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Reading *DeBoer* and *Obergefell* through the "Moral Readings Versus Originalisms". Debate: from Constitutional "Empty Cupboards" to Evolving Understandings*

Leer Deboer *y* Obergefell *a través del debate entre "lecturas morales versus originalismos": de los cajones vacíos a los entendimientos evolutivos*

Linda C. McClain**

Resumen:

Este ensayo examina el debate sobre las aproximaciones de la "lectura moral" y "originalista" a la interpretación constitucional, tal y como fue caracterizado por James E. Fleming en *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalism* (2015), al evaluar la reciente y trascendente controversia constitucional en los Estados Unidos de América acerca del acceso de las parejas de un mismo sexo al matrimonio civil. El ministro Kennedy en la histórica decisión de la mayoría en *Obergefell v. Hodges* (2015), la cual afirmó que tales parejas tienen un derecho

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** Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law; Laurance S. Rockefeller Visiting Faculty Fellow, University Center for Human Values, Princeton University. This essay is a revised version of a paper prepared for the conference, "Law and Constitutional Interpretation: Moral Readings versus Originalisms", held at Universidad Nacional Autónoma de México (UNAM) on February 16-17, 2015, in Mexico City. My thanks to Imer Flores for inviting me to participate in that conference and to participants for helpful comments. The analysis in Part III draws upon my portion of the Constitution Day lecture that James E. Fleming and I delivered at University of Missouri (Columbia) on September 17, 2015. My research assistants Gina Del Rio Gazzo and Samantha Maurer provided valuable help on this project. Thanks also to James Fleming for comments. A Boston University summer research grant supported this project. This essay previously appeared in a book symposium in 31 Constitutional Commentary (2016).

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fundamental para contraer matrimonio, empleó una "lectura moral" para enfatizar los entendimientos evolutivos de las garantías constitucionales de igualdad, la "promesa de la libertad", y la institución del matrimonio. En contraste con la minoría, la mayoría rechazó una lectura estática y estrecha del derecho fundamental a casarse —o a contraer matrimonio— y el rol de la "perspectiva" y del progreso generacional. El entendimiento evolutivo jugó un papel similar en *Goodridge v. Department of Public Health* (2013), la cual proporcionó una base para el rechazo de Kennedy al originalismo estrecho enfocado solamente en las prácticas históricas o la intención original. Tales lecturas morales de la Constitución han jugado un papel significativo en la confección de la enmienda décimocuarta (en palabras de la ministra Ginsburg) para que cada vez sea menos "un cajón vacío" para gays y lesbianas; asimismo, ha jugado un papel en hacerlo menos vacío en el contexto de la igualdad de género.

Este ensayo demuestra cómo el contraste de las aproximaciones de las opiniones mayoritaria y minoritaria en *DeBoer v. Snyder* (revertida por *Obergefell*) adelantaron la batalla interpretativa en *Obergefell* entre la mayoría y la minoría, pero con los lados invertidos. Entonces, observa que, en tanto que algunos juristas ofrecieron, en los *amicus* presentados en *Obergefell,* argumentos originalistas a favor del matrimonio de personas del mismo sexo, esos argumentos no persuadieron a ningún académico originalista ni a la minoría en *Obergefell*.

Palabras clave:

Interpretación constitucional, debido proceso, igual protección, enmienda décimocuarta, derechos LGBT, matrimonio, lectura moral, *Obergefell v. Hodges*, significado original, entendimiento original, matrimonio de personas del mismo sexo, igualdad sexual.

Abstract:

This essay assesses the debate over "moral reading" and "originalist" approaches to constitutional interpretation, as elaborated in James E. Fleming, Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalism (2015), by evaluating the recent, momentous constitutional controversy in the United Sates of America over access by same-sex couples to civil marriage. Justice Kennedy's landmark majority opinion in Obergefell v. Hodges (2015), which held that such couples have a fundamental right to marry, employed a "moral reading" in emphasizing evolving understandings of constitutional guarantees of equality, the "promise of liberty" and the institu-

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tion of marriage. By contrast to the dissenters, the majority rejected a static, narrow reading of the fundamental right to marry —and marriage— and stressed the role "insight" and generational progress. Evolving understanding played a similar role in Goodridge v. Department of Public Health (2013), which provided a template for Kennedy's rejection of a narrow originalism focused only on historical practices or original intent. Such moral readings of the Constitution have played a significant role in making the Fourteenth Amendment less of (in Justice Ginsburg's words) an "empty cupboard" for gay men and lesbians, just as they have played a role in making it less empty in the context of sex equality.

This essay demonstrates how the contrasting approaches to interpretation in the majority and dissenting opinions in DeBoer v. Snyder (reversed by Obergefell) previewed the interpretive battle between the Obergefell majority and dissents, but with the sides reversed. It then observes that, while some legal scholars offered, in amicus briefs filed in Obergefell, originalist arguments for same-sex marriage, such arguments persuaded neither other originalist scholars nor the Obergefell dissenters.

Keywords:

Constitutional interpretation, due process, equal protection, fourteenth amendment, LGBT rights, marriage, moral reading, Obergefell V. Hodges, original meaning, original understanding, same-sex marriage, sex equality.

Original meaning... When two individuals sign a contract to sell a house, no one thinks that, years down the road, one party to the contract may change the terms of the deal. That is why the parties put the agreement in writing and signed it publicly —to prevent changed perceptions and needs from changing the guarantees in the agreement. So it normally goes with the Constitution: The written charter cements the limitations on government into an unbending bulwark, not a vane alterable whenever alterations occur— unless and until the people, like contracting parties, choose to change the contract through the agreed-upon mechanisms for doing so [Article V].

...Applied here, this approach permits today's marriage laws to stand until the democratic processes say they should stand no

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> more. From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way.

– *DeBoer v. Snyder*, 772 F. 3d 388, 403-04 (6th Cir. 2014) (Sutton, Jeffrey, Circuit Judge)

> The majority's "original meaning" analysis …can tell us little about the Fourteenth Amendment, except to assure us that "the people who adopted the Fourteenth Amendment [never] understood it to require the States to change the definition of marriage". The quick answer is that they undoubtedly did not understand that it would also require school desegregation in 1955 or the end of miscegenation laws across the country, beginning in California in 1948 and culminating in the *Loving* decision in 1967…
>
> Moreover, …[t]here is not now and never has been a universally accepted definition of marriage… When Justice Alito noted in *Windsor* that the opponents of DOMA were "implicitly ask[ing] us to endorse [a more expansive definition of marriage and] to reject the traditional view, *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting), he may have been unfamiliar with all that the "traditional view" entailed, especially for women who were subjected to coverture as a result of Anglo-American common law. Fourteenth Amendment cases decided by the Supreme Court in the years since 1971 that "invalidat[ed] various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage". Latta [v. Otter], 771 F.3d 456, 487 [9th Cir. 2014] (Berzon, J., concurring).

– *DeBoer v. Snyder,* 772 F. 3d at 431-32 (Daughtrey, Martha Craig, Circuit Judge, dissenting)

History really matters in *Obergefell v. Hodges* … History, like the Constitution, can be read in more than one way.

– Nancy F. Cott, Which History in *Obergefell v. Hodges*?, Perspectives on History (July, 2015)

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I. INTRODUCTION

What's in a name? Why do labels such as "moral reader" or "originalist" matter? The title of the conference that generated this published symposium suggests one context in which such labels matter: constitutional interpretation.[1] We must consider the merits, it implies, of two approaches in evident tension with each other: "moral readings versus originalisms." As the judicial statements quoted above indicate, this interpretive choice mattered for a practical and momentous constitutional controversy that recently riveted the attention of scholars, judges, legislators, and the public: what would the United States Supreme Court do when it considered *DeBoer v. Snyder*,[2] the Sixth Circuit case in which Judge Sutton's majority opinion created a circuit split —disagreeing with the Fourth, Seventh, Ninth, and Tenth Circuits— by upholding statutes and constitutional amendments in four states (Kentucky, Michigan, Ohio, and Tennessee) that excluded same-sex couples from civil marriage and barred recognition of their valid out-of-state marriages. On January 16, 2015, the Supreme Court granted the petition for certiorari in that case. Amicus curiae (friends of the court) filed a record number (147) of amicus curiae briefs in the case,[3] proffering many different

[1] The conference, held at Universidad Nacional Autónoma de México on February 16-17, 2015, was entitled "Law and Constitutional Interpretation: Moral Readings versus Originalisms".

