethink the role of race in their intimate relationships.”<sup>36</sup> Although there is still evidence of strong same-race preference within most racial groups for dating and marriage,<sup>37</sup> there

<sup>28</sup> *Turner v. Safley*, 482 U.S. 78, 82 (1987).

<sup>29</sup> *Id.* at 95 (“We disagree with petitioners that *Zablocki* does not apply to prison inmates.”).

<sup>30</sup> Helen Dewar, *Victor in Mixed Marriage Case Relieved: “I Feel Free Now . . .”*, WASH. POST, June 13, 1967, at A11.

<sup>31</sup> Simeon Booker, *The Couple that Rocked the Courts*, EBONY, Sept. 1967, at 78, 78.

<sup>32</sup> See *State Couple “Overjoyed” by Ruling*, RICHMOND TIMES-DISPATCH, June 13, 1967, at B1 (quoting Richard after the Supreme Court’s decision: “Everyone here really wanted us to win the case . . . They were as happy as we were at the decision.”). But see *The Crime of Being Married*, LIFE, Mar. 18, 1966, at 82, 85 (“It doesn’t matter to folks around here. They just want to live and be left alone.”).

<sup>33</sup> See Pratt, *supra* note 11, at 241.

<sup>34</sup> See Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. TIMES, May 6, 2008, at B7.

<sup>35</sup> See Margolick, *supra* note 9, at B20.

<sup>36</sup> RACHEL F. MORAN, *INTERRACIAL INTIMACY* 99 (2001).

<sup>37</sup> See, e.g., Raymond Fisman et al., *Racial Preferences in Dating*, 75 REV. ECON. STUD.

has been a steady increase in the United States of the number of individuals who marry someone of a different race—up to twelve percent in 2013. Compared to members of other races, whites are the least likely to do so.<sup>38</sup> Attitudes change before behavior, and these numbers do reflect increasing social acceptance of interracial marriage. In 2014, thirty-seven percent of Americans labeled the increase of intermarriage as a “good thing for society,” an increase from twenty-four percent only four years earlier.<sup>39</sup>

## II

### LOVING AND MARRIAGE BY SAME-SEX COUPLES

But as attitudes and behavior surrounding interracial marriage have slowly but discernibly evolved, the national conversation moved on to a new topic: marriage equality for same-sex couples. Mildred Loving witnessed the change and, although she had generally stopped giving interviews by that time, she issued a statement on the fortieth anniversary of the Supreme Court’s ruling in her case “urging that gay men and lesbians be allowed to marry.”<sup>40</sup> By that anniversary in 2007, the fight was well underway.

After a few false starts in the early 1970s,<sup>41</sup> the quest for marriage equality began in earnest in the early 1990s. Advocates had filed suit in a variety of states, raising only state-law claims so as to avoid an unfavorable decision by the U.S. Supreme Court, alleging a constitutional right of same-sex couples to marry. *Loving* was front and center in these cases—it had established that state marriage laws must conform to federal constitutional norms and identified at least one class of marriages that could not be prohibited. But what else did it stand for? The first test of its scope came in *Baehr v. Lewin*, in which the Hawaii Supreme Court set the

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117, 131 (2008) (finding strong racial preferences in dating, even in a “population of relatively progressive individuals”).

<sup>38</sup> See Wendy Wang, *Interracial Marriage: Who Is ‘Marrying Out’?*, PEW RES. CTR. (June 12, 2015), <http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/> (finding that in 2013, seven percent of whites married spouses of a different race, as compared to nineteen percent of blacks, twenty-eight percent of Asians, and fifty-eight percent of American Indians).

<sup>39</sup> *Id.*

<sup>40</sup> Martin, *supra* note 34, at B7.

<sup>41</sup> Three early cases rejected the argument that bans on same-sex marriage were analogous to bans on interracial marriage. See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (rejecting argument that same-sex marriage ban violated the Federal Constitution); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (same), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. 1974) (rejecting analogy to *Loving* because same-sex couples are “being denied entry into the marriage relationship because of the recognized definition of that relationship”). On the history through 2010, see JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 142–55 (2011).

stage for the legalization of same-sex marriage in that state.<sup>42</sup> In *Baehr*, the court read *Loving* to reject any argument rooted in religious mandates and dismissed the idea that the “Deity had deemed such a union intrinsically unnatural.”<sup>43</sup> The Virginia trial court had indeed justified its ruling on religious grounds, explaining the long sentence given to the Lovings in these terms:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>44</sup>