[2] DeBoer v. Snyder, 772 F. 3d 388 (6th Cir. 2014) (reversing lower federal court rulings that the state statutes and constitutional amendments in Michigan, Kentucky, Ohio, and Tennessee violated the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment). *DeBoer* was overruled by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[3] Adam Liptak, 'Want to Be the Court's Friend? It's a Lot of Work', *N. Y. Times* (New York 8 March 2016) A18 (reporting on statistics kept by Anthony J. Franze and

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constitutional pathways to reversing or affirming the Sixth Circuit. On June 26, 2015, in *Obergerfell v. Hodges*, the Court did reverse, issuing its landmark holding that "same-sex couples may exercise the fundamental right to marry" and that the state laws at issue were invalid "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples".[4]

As historian Nancy Cott observed, "history really matter[ed]" in Justice Kennedy's landmark majority opinion, specifically, the history of the institution of marriage and how it has "changed over time to admit new understandings of liberty and equality" as well as "the history of condemnation and criminalization of same-sex intimacy until recent decades".[5] History also mattered in the various dissenting opinions, for, as Cott observed, "more than one version of the history of marriage [was] operating".[6] Chief Justice Roberts asserted that marriage is an "'unvarying social institution'" and invoked the "singular understanding of marriage [that] has prevailed in the United States throughout our history".[7] Dissenting Justice Scalia insisted that "*the People's* understanding" —"when the Fourteenth Amendment was ratified in 1868"— that states did and could (constitutionally) limit marriage to one man and one woman "resolves these cases".[8]

In this essay, I will argue that Justice Kennedy's landmark majority opinion in *Obergefell* crucially deployed two forms of evolving understanding —of constitutional guarantees of equality and the "promise of liberty" as well as of the institution of marriage—. Those two forms of evolution worked together in his opinion to reject a static notion either of the fundamental right to marry or of

R. Reeves Anderson, lawyers at Arnold & Porter). The party and amicus briefs are available at http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/.

[4] *Obergefell,* 135 S. Ct. 2604-05.

[5] Nancy F. Cott, 'Which History in Obergefell v. Hodges?' (*Perspectives on History* Summer 2015), https://www.historians.org/publications-and-directories/perspectives-on-history/summer-2015/which-history-in-obergefell-v-hodges (describing role played in majority opinion by friends of the court briefs filed by historians) accessed [date].

[6] *Idem*.

[7] *Obergefell,* 135 S. Ct. 2613, 2622 (Roberts, C.J., dissenting).

[8] *Ibid.* 2627-28 (Scalia, J., dissenting).

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marriage itself. This approach to constitutional reasoning exemplifies the "moral reading" approach articulated in James E. Fleming's recent book, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalism*.[9] As Fleming explains: "Moral readers accept our responsibility not to retreat from interpreting the Constitution so as to fulfill the promise of our commitments to abstract aspirational principles such as liberty and equality —not to retreat to originalism".[10] Such an approach, evident in Justice Kennedy's prior landmark LGBT rights decisions, such as *Lawrence v. Texas,*[11] stresses the role of "insight" and of generational progress in coming to see "that laws once thought necessary and proper in fact serve only to oppress".[12] In *Obergefell,* as elaborated below, two such examples concern the repudiation of the laws of coverture and sex-based classifications perpetuating gender hierarchy within marriage and of laws barring interracial marriage.

Previewing the interpretive battle between the *Obergefell* majority and the dissents (but with the sides reversed), in *DeBoer v. Snyder* Judge Sutton (writing the majority opinion) and Judge Daughtrey (in dissent) took sharply contrasting views of the relevance of "original meaning" with respect to the definition of marriage and the Fourteenth Amendment. These two judges' contrasting approaches to marriage —whether universal and (until recently) unchanging or evolving in light of constitutional norms of equality— are of particular interest for the evident conflict between moral readings and originalisms. Judge Sutton's analysis of "original meaning," for example, drew critiques by some legal scholars who contended that there were originalist arguments *for* same-sex marriage, such as a "principles-based originalism" that "leaves room for the possibility that we may learn from experience and systematic study that laws once thought necessary and proper serve only to needlessly oppress".[13]

[9] James E. Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms* (Oxford University Press 2015).

[10] *Ibid.* 191.

[11] 539 U.S. 558 (2003).

[12] *Ibid.* 578-579 (quoted in Fleming (n 9) 59, 191).

[13] Dale Carpenter, 'Inverted Equal Protection: Same-Sex Marriage at the Sixth Circuit (Part 1, Originalism)' (The Volokh Conspiracy 14 Nov. 2014) https://www.

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Indeed, two groups of prominent legal scholars filed amicus briefs in *Obergefell* enlisting the "original meaning" of the Fourteenth Amendment to oppose the restrictive marriage laws at issue,[14] spurring other originalist scholars to file an amicus brief contesting this approach to defining "original meaning" as pushing the term "originalist" so far that it "ceases to have any real meaning at all".[15]

Fleming's book went to press prior to *Obergefell*, but he noted the rise of "new" or "inclusive" originalist arguments for same-sex marriage, some growing out of new originalist justification for the Court's sex equality precedents.[16] He argued, however, that by "conceiving the relevant original meaning abstractly, rather than specifically", and by making arguments "about the evolving meaning" of commitment to "abstract evolving principles", such originalists "are engaging in moral readings", but without acknowledging that they are doing so.[17] This is a persuasive point, and at least some originalists would agree.[18] Perhaps these new originalists should join the moral reading big tent (as Fleming proposes),[19] rather than re-

washingtonpost.com/news/volokh-conspiracy/wp/2014/11/14/inverted-equal-protection-same-sex-marriage-at-the-sixth-circuit-part-I/ accessed [date].

[14] Brief of Amici Curiae Cato Institute, William N. Eskridge Jr., and Steven Calabresi in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 562, 571, 574) [hereinafter Cato Institute Brief]; Brief Amicus Curiae of Legal Scholars Stephen Clark, Andrew Koppelman, Sanford Levinson, Irina Manta, Erin Shelley and Ilya Somin, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 562, 571, 574) [hereinafter Legal Scholars Brief].

[15] Brief of Amici Curiae Scholars of Originalism in Support of Respondents, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 562, 571, 574) [hereinafter Scholars of Originalism Brief].

[16] Fleming *(*n 9) 16-19; *see also* William Baude, 'Is Originalism Our Law?'(2015) 115 Colum. L. Rev. 2349, 2383 n. 192 (noting that "many originalists did suggest that there were plausible originalist arguments in favor of the claimants' position" in *Obergefell* and listing examples).

[17] Fleming (n 9) 18-19.

[18] *See, e.g.*, Scholars of Originalism Brief, *(*n 15) 15 and discussion *infra* Part III.

[19] Fleming (n 9) 96 (countering resistance by "broad originalists" to the moral reading by arguing that "we should conceive the moral reading as a big tent that can encompass broad originalist conceptions such as those of Balkin and Ackerman").

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cruit others to a new, "inclusive" originalist big tent.[20] My primary interest in this essay, however, is not to adjudicate whether the new originalism is a defensible form of originalism, but instead to examine the respective roles of moral readings and originalism in *DeBoer* and then *Obergefell.* It is telling that (1) none of the conservatives justices —all of whom dissented— embraced the new originalism in *Obergefell* and that (2) although "meaning" and "understanding" feature centrally in Kennedy's majority opinion, they have less to do with fixed or "original" meaning or understanding than with evolving meaning and new understandings of constitutional guarantees and principles. An analysis of *Obergefell* (and, more broadly, the recent marriage equality litigation leading up to it) suggests that moral readings of the Constitution have played a significant role in making it less of (in Justice Ginsburg's words) an "empty cupboard" for gay men and lesbians, just as they have played a role in making it less empty in the context of sex equality claims.[21] As the Court's gender revolution in interpreting Equal Protection was unfolding, Ginsburg (then a pioneering litigator and scholar) insisted that: "Boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the Fourteenth Amendment's Equal Protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities".[22] Not surprisingly, in light of the long history of "empty-cupboard" jurisprudence and, for much of U. S. history, the

[20] Baude articulates an "inclusive originalism" and further contends that it is "our law," in terms of current constitutional practices. *See* Baude(n 16). For Fleming's critique of Baude, see Fleming (n 9) 15-19.

[21] Ruth Bader Ginsburg, 'Sexual Equality Under the Fourteenth and Equal Rights Amendments' 1979 Wash. U. L. Q. 161, 164.

[22] *Idem.* Some newer strands of originalism challenge Ginsburg's argument by advancing an account of "fidelity to the original public meaning" of the Fourteenth Amendment, under which reading that amendment's "anti-caste principle" in light of the Nineteenth Amendment leads "inexorably to the conclusion that the Fourteenth Amendment prohibits sex discrimination". *See* Steven G. Calabresi & Julia T. Rickert, 'Originalism and Sex Discrimination' (2011) 90 Tex. L. Rev. 1, 46 (drawing on Reva Siegel, 'She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family' (2001) 115 Harv. L. Rev. 947).

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absence of sex equality from the "constitutional canon",[23] feminist scholars are generally not among the ranks of originalists.[24] Nonetheless, even if the interpretive and historical projects in which new originalists are engaging may strain the label of "originalism", and may be better cast as forms of a moral reading of the Constitution, they are valuable in encouraging critical reflection upon how and why sex discrimination and sexual orientation discrimination were part of the historical practices in the United States but are now recognizably inconsistent with our constitutional commitments and aspirational principles.

In Part II, I analyze the majority and dissenting opinions in *DeBoer*, focusing on their competing approaches to the relevance of "original meaning" of the Fourteenth Amendment and to the definition and history of marriage. I argue that the dissent offers a more persuasive approach, in stressing the transformation of marriage and gradual elimination of discriminatory marriage laws. In characterizing this as a moral reading, I also highlight the role that a moral reading played in *Goodridge v. Department of Public Health*,[25] the Supreme Judicial Court of Massachusetts' pathbreaking opinion interpreting the Massachusetts constitution to require extending civil marriage to same-sex couples, which (as I elaborate in Part III) serves as a template for *Obergefell.* Part III first discusses new originalist arguments made in amicus briefs urging reversal of the Sixth Circuit, and counterarguments made in briefs challenging such use of originalism. I then observe the evident rejection of such new originalist approaches in the four dissents in *Obergefell*, which instead appealed to original meaning and understanding to conclude that state marriage laws survived challenge under the Fourteenth

[23] *See* Jill Elaine Hasday, 'Women's Exclusion from the Constitutional Canon' 2013 U. Ill. L. Rev. 1715.

[24] Notably, Mary Anne Case, who propounds a "feminist fundamentalism" theory of constitutional interpretation, reports that she had not given much thought to originalism until she "accepted the invitation from the Federalist Society to appear as the only woman with a speaking part" in their national symposium, Originalism 2.0. Mary Anne Case, 'The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism' (2014) 29 Const. Comm. 431.

[25] 798 N.E.2d 941 (Mass. 20003).

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Amendment. I argue that Justice Kennedy, writing for the majority, is best understood as offering a moral reading of the Constitution. Twin forms of evolution —of understanding constitutional guarantees and of the institution of marriage— animate his opinion. I argue that the similar treatment of those twin forms of evolution in *Goodridge* provided a template for Kennedy's opinion, as well as for his rejection of a narrow originalism that focuses on historical practices or original intent. History, for Kennedy (aided by friends of the court briefs filed by historians), was the beginning but not the end of the matter. In Part IV, I conclude.

II. *DeBoer v. Snyder*: "original meaning" or transformation of "tradition"?

In his majority opinion in *DeBoer v. Snyder*, Judge Sutton begins and ends with propositions about how "change" should occur "under the United States Constitution", contending that changing the definition of marriage to include same-sex couples should be left to "state democratic processes" rather than to federal judges.[26] I focus here on how forms of originalism shape Sutton's opinion, contrasting it with the dissenting Judge Daughtrey's emphatic rejection of such originalism.

1. *The Majority Opinion: "Original Meaning" Forbids a Construction Zone*

"Original meaning" features in the majority's approach both to interpreting the Fourteenth Amendment and to affirming the "traditional definition of marriage". Subsequently, as discussed in Part III, some of the *Obergefell* dissents would embrace similar approaches. As is evident in the passage quoted at the beginning of this essay, Judge Sutton contends that the original meaning of the Fourteenth

[26] DeBoer v. Snyder, 772 F.3d 388, 396 (6th Cir. 2014); *see ibid.* 420 ("This case ultimately presents *two* ways to think about change").

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Amendment was laid down at its ratification. Far from there being (to use terms in Fleming's book) a "construction zone" or any appropriate "building out" of constitutional principles such as liberty or equality,[27] the "originally understood meaning" is instead an "unbending bulwark", indeed, the "written charter cements" limits on government.[28] It is not a weather "vane," "alterable whenever alterations occur".[29] In other words, by contrast to certain forms of new originalism, there should be no "updating" in interpreting or applying "fixed" constitutional provisions (or principles) in light of new facts or changing social understandings.[30]

Sutton acknowledges that the "line between interpretation and evolution" in determining the "original meaning" of a constitutional provision "blurs from time to time"; after all, "the Fourteenth Amendment is old; the people ratified it in 1868", and "it is generally worded".[31] Nonetheless: "Nobody in this case... argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage".[32] Instead, Sutton continues by appealing to "tradition", noting the continuity in the definition of marriage in the states "[f]rom the founding of the Republic to 2003"[33] (the year of *Goodridge*). Consistent with this static view of traditional marriage, it is *Washington v. Glucksberg* that Sutton enlists in support of "the import of original meaning in

[27] Fleming (n 9) 33 (discussing Lawrence Solum's analysis of Balkin); *ibid.* 139-40 (discussing "living originalism as set out in Jack Balkin", *Living Originalism* (Harvard University Press 2011)).

[28] *DeBoer,* 772 F.3d at 403.

[29] *Iden.*

[30] By contrast to Judge Sutton, for example, Ilya Somin, who advances a sex discrimination argument for marriage equality, argues that originalist methodology is "entirely consistent with updating the application of [the Fourteenth Amendment's] fixed principles in light of new factual information", and such updating is "not only permitted but actually required by the theory." Ilya Somin, 'William Eskridge on Originalism and Same-Sex Marriage' (Volokh Conspiracy23 Jan. 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/23/william-eskridge-on-originalism-and-same-sex-marriage/ accessed [date]

[31] *DeBoer,* 772 F.3d. 403.

[32] *Idem.*

[33] *Ibidem.* 404.

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legal debates".[34] Strikingly absent here, as the dissent points out, is any attention to the tension between original meaning and the role of the Fourteenth Amendment in the subsequent transformation of certain features of marriage present in 1868 —such as coverture and antimiscegenation laws—.

The majority opinion sounds a theme familiar both from state and federal constitutional litigation over marriage equality and from legislative arguments in favor of constitutional amendments: until 2004, when due to *Goodridge*, marriage became available to same-sex couples in Massachusetts, marriage had a fixed and shared meaning. Not only does that meaning of marriage as "between a man and a woman" date back to "the founding",[35] Judge Sutton argues, it dates back "thousands of years".[36] Accepting as a rational basis for state marriage bans that states "might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries", he contrasts the comparatively shorter time line of the experiment with same-sex marriage:

> The fair question is whether in 2004, *one* year after *Goodridge*, Michigan voters could stand by the traditional definition of marriage. How can we say that the voters acted irrationally for sticking with the seen benefits of thousands of years of adherence to the traditional definition of marriage in the face of one year of experience with a new definition of marriage… A Burkean sense of caution does not violate the Fourteenth Amendment, least of all when measured by a timeline less than a dozen years long…[37]

Sutton asserts: "A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States".[38]

[34] *Ibid.* 403 (citing Washington v. Glucksberg, 521 U.S. 702, 710-19 (1997)).
[35] *Ibid.* 404.
[36] *Ibid.* 406.
[37] *Idem.*
[38] *Ibid.* 404.

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That view of marriage is, in effect, the by-now familiar "responsible procreation" or channelling argument offered as a rational basis for state marriage definitions that exclude same-sex couples. Although, in post-*Windsor* constitutional litigation, the other four circuit courts had rejected the responsible procreation argument, as does Judge Daughtrey in her dissent, Judge Sutton concludes it is one possible rational basis for the state laws under challenge. State marriage laws make sense, he asserts, if one starts with the premise that "governments got into… and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse", and to ensure parental investment in and commitment to "the natural effects of male-female intercourse: children". Notably, he finds that "[i]t is not society's laws or… any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative" for marriage and, thus, "governments typically are not second-guessed under the Constitution for prioritizing how they tackle such issues".[39]

Sutton's account of the familiar "channelling" argument about the origins of marriage appeals to history and nature, specifically, to assumed factual premises about the two sexes and gender complementarity. On this account, the state may rationally restrict marriage only to heterosexuals because only they may accidentally or unintentionally procreate and, thus, they particularly need the inducement of the many benefits linked to marriage to anchor their commitment to the children their sexual relations may produce. In contemporary marriage equality litigation, an early articulation of this channelling argument featured in Justice Cordy's dissent in *Goodridge v. Department of Public Health.*[40] It also features in Chief Justice Roberts' dissent in *Obergefell* (as discussed in Part III, below). Cordy advances, as I elaborate in other work, a conception of marriage as a social institution designed to solve a problem presented by nature, or evolution.[41]

[39] *Ibid.* 405.

[40] 798 N.E.2d 941, 983, 995-96 (Mass. 2003) (Cordy, J., dissenting).

[41] I have written about the channelling function and its role in marriage equality litigation in Linda C. McClain, 'Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law' (2007) 28 Cardozo L. Rev. 2133.

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Cordy drew on James Q. Wilson's *The Marriage Problem* (also cited by Roberts), which identified that evolutionary problem as the sexual and reproductive asymmetry of men and women in the state of nature and the need for a mechanism to anchor men to women and to children.[42] Even on the terms of this single purpose, a historical account of marriage, Judge Sutton fails to explain the logic of how excluding same-sex couples from marriage advances state purposes.[43]

Finally, the majority opinion's reliance on some form of originalism and rejection of a moral reading is also evident in its emphatic rejection of what it calls an "evolving meaning" approach to constitutional interpretation, which it understands to entail looking at "evolving moral and policy considerations".[44] Quoting the landmark sex equality case, *United States v. Virginia*, Judge Sutton acknowledges a conception of constitutional interpretation that moves toward better realization of aspirational principles: "'A prime part of the history of our Constitution… is the story of the extension of constitutional rights… to people once ignored or excluded'".[45] He observes that the Court has looked to "evolving moral and policy considerations before", so "Why not do so here?"[46] His answer is a curious account of constitutional evolution and "living constitutionalism". To wit: "[a] principled jurisprudence of constitutional evolution turns on evolution in *society's* values, not evolution in *judges'* values"; while "every generation has the right to govern itself", this means that until society has "moved past" certain principles, judges must not "anticipat[e] principles that society has yet to

[42] 798 N.E.2d 995-96 (citing James Q. Wilson, *The Marriage Problem* (Harper Collins 2002) 23-32); Obergefell v. Hodges, 135 S. Ct. 2584, 2613 (Roberts, C. J., dissenting) (citing Wilson). For analysis of Wilson and the role his work has played in marriage equality litigation, see Linda C. McClain, 'James Q. Wilsons's–and Society's–Marriage Problem' (2014) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2511229

[43] My aim here is not to criticize this argument, which, as I point out *infra*, Daughtrey does effectively, enlisting Judge Posner's trenchant critique in *Baskin v. Bogan.*

[44] *DeBoer,* 772 F.3d 416.