But in the Hawaii court’s view, the Supreme Court’s reversal of the conviction also signified a repudiation of this reasoning. The Hawaii Supreme Court wrote that “we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.”<sup>45</sup>

*Baehr* was the public debut of the so-called “*Loving* analogy.” One of *Loving*’s significant contributions to the marriage equality fight, though, was its rejection of the equal application justification for discrimination. In *Baehr*, plaintiffs had argued that a ban on marriage by same-sex couples constituted sex discrimination because men were not allowed to marry men, but women were; and women were not allowed to marry women, but men were.<sup>46</sup> Classic sex discrimination. The Hawaii court agreed, citing *Loving* for support. The Supreme Court in *Loving* had refused to accept the argument that the Virginia law was nondiscriminatory because both blacks and whites were restricted in their choice of marital partners. Substitute sex for race, the *Baehr* court reasoned, to yield “the precise case before us together with the conclusion that we have reached.”<sup>47</sup> A ban on marriage by same-sex couples is sex discrimination, plain and simple, the court concluded. And, under the Hawaii constitution, sex-based classifications merit strict scrutiny.<sup>48</sup>

The ruling in *Baehr* loomed large over the country, as people began to hope or fear that when same-sex couples could marry in Hawaii—which seemed inevitable after the state high court’s ruling, but ultimately never materialized—they would flood to other states and demand recognition of

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<sup>42</sup> 852 P.2d 44 (Haw. 1993).

<sup>43</sup> *Id.* at 63.

<sup>44</sup> *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting the trial court).

<sup>45</sup> *Baehr*, 852 P.2d at 63.

<sup>46</sup> *See id.* at 50.

<sup>47</sup> *Id.* at 68.

<sup>48</sup> *Id.* at 63–64.

their unions. *Baehr* catalyzed legislators and voters to mobilize in their opposition to marriage equality. Congress soon would enact the Defense of Marriage Act (DOMA), which would refuse recognition to same-sex marriages for any federal-law purpose, and more than forty states followed with mini-DOMAs enshrined in their state codebooks, constitutions, or both.<sup>49</sup>

In the two decades following *Baehr*, marriage equality was litigated everywhere and at every level. In those cases, *Loving* played many roles. There were cases that wrestled with the “equal application” argument, as the court did in *Baehr*, but the results were mixed.<sup>50</sup> Perhaps more significantly, *Loving*’s bigger legacy was litigated—how broad was the right to marry? Despite the Court’s rulings in *Zablocki*<sup>51</sup> and *Turner*,<sup>52</sup> which made clear that even restrictions without a racial component might violate the right to marry, some courts clung to the racial narrative in refusing to recognize a right of same-sex couples to marry. The New Jersey Supreme Court, for example, rejected the same-sex plaintiffs’ reliance on *Loving* because “the heart of the case was invidious discrimination based on race” and the holding was premised on the “fact-specific background of that case, which dealt with intolerable racial distinctions.”<sup>53</sup> The Vermont Supreme Court refused to see the same “institutionalized racism” in the exclusion of same-sex couples as it saw in the exclusion of interracial couples.<sup>54</sup> Heteronormativity just doesn’t resonate the way white supremacy does, perhaps. Courts were also cautious about getting too far ahead of legislative and public opinion. Miscegenation bans were deeply on the decline by 1967, while same-sex couples were prohibited from marrying in every state. This argument of course lost some sway as states began to legalize same-sex marriage, beginning with Massachusetts in 2004; Connecticut in 2008; Iowa, Vermont, New Hampshire and the District of Columbia in 2009; and then a cascade of states from 2011 to 2015.<sup>55</sup> Although each development on the way to marriage equality for

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<sup>49</sup> See Defense of Marriage Act, Pub. L. No. 104–199, 119 Stat. 2419 (1996). On related developments, see GROSSMAN & FRIEDMAN, *supra* note 41, at 147–49.

<sup>50</sup> Compare, e.g., *Andersen v. King County*, 138 P.3d 963, 989 (Wash. 2006) (holding that the ban on same-sex marriage creates an illegal sex-based classification) with *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451 (Ariz. 2003) (same).

<sup>51</sup> 434 U.S. 374, 387–91 (1978) (striking down a Wisconsin statute which mandated that individuals with court-ordered child support obligations could not get married without court approval).

<sup>52</sup> 482 U.S. 78, 97–100 (1987) (striking down a Missouri statute which prohibited inmates from marrying each other or civilians without approval from the prison superintendent).

<sup>53</sup> *Lewis v. Harris*, 908 A.2d 196, 210 (N.J. 2006).