[45] *Ibid.* (quoting United States v. Virginia, 518 U.S. 515, 557 (1996)).

[46] *Idem.*

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embrace".[47] This conception of "living constitutionalism" entails that courts should not get ahead of "democratic majorities", who should be given judicial deference in "deciding within reasonable bounds when and whether to embrace an evolving, as opposed to settled, societal norm".[48] The court distinguishes *Lawrence*, where only a minority of states still had anti-sodomy laws, from the instant case, in which over thirty states would still bar same-sex marriage but for "federal-court intervention".[49] Rather than seeking vindication through "creation of a new constitutional right" as a way to remedy the "loss of... dignity and respect", plaintiffs, Judge Sutton argues, should turn to the actual source of this loss —"the neighborhoods and communities in which gay and lesbian couples live"; and such couples should work to forge a new community "consensus" there, thus "earn[ing] victories through initiatives and legislation and the greater acceptance that comes with them".[50] Urging that persuading a majority of citizens to "dignify and respect the rights of minority groups through majoritarian laws" is preferable to doing so "through decisions issued by a majority of Supreme Court Justices", the court adds: "Rights need not be countermajoritarian to count".[51] Sutton closes his opinion by returning to the themes of tradition and change: states —free from judicial intervention— must be allowed to decide whether to "expand a definition of marriage that until recently was universally followed going back to the earliest days of human history"; citizens will be "heroes of their own stories" if they resolve this issue outside of the courts.[52]

2. *Judge Daughtrey's Dissent: Debunking an "Original Meaning" Approach to the Fourteenth Amendment and Marriage*

Judge Sutton's static conception of marriage contrasts strikingly with the picture of marriage recounted in Judge Daughtrey's dissent,

[47] *Idem*.
[48] *Ibid.* 417.
[49] *Ibid.* 416.
[50] *Ibid.* 417.
[51] *Ibid.* 418.
[52] *Ibid.* 421.

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which identifies the problems with the appeal to "original meaning" as a way of resolving the federal constitutional challenge to restrictive state marriage laws. As we will see, this dissent has echoes in Justice Kennedy's majority opinion in *Obergefell*. As the passage quoted at the beginning of this essay indicates, Daughtrey counters Sutton's appeal to "original meaning" and his argument that "the people", in 1868, did not understand the Fourteenth Amendment to "require the States to change the definition of marriage" to permit same-sex couples to marry with the rejoinder that they also "undoubtedly did not understand that it would also require school desegregation in 1955 or the end of miscegenation laws across the country, beginning in California in 1948 and culminating in the *Loving* decision in 1967".[53] Here Daughtrey stresses the challenge of realizing the Constitution's commitments and stresses the role of courts in that realization: even after "a civil war, the end of slavery, and ratification of the Fourteenth Amendment in 1868, extensive litigation has been necessary to achieve even a modicum of constitutional protection from discrimination based on race, and it has occurred primarily by judicial decree, not by the democratic election process to which the majority suggests we should defer regarding discrimination based on sexual orientation".[54]

Daughtrey also challenges Sutton's picture of a universal and —until recently— unchanging definition of marriage: "there is not now and never has been a universally accepted definition of marriage". For starters, "even today, polygynous marriages outnumber monogamous ones".[55] Judge Posner makes this point emphatically in *Bogan v. Baskin*, observing that there is no acknowledgment of polygyny when the State of Wisconsin appeals to "the wonders of tradition" by referring to "thousands of years of collective experience" as establishing "traditional marriage, between one man and one woman, as optimal for the family, society, and civilization".[56] Daughtrey further observes that, in different historical periods and countries, mar-

[53] *Ibid.* 431 (Daughtrey, J., dissenting).

[54] *Idem.*

[55] *Idem.*

[56] Baskin v. Bogan, 766 F.3d 648, 667 (7th Cir. 2014).

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riage has been "about" many things, including religious obligation and political and economic arrangements.[57]

Historically, marriage was also "about" gender inequality, a dimension largely missing from Sutton's account. Daughtrey observes that (as quoted above) when Justice Alito noted in *Windsor* that the opponents of DOMA were "implicitly ask[ing] us to endorse [a more expansive definition of marriage and] to reject the traditional view", he "may have been unfamiliar with all that the 'traditional view' entailed, especially for women who were subjected to coverture as a result of Anglo-American common law".[58] Elaborating upon marriage's history as a "'profoundly unequal institution, one that imposed distinctly different rights and obligations on men and women'", Daughtrey quotes at length from Judge Barbara Berzon's concurring opinion in *Latta v. Otter*, in which Berzon argued that Idaho and Nevada's "same-sex marriage bans" were unconstitutional because "they are classifications on the basis of gender" that do not survive intermediate scrutiny under the Equal Protection Clause.[59] Daughtrey details the magnitude of this sex inequality within marriage to make a point about constitutional transformation and the limits of an appeal to "original meaning": "Fourteenth Amendment cases decided by the Supreme Court in the years since 1971 that 'invalidat[ed] various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage'".[60] The significance of 1971, of course, is that *Reed v. Reed*, decided that year, signaled the beginning of the Court's turning away from what Ruth Bader Ginsburg coined the "empty-cupboard interpretation of equal protection in relation to sex equality claims".[61] The significance of this constitutional transformation for purposes of appeals to the "traditional definition of marriage" is, as Berzon and Daughtrey argue, that marriage as

[57] *DeBoer*, 772 F.3d 431.

[58] *Ibid.* 432 (quoting United States v. Windsor, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting)).

[59] Latta v. Otter, 771 F.3d 456, 479 (9th Cir. 2014) (Berzon, J., concurring).

[60] *DeBoer,* 772 F.3d 432 (quoting *Latta,* 771 F.3d at 487 (Berzon, J., concurring)).

[61] Ginsburg(n 21) 167.

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an institution has undergone deep transformation. Daughtrey sums up: "The majority's admiration for 'traditional marriage' thus seems misplaced if not naive. The legal status has been through so many reforms that the marriage of same-sex couples constitutes merely the latest wave in a vast sea of change".[62]

While Sutton, like Cordy, posits an age-old purpose of regulating sex as the reason government got into the marriage business, Daughtrey and Berzon appeal to historians of the family, such as Nancy Cott, who show that the founders' political theory viewed marriage as a metaphor for consent by the governed (the wife freely consented to the husband's governance of the household).[63] As these jurists observe, the loss of women's civil capacity and identity was bound up in reciprocal, but complementary, gender roles.[64] As Cott and Linda Kerber elaborate, marriage performed important work because, within the family, wives gentled men and taught them manners and mothers cultivated virtue in their children.[65] Moreover, as Hendrik Hartog (another historian cited by Daughtrey and Berzon) elaborates, "the corollary of wife's obedience was husband's authority".[66] Further, "[i]mplicit in the idea of coverture was [an] image… of a wife as the possession of her husband, as [a] husband's property".[67] All of this gender work going on within the marital household is distinct from the "responsible procreation" argument that Sutton and others insist has always been the reason to

[62] *DeBoer,* 772 F.3d 434.

[63] Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press 1999) 9-16.

[64] *DeBoer*, 772 F.3d 432-33 (quoting *Latta*, 771 F.3d at 487 (Berzon, J., concurring) (citing Cott, *Public Vows* (n 63) and other sources)).

[65] Cott (n 63) 19-21; *see also* Linda Kerber, *Women of the Republic* (Institute of Early American History and Culture University of North Carolina 1980) 199-200. For further discussion of the family as a seedbed of civic virtue (despite sex inequality), see Linda C. McClain, The Place of Families: Fostering Capacity, Equality, and Responsibility (Harvard University Press 2006) 56-64.

[66] Hendrik Hartog, *Man and Wife in America: A History* (Harvard University Press 2000) 149-50.

[67] *Ibid.* 137. Daughtrey reproduces a passage from Judge Berzon's concurrence that cites Hartog on a husband's possessory interest in his wife. *DeBoer*, 773 F.3d 432-33 (quoting *Latta*, 771 F. 3d 488 (quoting Hartog, *supra* note 66, at 137)).

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regulate marriage. Certainly, the combination of criminal and marital law drew a sharp line between licit and illicit sex and between marital and nonmarital children. However, as Daughtrey points out, "although sex was strongly presumed to be an essential part of marriage, the ability to procreate was not".[68]

Daughtrey observes that Cott, an expert witness who testified on behalf of the plaintiffs in the trial in *DeBoer* concerning whether there were rational bases for Michigan's restrictive marriage laws, "explained how the concept of marriage and the roles of marriage partners have changed over time".[69] One example was the erosion of coverture and of "traditional gender-assigned roles"; another was that "interracial marriages are legal now that the antiquated, racist concept of preserving the purity of the white race has fallen into its rightful place of dishonor".[70]

Daughtrey also summarizes the holdings and reasoning of the four circuit courts that had (by then) struck down state marriage laws to show, in effect, the importance of a moral reading. In other words, over time, the Nation better realizes the Constitution's abstract commitments to liberty and equality and the aspirational principles entailed in those provisions. In *Bostic v. Schaefer*, for example, the Fourth Circuit read *Loving* to illustrate that "the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms".[71] The Fourth Circuit, Judge Daughtrey observes, pointed to the "principle" articulated by Justice Kennedy in *United States v. Windsor* —invoking *Loving* in support— that "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons".[72] *Loving* has been enormously significant in this post-*Windsor* jurisprudence as a vital precedent for the fundamental right to marry and for the argument that such a right must

[68] *DeBoer*, 773 F.3d 433.

[69] *Ibid.* 425.

[70] *Idem.*

[71] *Ibid.* 429 (citing Bostic v. Schaefer, 760 F.3d 352, 376 (4th Cir. 2014)).

[72] *Ibid.* (citing *Bostic*, 760 F.3d at 379 (quoting United States v. Windsor, 133 S. Ct. 2675, 2691 (2013))).

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not be read narrowly, but broadly to include the freedom to marry the person of one's choice (regardless of race or gender).[73]

To connect this to the sex discrimination argument for a constitutional challenge to the one man-one woman marriage definition, the entire edifice of domestic relations law rested on gender hierarchy, (subsequently) separate spheres ideology, and premises of gender ordering. A combination of state law reform and constitutional litigation (including the shift away from the "empty-cupboard" interpretation of the Equal Protection clause) has dismantled nearly all of that edifice. The one man-one woman definition, one may plausibly argue, is a vestige of coverture and the "sex-based legal rules once imbedded in the institution" and also reflects gender stereotyping because it related to the different, complementary roles or offices that husbands and wives were to perform as head of the household and obedient and dependent *feme covert.*[74]

3. *Goodridge as a Template for Dual Evolution and a Moral Reading*

Family law scholars and historians of marriage will find the conception of marriage as an evolving institution set out in Judge Daughtrey's dissent, in Judge Berzon's concurrence, and in other judicial opinions far more persuasive as a matter of history than Judge Sutton's (and, subsequently, than the opinions of the dissenting jus-

[73] *See, e. g., Bostic*, 760 F.3d 384 (concluding that excluding same-sex couples from marriage excludes them "from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance"); Latta v. Otter, 771 F.3d 456, 477-478 (Reinhardt, J., concurring) (citing *Loving* in rejecting a narrow definition of the right to marry that would confine it to those historically allowed to exercise it and embracing evolving interpretation of "liberty").

[74] *See Latta,* 771 F. 3d 490 (Berzon, B., J., concurring) (citing Baker v. State, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part)). It is beyond the scope of this Essay to discuss the many scholarly sources advancing this argument.

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tices in *Obergefell*),[75] just as moral readers will find it a better account of realization of aspirational principles and generational moral progress. If Justice Cordy's dissent in *Goodridge* provides an early template for a universally understood, not fundamentally changing conception of marriage (originating in channelling responsible procreation), then a template for the conception of marriage as an evolving institution, shaped by remedying injustices within it, features in Chief Justice Marshall's majority opinion in *Goodridge*. This pathbreaking opinion also warrants mention for paving the way for Justice Kennedy's *Obergefell* opinion, particularly in the way it uses history. Evolution away from race and sex discrimination in the law of marriage is part of this conception. Marshall looks to the "long history" in many states, including Massachusetts, during which "no lawful marriage was possible between black and white Americans", but observes that "long history" did not prevent, first, the California Supreme Court, and, subsequently, the U. S. Supreme Court to rule that such laws violated the Fourteenth Amendment.[76] So, too, in the case of the bar on same-sex marriage, Marshall argues, "history must yield to a more fully developed understanding of the invidious quality of the discrimination".[77]

Marshall offers a moral reading, quoting the very passage from *VMI* that Sutton invokes, to different effect: "The history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded'", evident in Supreme Court precedents striking down sex and race discrimination as contrary to Equal Protection.[78] Marshall finds that this is as true

[75] Such scholars have also contributed amicus briefs elaborating that evolution. *See* Cott (n 5) (discussing role of such briefs in *Obergefell*); Amici Curiae Brief of the Professors of the History of Marriage, Families, and the Law, Goodridge v. Dept. of Public Health, 798 N.E.32d 941 (Mass. 2003) (No. SCJ-08860), at 2 (arguing that: "allowing same-sex couples to participate as full citizens in the institution of marriage is not a radical change", but "the logical next step in this Court's long tradition of reforming marriage to fit the evolving nature of committed intimate relationships and the rights of the individuals in those relationships"). The author of this essay was a signatory to this brief filed in *Goodridge.*

[76] *Goodridge,* 798 N.E.2d 958.

[77] *Idem.*

[78] *Ibid.* 966.

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for "civil marriage" as for other areas of "civil rights," offering the demise of both antimiscegenation law and coverture as examples:

> As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm. The common law was exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband… But since at least the middle of the Nineteenth Century, both the courts and the legislature have acted to ameliorate the harshness of the common law regime... Alarms over the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no fault" divorce. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.[79]

In this passage, Marshall not only analogizes to prior forms of discriminatory marriage laws to situate the present challenge by same-sex couples, but also concludes that marriage as an institution has survived seeming challenges to the "natural" order of things and predicts that it will continue to do so.[80]

Finally, Marshall adopts a moral reading in declaring that the Court has authority to provide a remedy by "constru[ing] civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others". She explains that such a remedy is "entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards".[81] Concurring Justice Greaney expressly rejects an "original intent" approach to constitutional interpretation, indicating that "the provisions of our Constitution are, and must be, adaptable to changing circumstances and new social phenomena".[82]

[79] *Ibid.* 966-67.

[80] *Ibid.* 967. Concurring Justice Greaney invoked these changes in marriage law in making a sex discrimination argument against the one man-one woman definition. *Id*. at 970-74 (Greaney, J., concurring).

[81] *Ibid.* 969.

[82] *Ibid.* 974 n. 6 (Greaney, J., concurring) (disagreeing with dissenting Justice Cordy's argument that because "the people," when they revised the Massachusetts Constitution in 1976, did not intend it to be "relied upon to approve same-sex marriage," it cannot now be used to reach that result).

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III. "Moral readings versus originalisms" in *Obergefell*

In the wake of the circuit split created by *DeBoer*, and the Supreme Court granting certiorari, amici filed a record number of amicus curiae briefs.[83] These set forth many constitutional pathways for reversing or affirming the Sixth Circuit. Most pertinent for this essay are (1) those briefs filed by legal scholars enlisting originalism either to strike down or uphold the restrictive state marriage laws and (2) those filed by historians to delineate the history of marriage and of the treatment of LGBT persons in the United States.

In this Part, I first discuss various new originalist arguments made in *Obergefell* and challenged by other originalist scholars. I point out that the *Obergefell* dissenters hued closer to what Fleming would call conventional forms of originalism than the new originalism, similar to that of Judge Sutton in *DeBoer*. I then argue that Justice Kennedy's majority in *Obergefell* is more compatible with a moral reading than with an originalist one in its focus on the dual evolution of understanding constitutional principles and of the institution of marriage. Notably, while Kennedy did not enlist the new originalist briefs or arguments, he did draw upon the briefs filed by historians and historians of marriage in his discussion of the relevance of history.

1. *Competing visions of originalism*

The Cato Institute, along with William Eskridge Jr., Steven Calabresi, and several other legal scholars, filed an amicus brief arguing that the *DeBoer* majority opinion "erred by focusing on a certain kind of original *understanding*" of the Equal Protection Clause —"the immediate effect supporters 'understood' the Fourteenth Amendment to have"— rather than on "original *meaning*".[84] Amici contended that

[83] *See* Liptak (n 3) (147 briefs).

[84] Cato Institute Brief (n 14) 3. One signatory to the brief, William Eskridge, is a pioneer in the field of sexual orientation and the law and an advocate of dynamic statutory interpretation, perhaps making his turn to originalism surprising. Ilya Somin, a signatory on a different amicus brief enlisting originalism (The Legal

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the latter approach is that taken by the Supreme Court, under which it "has asked how the well-established meaning of terminology added to the Constitution in 1868 applies to modern exclusion of new as well as established social groups".[85] On this approach, it would not be controlling that "there is no evidence that 'the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage'".[86] The Cato Institute Brief argues that the "original meaning" of the Equal Protection Clause is "the protection of equal laws", and that it "prohibits caste legislation that discriminates against a social class, 'not to further a proper legislative end but to make them unequal to everyone else'".[87] While "original understanding" will not suffice to justify certain Equal Protection precedents, this original meaning approach can do so.

The Cato Institute Brief articulates one form of what Fleming would call "new originalism": it contends that "original-meaning originalism 'is entirely consistent with updating the application of its fixed principles in light of new factual information. Indeed, such updating is often not only permitted, but actually required by the theory'".[88] On this approach, while there was "no class of 'gay people' who could be targets of a caste regime" in 1868, a legal regime subsequently developed that "defined 'homosexuals' as a pariah class outside the general benefits and protections of the laws"; recently enacted state defense of marriage statutes and constitutional amendments "expanded" this caste regime.[89] Seen in this light, then, "updating" involves recognizing that "distinctions between opposite-sex and same-sex couples do not serve any legitimate interest

Scholars Brief (n 15) discussed *infra*), observes that while "Eskridge himself is not an originalist – at least not in the sense of believing that originalism generally trumps other modes of constitutional interpretation, ... as Michael Ramsey notes, '[i]t says something about originalism's new place that the most prominent academic defender of same sex marriage makes the text's original meaning the centerpiece of his argument'". Somin (n 30) 1-2.