<sup>54</sup> *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999).

<sup>55</sup> On the developments in chronological order, see *Gay Marriage Timeline*, PEW RES. CTR. (Apr. 1, 2008), <http://www.pewforum.org/2008/04/01/gay-marriage-timeline/>.



same-sex couples was riveting in real time, their significance in the historical narrative is eclipsed by the two cases that ended the fight, *United States v. Windsor*<sup>56</sup> and *Obergefell v. Hodges*.<sup>57</sup>

In *Windsor*, the widow of a same-sex spouse, who had been married in Canada, sought (and won) a refund of estate taxes that would not have been owed had the federal government given effect to the couple's same-sex marriage.<sup>58</sup> Transfers to a legal spouse at death are exempted from the estate tax, but the IRS denied Windsor's request for a refund on the grounds that she was not a "surviving spouse" for estate tax purposes.<sup>59</sup> At the time, New York did not allow for the celebration of valid same-sex marriages, but it did give effect to those that were validly celebrated elsewhere.<sup>60</sup> Edith Windsor challenged the estate tax assessment on the ground that the federal-law provision of DOMA was unconstitutional. A federal district judge ruled in her favor, reasoning that Congress had no legitimate reason for refusing to recognize marriages based solely on the sexual orientation of the parties.<sup>61</sup> She ordered, without a stay of the judgment, that the Internal Revenue Service refund over \$350,000 to the decedent spouse's estate.<sup>62</sup>

The ruling was appealed to the Second Circuit, but before a decision came from that court, both parties petitioned for certiorari before judgment, asking the Supreme Court to take the case immediately.<sup>63</sup> While the petition was pending, the Second Circuit issued its ruling.<sup>64</sup> It affirmed the trial court's ruling in favor of the plaintiffs, holding that sexual orientation classifications merit heightened scrutiny and that the government did not have sufficiently good reasons for this one.<sup>65</sup>

The question presented by the petitioner to the Supreme Court was this: "Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State."<sup>66</sup> In its order granting review, the Supreme Court asked the parties to brief and argue not

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<sup>56</sup> 133 S. Ct. 2675 (2013) (finding that DOMA's definition of marriage unconstitutional).

<sup>57</sup> 135 S. Ct. 2584, 2588 (2015) (finding that same-sex marriage is a constitutionally protected right).

<sup>58</sup> 133 S. Ct. at 2682.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2683. Subsequently, the New York legislature passed a law to legalize same-sex marriage. See Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws 749 (McKinney).

<sup>61</sup> *Windsor v. United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012) ("With no other rational basis to support it, Congress's interest in economy does not suffice.").

<sup>62</sup> *Id.*

<sup>63</sup> *Windsor*, 135 S. Ct. at 2684.

<sup>64</sup> *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

<sup>65</sup> *Id.* at 181–88.

<sup>66</sup> Petition for a Writ of Certiorari Before Judgment, *United States v. Windsor*, No. 12-307, 2012 WL 3991414 (Sept. 11, 2012).

only the question presented, but also the question whether the Bipartisan Legal Advisory Group, which stepped in when the Department of Justice ceased defending DOMA in court because of its determination that the provision was unconstitutional, had standing to defend DOMA in court.<sup>67</sup> In the opinion on the merits, the Supreme Court invalidated the federal-law provision of the Defense of Marriage Act on equal protection grounds.<sup>68</sup> *Loving* was cited only once in *Windsor* for the very certain proposition that although marriage laws have “long been regarded as a virtually exclusive province of the States,” state laws defining and regulating marriage must conform to federal constitutional standards.<sup>69</sup> But this was offered not only as a truism that bears repeating, but also as a set up for the Court’s determination that Congress’s decision to categorically exempt one type of marriage from every type of benefit and obligation was inconsistent with its past behavior. Indeed, most federal laws and programs defer to state-law determinations of marital and parent-child status, even when allocating significant benefits and burdens, such as Social Security benefits and taxes. Given the federal government’s usual practices, its sudden refusal to give effect to one class of marriage for every purpose was a discrimination of an “unusual character” that raised an inference of animus, a motivation the Court had determined in a previous case was not sufficient to survive even the lowest form of judicial scrutiny.<sup>70</sup> The Court rejected Congress’s ostensible motivations for the law as either false or insufficient, and it struck the law down. Justice Scalia, in a strongly worded dissent, predicted that *Windsor* would certainly give way to a full-blown right of marriage equality.<sup>71</sup> Just two years later, his prediction came to pass.