[85] Cato Institute Brief (n 14) 3 (citing *VMI*; Romer v. Evans, 517 U.S. 620 (1996)).

[86] *Ibid.* 2-3 (quoting *DeBoer*, 772 F.3d at 388).

[87] *Ibid.* (citing *Romer*, 517 U.S. at 635).

[88] *Ibid.* 4 (citing Somin, *supra* note 30).

[89] *Ibid.* 22, 24-25.

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and are instead founded on the core stereotypes that have underwritten the past century's anti-gay legislation".[90]

The second brief that enlisted a form of new originalism to challenge restrictive state marriage laws was filed by Andrew Koppelman and several other legal scholars. It makes a sex discrimination argument: laws forbidding same-sex couples to marry classify on the basis of sex and often rest on impermissible gender stereotypes and, thus, require intermediate scrutiny.[91] As discussed in Part II, Judge Berzon's *Latta* concurrence and some other judicial opinions make this argument. What this brief adds is the contention that "laws restricting the right to marry on the basis of gender go against ... the original meaning of the Fourteenth Amendment".[92] As does the Cato Institute, this second brief criticizes Judge Sutton's claim that those laws "are consistent with the original meaning, because few if any observers in 1868 would have thought otherwise". They counter that "as most originalists recognize today, the original expected application of framers are distinct from the original understanding of the meaning of the text. Only the latter is controlling law".[93] This form of originalism, to use Fleming's framework, seems to be "abstract originalism" in that it recognizes that "many important provisions of the Constitution establish broad, general principles that must be applied to factual conditions that can change over time".[94] However, it is not the principles that seem to evolve, but "our understanding of the relevant facts", as "new evidence accumulates".[95] It is "changes in factual understanding" from 1868 to the present that support an argument, today, that restrictive marriage laws are a prohibited form of sex discrimination; for in 1868, "the drafters and rati-

[90] *Ibid.* 24-25.

[91] Legal Scholars Brief (n 14). Koppelman, one author on the brief, is known for advancing the argument that discrimination against gay men and lesbians (including restrictions on the right to marry) is sex discrimination; like Eskridge, he is not generally viewed as an originalist. *See* Andrew Koppleman, 'Why Discrimination Against Lesbians and Gay Men is Sex Discrimination' (1994) 69 N.Y.U. L. Rev. 197.

[92] Legal Scholars Brief *(*n 14) 23-24.

[93] *Ibid.* 24.

[94] *Idem.*

[95] *Idem.*

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fiers of the [14th] amendment believed that many forms of sex discrimination were compatible with the Amendment's general ban on 'class' and 'caste' discrimination".[96] Indeed, the Legal Scholars Brief chronicles the long history of appeals to "natural" differences between men and women to justify laws that discriminated on the basis of gender, including laws about gender roles within marriage.[97] Such would be the assumptions of "most Americans in 1868".[98] The authors draw parallels between present-day recognition of the unsoundness of nineteenth century assumptions about gender roles within marriage and "overwhelming evidence" today indicating that "same-sex marriages are capable of carrying out the major social purposes of opposite-sex marriage, including raising children and strengthening social ties".[99]

Obliquely addressing a question posed two years earlier by Justice Scalia in the oral argument over the constitutional challenge to Proposition 8 —about the date on which laws banning same-sex marriage became unconstitutional— the brief contends: "In order to justify striking down laws banning same-sex marriage, we need not identify exactly when the accumulation of evidence became great enough to be decisive, only that it reached that point at some time before the present case came before the court".[100]

Both of these briefs reject the narrow "original meaning" approach adopted by the Sixth Circuit in favor of what Fleming might call "abstract originalism", which is more like a moral reading than conventional originalism. These brief authors might resist his argu-

[96] *Ibid.* 25. The authors give the example of Robert Bork's account of why the Court in *Brown v. Board of Education* was justified because "[b]y 1954... it had been apparent for some time that segregation rarely if ever produced equality". *Ibid.* (quoting Robert H. Bork, *The Tempting of America* (Free Press 1990) 82).

[97] *Ibid.* 26-27.

[98] *Ibid.* 27.

[99] *Idem.*

[100] *Ibid.* 27-28 (citing Ilya Somin, 'How to Figure Out When Laws Banning Same-Sex Marriage Became Unconstitutional, and Why the Precise Date May Not Matter' (Volokh Conspiracy 26 Mar. 2013, 11:44 PM), http://volokh.com/2-13/03/26/how-to-figure-out-when-laws-banning-same-sex-marriage-became-unconstitutional-and-why-the-precise-date-may-not-matter/) accessed [date].

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ment that they are engaging in a moral reading because they insist that the moving parts are not evolution in understanding of principles of equality or liberty, but evolution in understanding of facts and the application of those principles to facts. Is this a distinction with a difference? Certainly, evaluating those facts requires some exercise of moral and political judgment. On this question of the boundaries of originalism, two observations based on the *Obergefell* record may be helpful. First, it is telling that some originalist legal scholars (including Lawrence Alexander and Steven D. Smith), along with the Marriage Law Foundation, filed an amicus brief specifically *challenging* the Cato Institute's account of "original meaning" and contending that the Cato Institute Brief's approach was more akin to that of Ronald Dworkin, a "sophisticated critic of originalist constitutionalism".[101] Indeed, Fleming views Dworkin as a leading exemplar of a moral reading approach;[102] the Scholars of Originalism Brief characterizes Dworkin's approach as that judges should "enforce the general 'concepts' reflected in the Constitution, not the specific 'conceptions' contemplated by the enactors".[103] While Dworkin and similar critics of originalism specifically acknowledged that "they were *opposing* historical meaning as an authoritative criterion", the Cato Brief exemplifies a tack of making "prodigious use of the 'abstraction' strategy, while continuing to claim the label of 'originalism'".[104] Indeed, the Scholars of Originalism Brief asserts that while there may be "definite advantages, at least within the academy, in turning 'originalism' into a big tent that can include almost anyone", such as "dispel[ling] some of the hostility that originalism has sometimes provoked", "if 'original meaning' is defined so loosely that virtually everyone and every decision can be classed as 'originalist,' the term ceases to have any real meaning at all".[105] (These criticisms echo those Fleming makes of Baude's "inclusive

[101] Scholars of Originalism Brief (n 15) 15.
[102] Fleming (n 9) 11, 73-74.
[103] Scholars of Originalism Brief (n15) 15.
[104] *Idem.*
[105] *Ibid.* 15-16.

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originalism".[106]) Finally, the authors proffer their most serious objection to this "theoretical conception of 'original meaning' that is highly abstract and separated from the 'understanding' of constitutional enactors and ratifiers":

> [it] defeats the goal of permitting "We the People", acting through our elected representatives in Congress and the state legislatures, to deliberate intelligently and understandingly about proposed constitutional measures, and then to decide whether or not to entrench those measures in our constitutional law.[107]

Second, none of the conservative members of the Court —all of whom dissented in *Obergefell*— accepted these newer approaches to original meaning. Instead, they hued closer to the approach taken by Judge Sutton. Justice Scalia insisted that "*the People's* understanding" —"when the Fourteenth Amendment was ratified in 1868"— that states did and could (constitutionally) limit marriage to one man and one woman "resolves these cases".[108] As Cott observes, "more than one version of the history of marriage [was] operating" in *Obergefell*.[109] Chief Justice Roberts viewed marriage as an "unvarying social institution." He asserted that the "singular understanding of marriage" —as the union of one man and one woman— "has prevailed in the United States throughout our history", so that "to those who drafted and ratified the Constitution, this conception of marriage and family 'was a given…'".[110] Further, because "the Constitution itself says nothing about marriage", "the Framers… entrusted" the subject of domestic relations —including the definition of marriage— to the states.[111] Affirmatively citing *DeBoer*, Roberts observes that, before and after statehood, the four states whose laws are under challenge "defined marriage in the traditional, biologically

[106] Fleming *(*n9) 15-19.
[107] *Idem.*
[108] Obergefell v. Hodges*,* 135 S. Ct. 2584, 2628 (Scalia, J., dissenting).
[109] Cott (n 5) 1.
[110] *Obergefell,* 135 S. Ct. 2613 (Roberts, C.J., dissenting).
[111] *Idem*.

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rooted way".[112] Like Sutton, Roberts endorses the responsible procreation rationale for this definition of marriage.[113] Roberts concurs with the Sixth Circuit's conclusion that, rather than "constitutionalizing the definition of marriage", it should be left in the place "where it has been since the founding: in the hands of state voters".[114] Justice Alito argues similarly, charging the majority with giving a "distinctively postmodern meaning" to Due Process "liberty".[115] Finally, Justice Thomas appeals to how "the Framers" understood "liberty" to argue that the Court is "deviating from the original meaning" of the Due Process Clauses.[116]

It is clear, thus, that none of the conservative justices found the new originalism persuasive. What about Justice Kennedy, who everyone assumed would be the decisive vote one way or the other? To the extent that amici pitched their new originalist arguments to "an audience of one",[117] it is telling that while Justice Kennedy's opinion repeatedly referred to the "meaning" of marriage as well as of liberty and equality, he emphasized evolving meaning, not "original meaning". Further, he did not follow the route of deploying "original meaning" to hold the state laws unconstitutional as sex discrimination or (explicitly) as impermissible class discrimination prohibited by the Fourteenth Amendment.[118] More obviously influential on Justice Kennedy's opinion than the new originalist briefs discussed above were briefs filed by historians that informed his account of

[112] *Ibid.* 2613-14.