As one might expect, *Loving* played a much more significant role in *Obergefell v. Hodges*, in which the scope of the constitutional right to marry, first recognized in *Loving*, was front and center. But the pathway from *Loving* to *Obergefell* included one very important stop: *Lawrence v. Texas*.<sup>72</sup> In that case, the Court held that a state law criminalizing same-sex sodomy ran afoul of the right of privacy protected in the substantive component of the Fourteenth Amendment’s Due Process Clause. Two men were arrested after the police, dispatched on a report of a weapons disturbance, encountered them in their apartment engaged in a sexual act.

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<sup>67</sup> United States v. Windsor, 133 S. Ct. 786, 787 (2012) (granting certiorari).

<sup>68</sup> United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

<sup>69</sup> *Id.* at 2691 (internal citation omitted).

<sup>70</sup> *Id.* at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

<sup>71</sup> The hand-wringing conclusion of his dissent expressed deep skepticism “that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here . . . . I promise you this: The only thing that will ‘confine’ the Court’s holding is its sense of what it can get away with.” *Id.* at 2709 (Scalia, J., dissenting).

<sup>72</sup> 539 U.S. 558 (2003).

They were convicted under a Texas law criminalizing “deviate sexual intercourse with another individual of the same sex.”<sup>73</sup> By a 6–3 majority, the Court, in a majority opinion authored by Justice Anthony Kennedy, invalidated the law—and all anti-sodomy laws, even those that apply to both same-sex and opposite-sex couples. The Court never expressly labeled the conduct at issue a “fundamental” right, but it spoke in language we associate with such rights. It wrote broadly about a sphere of privacy broad enough to include choices about intimate relationships and physical expressions that arose from them. Two aspects of *Lawrence* were essential in paving the way for the *Obergefell* opinion thirteen years later. First was the Court’s discussion of fundamental rights analysis, in which it observed that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>74</sup> This would have obvious implications in the marriage equality context when arguing for recognition of a right that, in that particular iteration, had never before been granted. Second, the Court dispensed with the notion that moral disapproval, without more, could constitutionally justify the state’s infringement of an important liberty interest.<sup>75</sup> This would also be important in the later battle, particularly as the standard governmental defenses of same-sex marriage bans seemed to get less and less traction in court.

James Obergefell and John Arthur, a gay couple who had been together for over two decades, made only a modest request of their home state of Ohio. They wanted their marriage to be acknowledged on Arthur’s death certificate. Arthur was suffering with end-stage ALS (Lou Gehrig’s Disease), a progressive and fatal illness, but the couple wanted to marry before he died. They flew from Ohio, which did not allow same-sex couples to marry, to Maryland, which did, on a medical transport plane. Because it was too difficult to move Arthur given his debilitating illness, the marriage was solemnized in a ceremony on the plane as it sat on the tarmac. Arthur died, as expected, just three months later.<sup>76</sup> Ohio law did not permit recognition of a marriage by a same-sex couple for any reason, including for vital statistics records. Obergefell sued, arguing that Ohio’s refusal to give effect to a validly celebrated marriage from Maryland violated his equal protection and due process rights under the Federal Constitution. A federal district court sided with Obergefell, ordering Ohio

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<sup>73</sup> *Id.* at 563.

<sup>74</sup> *Id.* at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

<sup>75</sup> *Id.* at 559 (stating that “this Court’s obligation is to define the liberty of all, not to mandate its own moral code”).

<sup>76</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–95 (2015).

to record Arthur's status at death as "married."<sup>77</sup> But the U.S. Court of Appeals for the Sixth Circuit reversed, reasoning that the decision whether to allow or disallow marriages by same-sex couples was reserved to the states.<sup>78</sup>

The appellate court reversed all trial court rulings in cases from other states within its jurisdiction. It found no constitutional problem with a Michigan law that prevented a lesbian couple from jointly adopting a special needs child because their out-of-state marriage could not be recognized there.<sup>79</sup> Nor with Tennessee's refusal to recognize the valid New York marriage of an Army reservist who settled there with his husband after a year's deployment to Afghanistan.<sup>80</sup> Nor, finally, with the denial of a marriage license to a Kentucky couple with thirty-one years under their relationship belt and two teenage children.<sup>81</sup> These cases involved sixteen couples (two with only a surviving partner) who had been denied either the right to marry in a state within the Sixth Circuit, or the right to have an out-of-state marriage recognized, or both. Although the Sixth Circuit reversed all the district court rulings in its jurisdictions, every other federal appellate court facing a similar challenge did the opposite—they struck down state bans on the celebration and recognition of same-sex marriage.<sup>82</sup>

At stake in *Obergefell* was the constitutional validity of the bans all over the country that denied same-sex couples the right to marry and the right to have otherwise valid marriages recognized. The Court looked to *Loving* as the Court's first and clearest statement that "the right to marry is protected by the Constitution"<sup>83</sup>—indeed, in the *Loving* Court's words, marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>84</sup> It then looked to *Loving* as one of the more "instructive precedents" that allowed the Court to sidestep *Baker v. Nelson*, where, in 1972, it had dismissed the writ of certiorari in a same-sex marriage case "for want of a substantial federal question."<sup>85</sup> *Baker* had lurked in the background of marriage equality litigation, perhaps standing for the proposition that the Supreme Court had already ruled on the merits of the question presented in *Obergefell*. But the Court this time around was

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<sup>77</sup> *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013).

<sup>78</sup> *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014).

<sup>79</sup> *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014).

<sup>80</sup> *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014).

<sup>81</sup> *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014).

<sup>82</sup> See *Kitchen v. Herbert*, 755 F.3d 119 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

<sup>83</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

<sup>84</sup> *Id.* (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

<sup>85</sup> 409 U.S. 810, 810 (1972).

dismissive of *Baker* as one of the “assumptions defined by the world and time of which it is a part.”<sup>86</sup> *Baker* was contrasted with *Loving*, which “identified essential attributes of [the right to marry] based in history, tradition, and other constitutional liberties inherent in this intimate bond.”<sup>87</sup> It helped the Court understand *why* the right to marry is protected in the first place. *Loving*, according to the *Obergefell* court, established the “abiding connection between marriage and liberty.”<sup>88</sup> “[D]ecisions concerning marriage are among the most intimate that an individual can make.”<sup>89</sup> Moreover, *Loving* helped establish that the freedom to marry “resides with the individual” and that there is dignity in the bond between any two people as well as in the autonomy to “make such profound choices.”<sup>90</sup>

*Loving* was important to refuting a key argument by the State of Ohio, which was trying to defend its ban. Ohio suggested that the Court needed to engage in so-called *Glucksberg* analysis, the process for determining whether a new right is indeed fundamental and deserving of constitutional protection.<sup>91</sup> This analysis was defined in *Washington v. Glucksberg*, a case in which the Court was asked to consider whether individuals have a right to physician-assisted suicide.<sup>92</sup> But the *Obergefell* Court beat back this suggestion, concluding that the plaintiffs were not seeking recognition of a new right any more than the plaintiffs in *Loving* were seeking a new “right to interracial marriage.”<sup>93</sup> In 1967 and in 2015, the question was whether there was “sufficient justification for excluding the relevant class” from an already-established right.<sup>94</sup>

Finally, *Loving* was relevant to the *Obergefell* Court’s understanding of the interconnected relationship between the Equal Protection and Due Process Clauses. The *Loving* Court could have stopped its opinion after invalidating Virginia’s miscegenation ban on equal protection grounds. But it continued with a full and independent analysis of the law’s validity under the Due Process Clause, a move that arguably led to the robust protection for the right to marry that would follow.<sup>95</sup> With both liberty and equality at

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<sup>86</sup> *Obergefell*, 135 S. Ct. at 2598.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2599.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 2602 (“[R]espondents refer to *Washington v. Glucksberg* . . . which called for a ‘careful description’ of fundamental rights.” (citation omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997))).

<sup>92</sup> *Glucksberg*, 521 U.S. at 704–05.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See id.* at 2603–05 (discussing the important implications of the *Loving* Court’s due process analysis).

stake, the right to marry must be jealously guarded.

In the end, the *Obergefell* Court held that states cannot deny same-sex couples the right to marry without running afoul of the Fourteenth Amendment.<sup>96</sup> Almost fifty years after the ruling in *Loving v. Virginia*, and at a very different social time, the opinion began broadly and poetically—or language better reserved, as Justice Scalia suggested in a biting dissent, for a fortune cookie. “The Constitution,” it opened, “promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>97</sup> This sentence left no mystery as to the outcome of the case and established the tone and substance of the opinion that followed.

Thus, Justice Kennedy did for gay couples what Chief Justice Warren did for interracial couples: He recognized their humanity and their right, rooted in liberty and equality, to partake in this most essential of institutions. He let the rainbow loving begin.