[113] *Ibid.*; *see supra* Part II.A for discussion of this argument.

[114] *Ibid.* 2615.

[115] *Ibid.* 2640; *ibid*. 2642 (because "the Constitution simply does not speak to the issue of same-sex marriage" by including a "right to marry a person of the same sex," it falls to "the people," not the Court, to "control their destiny" and decide on whether to fundamentally change the definition of marriage).

[116] *Ibid.* 2632-34 (Thomas, J., dissenting).

[117] *Cf*. Susan R. Estrich and Kathleen M. Sullivan, 'Abortion Politics: Writing for an Audience of One' (1989) 138 U. Penn. L. Rev. 119 (making argument for women's reproductive rights aimed at Justice O'Connor).

[118] Notably, an author on the Cato Institute Brief acknowledges that Justice Kennedy did not adopt various originalist arguments. *See* William N. Eskridge, Jr., 'The Marriage Equality Cases and Constitutional Theory' 2015 Cato Sup. Ct. Rev. 111.

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these forms of evolution. As Nancy Cott (coauthor of an influential amicus brief and a frequent expert in marriage litigation) observed, "history really matter[ed]" in Justice Kennedy's landmark majority opinion, specifically, the history of the institution of marriage and how it has "changed over time to admit new understandings of liberty and equality" as well as "the history of condemnation and criminalization of same-sex intimacy until recent decades".[119] Kennedy enlisted this history, I will argue, in service of a moral reading of the Fourteenth Amendment.

2. *The Obergefell majority opinion: dual forms of evolving understanding*

Justice Kennedy's landmark majority opinion in *Obergefell* crucially deployed two forms of evolving understanding —of constitutional guarantees of equality and the "promise of liberty" as well as of the institution of marriage. Those two forms of evolution worked together in his opinion to reject a static notion either of the fundamental right to marry or of marriage itself. They both undergird the holding that same-sex couples may exercise the fundamental right to marry in all states. They reflect a moral reading of the Fourteenth Amendment.

With respect to the evolving understanding of the Constitution's "promise" of liberty, Kennedy opens the *Obergefell* opinion with the declaration that: "The Constitution 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".[120] This language closely parallels the opening passage of *Lawrence v. Texas:* "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct".[121] Similarly, the joint opinion in *Planned Parenthood v. Casey* declared: "It

[119] Cott *(*n 5).
[120] *Obergefell,* 135 S. Ct. 2593.
[121] 539 U.S. 558, 562 (2003).

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is a promise of the Constitution that there is a realm of personal liberty which the government may not enter".[122]

"Insight", or evolving understanding, plays a critical role in *Lawrence*, for example, about fulfilling "the promise of liberty". *Lawrence* ends with the often-quoted passage that the ratifiers of the Due Process Clauses of the Fifth and Fourteenth Amendments did not "presume" to have the "insight" to map specifically all the components of liberty, but instead "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress".[123] Because of this temporal dimension to understanding constitutional principles, Kennedy adds: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom".[124] The joint opinion in *Casey* made a similar statement about the Constitution as "a covenant running from the first generation of Americans to us and then to future generations" and that "Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one".[125] In *Fidelity to Our Imperfect Constitution*, Fleming points to both of these opinions — and these passages— as exemplifying a moral reading.[126]

Obergefell builds on this idea by observing that: "[t]he nature of injustice is that we may not always see it in our own times".[127] Thus, as "new insight" reveals "discord" between the Constitution's "central protections" and "a received legal stricture," claims of liberty "must be addressed".[128] New insights about constitutional guarantees intersect with new insights about marriage as new generations help to reveal that what once seemed "natural and just" —defining marriage only as the union of one man and one woman— now is an injustice that is "inconsistent[] with the central meaning of the

122 505 U.S. 833, 844, 847 (1992).
123 539 U.S. 578-579.
124 *Ibid.* 579.
125 *Casey,* 505 U.S. 901.
126 Fleming (n 9) 58, 191.
127 135 S. Ct. 2598.
128 *Idem.*

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fundamental right to marry".[129] This view of marriage stands in sharp contrast with that offered in the several dissents, which argue for the unchanging, universal definition and purpose of marriage. In *Windsor*, just two years earlier, Justice Kennedy observed that New York's citizens and elected representatives, in enacting a law allowing same-sex couples to marry, acted to "correct" what they now perceived "to be an injustice that they had not earlier known or understood".[130]

Justice Kennedy's opinion closely resembles the opinion in *Goodridge v. Department of Public Health*, in which the Supreme Judicial Court of Massachusetts stated that marriage is an "evolving paradigm" —rather than static.[131] Moreover, Kennedy, like the *Goodridge* court, goes further in contending that "new insights" have spurred "deep transformations" that have "strengthened, not weakened, the institution of marriage".[132] In canvassing these transformations, Kennedy cites to the amicus brief filed by the Historians of Marriage and the American Historical Association,[133] which challenged the Sixth Circuit's argument that correcting any injustices in that law should be left to the democratic process as community mores evolve. That brief contends that: "Judicial review has often led to the recognition that traditional or discriminatory views of marriage (and marriage-related laws) must give way in the face of evolving understandings of race and gender embodied in constitutional guarantees under the Fourteenth Amendment".[134]

Countering the Sixth Circuit's assertion of a universal definition of marriage and marriage's origin in channelling procreation, the Marriage Historians Brief chronicles the "multiple" political, social, economic, legal, and personal purposes served by marriage as a

[129] *Ibid.* 2602.

[130] 133 S. Ct. 2675, 2689 (2013).

[131] 798 N.E.2d 941, 966-967 (Mass. 2003).

[132] *Obergefell,* 135 S. Ct. 2595-96.

[133] Brief of Historians of Marriage and the American Historical Association as Amici Curiae in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, -562, -571, and 574) [hereinafter Marriage Historians Brief].

[134] *Ibid.* 22.

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civil institution "[o]ver this Nation's history" since the founding.[135] The brief also charts the evolution of the laws governing marriage as the Nation has recognized the injustice of restricting some citizens from exercising the right to marry.[136] While Judge Sutton rooted marriage's origin in laws of nature, the Marriage Historians Brief points out how opponents of the demise of coverture attacked its dismantling as "blasphemous and unnatural," contrary to Divine will; opponents of the striking down of antimiscegenation laws later warned that "permitting cross-racial couples to marry would fatally degrade the institution of marriage," on the premise that "marriages across the color line were against nature, and against the Divine plan (as some opponents argue today against same-sex marriage)".[137]

While the dissents emphasize the determinative role of history and tradition, Kennedy takes a more critical approach to history. While conceding that the historical understanding of marriage was a union between one man and one woman, he rejects the respondent states' argument that history is not only "the beginning of these cases," but also "should be the end as well". Instead, he observes: "The history of marriage is one of both continuity and change".[138]

In explaining how new insights about the injustice within basic institutions such as marriage are gained, Kennedy again sounds the theme of generational moral progress: "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations".[139] Further, social movements seeking change play a role, since these new understandings often become apparent "through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process".[140] Kennedy's view of the relationship between democracy and constitutionalism differs notably from Judge Sutton's and from the *Obergefell* dissents.

[135] *Ibid*. 6-7.
[136] *Ibid.* 6.
[137] *Ibid.* 18, 21.
[138] *Obergefell,* 135 S. Ct. 2595.
[139] *Ibid.* 2596.
[140] *Idem.*

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What new insights about marriage inform the majority's holding that same-sex couples may exercise the fundamental right to marry? One source of insight is the substantial body of case law growing out of challenges by same-sex couples to state marriage laws and to the federal DOMA, beginning back in the 1990s in Hawaii and proliferating post-*Windsor*. Kennedy says that case law has helped to "explain and formulate the underlying principles" about the right to marry that the Court concludes apply equally to same-sex and opposite-sex couples.[141]

Another significant "new insight" involving "changing understandings" arising out of social movements and "pleas and protests" is not about marriage as such, but about the capacity of gay men and lesbians to enter into it. To chronicle this "dynamic", Kennedy draws on another historical brief, filed by the Organization of American Historians.[142] That history includes long moral condemnation of "same-sex intimacy", a condemnation expressed in the criminal law (upheld in *Bowers v. Hardwick* but eventually struck down in *Lawrence*).[143] Kennedy observes that the Supreme Court, "like many institutions," made "assumptions defined by the world and time of which it is a part", thus issuing a one sentence summary affirmance (in 1972) in one of the earliest challenges by a same-sex couple to state marriage laws, *Baker v. Nelson*, which *Obergefell* overrules.[144] That history also includes a failure to appreciate the dignitary claims of gays and lesbians and, prior to 1973, a labeling of their sexual orientation as a mental disorder rather than as a "normal expression of human sexuality and immutable".[145]

Three prior Kennedy opinions–*Romer*, *Lawrence*, and *Windsor*–all were turning points in marking this new insight; those opinions have characteristic vocabulary of concern for dignity and respect

[141] *Ibid.* 2597.