The pathway from *Loving* to *Obergefell* is indisputable, but *Loving* did more than just open the door to marriage equality. Prior to *Loving*, there were only a handful of cases, mostly involving attempted intrusions into parental autonomy, in which the Supreme Court considered overriding a state law regarding family status or operation based on constitutional constraints.<sup>98</sup> But the body of constitutional family law grew dramatically beginning in the 1970s, an arc triggered in part by the Supreme Court’s intervention into Virginia marriage law in *Loving*. According to Professor Pamela Karlan, “*Loving* is seen today as a critical point in the revival of substantive due process.”<sup>99</sup> The number of specific rights recognized as falling within that sphere increased significantly in the two decades after *Loving* was decided.<sup>100</sup>

## CONCLUSION

There is now a lengthy patchwork of cases cited for the principle that individuals have “the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy,”<sup>101</sup> and *Loving*

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<sup>96</sup> *Id.* at 2604–05.

<sup>97</sup> *Id.* at 2593.

<sup>98</sup> *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (affirming, against Fourteenth Amendment challenge, a parent’s conviction for violating child labor laws by using a child to distribute religious pamphlets); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating, on due process grounds, a statute that banned the teaching of foreign languages to children who had not passed the eighth grade).

<sup>99</sup> Pamela S. Karlan, *Foreword: Loving* *Lawrence*, 102 MICH. L. REV. 1447, 1463 n.7 (2004).

<sup>100</sup> *See id.* at 1456 (“The Court’s decisions in *Griswold*, *Eisenstadt v. Baird*, and *Roe* had dramatically expanded constitutionally protected autonomy.”).

<sup>101</sup> *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1055 (1987) (denying certiorari) (Marshall, J., dissenting) (citing, for example, *Loving*, *Zablocki*, *Skinner v. Oklahoma*, *Meyer*,

is virtually always amongst those cited. *Loving* thus provides support for the right to *not* marry as well as the right to marry, and the related rights to make decisions over a “broad range of private choices involving family life and personal autonomy.”<sup>102</sup> The Supreme Court includes *Loving* among the litany of cases collectively establishing the contours of the right to privacy: “Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.”<sup>103</sup>

Perhaps the Supreme Court has closed the loop now on fundamental rights. The future is impossible to predict. But the past is the past, and we know the role that *Loving* played in shaping it. Objections to marriages of same-sex couples were as strong, if not stronger, than those of interracial couples. Whether the objections spoke of robins and sparrows, or strange metaphors about the length of golf putters, they were deeply held and hard fought. But in both cases, the arc of history bent towards justice—and marriage equality for all. The Obergefell marriage lasted only a short time, but it will play a lasting role in history, just as the Loving marriage did.

As Jim Obergefell wrote on the day the decision was handed down, “[m]y husband John died 20 months ago, so we’re unable to celebrate together the Supreme Court’s decision on the case that bears my name, *Obergefell v. Hodges*. . . . America has taken one more step toward the promise of equality enshrined in our Constitution, and I’m humbled to be part of that.”<sup>104</sup>

*Moore, Pierce*, etc., to invalidate a public employer’s prohibition on unmarried employees’ living together in an intimate relationship).

<sup>102</sup> *Whisenhunt v. Spradlin*, 464 U.S. 965 (1983) (denying certiorari) (Brennan, J., dissenting) (considering validity of police department’s antinepotism policy as applied to a nonmarried couple); see also Robert A. Destro, *Introduction: Law and the Politics of Marriage: Loving v. Virginia After 30 Years*, 47 CATH. U. L. REV. 1207, 1218 (1998) (noting *Loving*’s support for “federal oversight of State power to define, regulate, and order sexual, marital, and family relationships”).

<sup>103</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citation omitted) (invalidating a Mississippi statute requiring a woman to prepay record preparation fees in order to appeal an order terminating her parental rights). *Loving* is cited in many pivotal privacy cases. See *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (upholding conclusive presumption of husband’s paternity over constitutional challenge from child’s biological father); *Harris v. McRae*, 448 U.S. 297, 312 n.18 (1980) (refusing to extend the right to privacy to include a right to Medicaid reimbursement for a medically necessary abortion); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977) (striking down New York ban on distribution of non-prescription contraceptives); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (invalidating zoning ordinance that distinguished between nuclear and non-nuclear families for purposes of residential restrictions).

<sup>104</sup> Jim Obergefell, *My Husband*, MEDIUM (June 26, 2015), <https://medium.com/@ObamaWhiteHouse/my-husband-69362c9d63df#.kf4nmsvhv>.