[142] Brief of the Organization of American Historians as Amicus Curiae in Support of Petitioners, Obergefell v. Hodges, 135 U.S. 2584 (2015) (Nos. 14-556, 562, 571, 574).

[143] *Obergefell*, 135 S. Ct. 2596 (citing Organization of American Historians Brief, *supra* note 142, at 5-28).

[144] *Ibid.* 2598.

[145] *Ibid.* 2596.

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and not demeaning the existence of gay men and lesbians. *Windsor* shifts the focus to the dignity and respect conferred by the bond of marriage itself upon same-sex couples and the message of inequality sent by DOMA when it fails to recognize their marriages. *Windsor* involved a two-step process: (1) *Lawrence* declaring that the intimate lives of same-sex couples were worthy of dignity and respect; and (2) the state of New York conferring dignity and respect and community stature through allowing such couples to marry.[146] By contrast, *Obergefell* holds that those couples may exercise that right pursuant to the federal constitution itself, in light of evolving understanding both of constitutional freedom and of marriage.

Two other new insights about marriage warrant mention because they contribute to the majority's conclusion that deep transformations in marriage actually strengthen the institution: the demise of laws barring interracial marriage and the repudiation of gender hierarchy in marriage. As discussed in Part II, these two transformations feature prominently in prior marriage equality jurisprudence, as evidenced in the *DeBoer* dissent and the *Goodridge* majority. Kennedy relates these insights to the intertwining of Due Process and Equal Protection in understanding the scope of the right to marry. The intertwining or "synergy" between these two clauses is another characteristic theme in Justice Kennedy's jurisprudence.[147] He invokes *Loving v. Virginia* to illustrate the "interrelation" of the independent principles of each Clause. The Court's invalidation of racial restrictions on who may marry drew on both Equal Protection and Due Process. While conventional understandings of *Loving* have emphasized its equal protection holding, Justice Kennedy argues that looking at liberty and equality together helped to make "the reasons why marriage is a fundamental right bec[o]me more clear and compelling".[148] Notably, Kennedy refers to this understanding as

[146] United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

[147] 135 S. Ct. 2603. Similarly, in *Goodridge*, Chief Justice Marshall —citing *Perez* and *Lawrence*— observed that, "in matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [of liberty and equality] frequently overlap, as they do here". 798 N.E.2d 941. 953 (Mass. 2003).

[148] *Obergefell,* 135 S. Ct. 2603.

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coming from a "full awareness and understanding of the hurt that resulted" from such laws.[149] Hurt and humiliation, of course, was a large theme in *Windsor* and in numerous post-*Windsor* federal opinions; it is not a prominent theme in the economically written *Loving* opinion itself.[150]

In a passage that may reflect the influence of Justice Ruth Bader Ginsburg, Justice Kennedy offers his second example of how interpreting the Equal Protection Clause can lead the Court to recognize "that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged".[151] That example is that, even in the 1970s and 1980s, "invidious sex-based classifications in marriage remained common"; such laws "denied the equal dignity of men and women". The Court, "responding to a new awareness," used equal protection principles "to invalidate laws imposing sex-based inequality [i]n marriage".[152]

Kennedy, thus, observes that the Court has "correct[ed] inequalities" based on race and sex within the institution of marriage, thus vindicating "precepts of liberty and equality".[153] His opinion also notes the intertwining of liberty and equality in *Lawrence* and then asserts that the same dynamic applies to same-sex marriage. The significance of evolving understanding is evident when the Court states: "It is now clear that the challenged laws burden the liberty of same-sex couples" and "abridge central precepts of equality".[154] Significant themes about denial of liberty and equality join together here: against a "long history of disapproval of their relationships"– recall the constitutional limits in liberty and equality cases on sin-

[149] *Idem.*

[150] In her dissent in *DeBoer*, Judge Daughtrey led with the majority's disturbing lack of attention to the "actual plaintiffs as persons, suffering actual harm," as well as the impact of the restrictive laws upon their children, drawing on the extensive trial record about the capacity of gay and lesbian parents to rear children. 772 F.3d 421-28.

[151] *Obergefell*, 135 S. Ct. 2603.

[152] *Ibid.* 2603-04.

[153] *Ibid.* 2604.

[154] *Idem*.

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gling out a group based on moral disapproval–this denial of the right to marry "works a grave and continuing harm".[155] The denial imposes a "disability" on them that "serves to disrespect and subordinate them".[156] Although *Romer* is not cited here, that opinion noted the disability imposed by Amendment 2 forbidding protection against discrimination on the basis of sexual orientation or conduct.[157] To be sure, new originalists might well argue that the majority's use of the language of imposing a "disability" upon a class that is singled out is consistent with the "original meaning" of the Fourteenth Amendment as anti-class legislation.[158] I believe, though, that the role of evolving understanding of the meaning of constitutional guarantees, so prevalent in Kennedy's opinion, signals a moral reading. For instance, Kennedy states:

> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is *now* manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[159]

While new factual understandings play a role, normative judgments about justice and about rights also evolve.

By contrast to Justice Kennedy's emphasis on the evolution of the institution of marriage to correct injustices within it, Chief Justice Roberts rejects the idea that these were "fundamental" transformations. On his view, the fundamental (essential) character of marriage through all these changes was as a one man-one woman institution. This minimizing strategy is unpersuasive. Defenders of bans on interracial marriage stressed marriage's link to procreation; preventing mixed- race offspring was a central rationale offered for those

[155] *Idem*.

[156] *Idem.*

[157] *Romer v. Evans*, 517 U.S. 620, 631 (1996).

[158] *See* Cato Institute Brief (n 14) 17-24 (arguing that restrictive state marriage laws expand an "anti-gay caste regime").

[159] *Obergefell*, 135 S. Ct. 2602 (emphasis added).

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laws.[160] Further, the Marriage Historians Brief and other briefs emphasized some of the similarity in arguments made in defense of these laws and of bans on same-sex marriage.[161]

Roberts is also unpersuasive when he asserts that if you asked a person on the street, while state marriage law embraced the common law's model of gender hierarchy, they would never had defined marriage as "the union of a man and a woman, where the woman is subject to coverture".[162] They may well not have used the term "coverture", but many likely would have had an everyday understanding of marriage as a domestic relation in which husband and wife occupied distinct, and complementary gender roles, with the husband as the head of the household and representative of the family in public life, and the wife as subject to and properly dependent upon her husband. Civil marriage, as the Marriage Historians Brief explains, developed in Western political culture as closely related to governance, in particular, with male heads of households as "delegates" for those within the household.[163]

3. *A road not taken: sex discrimination*

Kennedy declined to make a full-blown sex discrimination argument for striking down state marriage laws limiting marriage to one man and one woman, although such an argument was among those advanced by the petitioners and a number of amici. If Justice Ginsburg had written a concurring opinion that (similar to Judge Berzon) elaborated that sex discrimination rationale, the Court's new

[160] *See generally* Peggy Pascoe, *What Comes Naturally* (Oxford University Press 2009).

[161] Marriage Historians Brief (n 133) 22-23. *See* Brief Amicus Curiae of Carlos A. Ball et al in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, -562, -571, -574) (drawing parallels between "pseudoscientific" and "pseudoempirical" justifications offered for antimiscegenation laws and opposition to same-sex marriage).

[162] *Obergefell*, 135 S. Ct. 2614.

[163] Marriage Historians Brief (n 133) 7.

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Equal Protection jurisprudence and corresponding changes in family law would likely have been central components. While, as noted above, the Legal Scholars Brief offered this argument as consistent with "original meaning" of the Fourteenth Amendment, I would argue that any such Ginsburg opinion would likely have evidence of a moral reading. Fleming argues, for example, that Ginsburg, like Justice Brennan, is a moral reader who believes that "the point of adopting and amending the Constitution is not to embody longstanding historical practices but to transform them in pursuit of our constitutional aspirations to normative principles like liberty equality and liberty".[164] Ginsburg long ago called for "boldly dynamic interpretation," rather than an "original understanding" approach to change the long history of "empty-cupboard" jurisprudence with respect to sex equality.[165] Ginsburg, like Justice O'Connor before her, has given her share of speeches pointing out some of the "greatest hits" (or, I suppose "greatest misses") in the Court's long history of failing to treat women as equals to men and its upholding of aspects of the law of coverture and of separate spheres ideology.[166] While some prominent feminist constitutional scholars support sex discrimination as a constitutional hook for striking down the one man-one woman definition of marriage,[167] they do so not by appealing to "original understanding" or "original public meaning" either of marriage or of equality. The dissenting opinion by Judge Daughtrey, as well as the underlying concurring opinion by Judge Berzon, discussed in Part II are instructive.

4. *The four principles and reasoned judgment*

Finally, Justice Kennedy's method of identifying four principles underlying the reason that the right to marry is fundamental also evidence a moral reading. In looking to such principles the majority

[164] Fleming *(*n 9) 44.

[165] *See* Ginsburg *(*n 21) and accompanying text; see also Case *(*n 24).

[166] The concurring opinion by Justice Bradley in *Bradwell v. State*, 83 U.S. 130 (1872) is a standard text in such presentations of the history of the Court's treatment of women's status under the Constitution. As noted in text, it is similarly cited in *Planned Parenthood v. Casey*.

[167] Case *(*n 24).

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rejects *Glucksberg,* which defined "liberty" in a "circumscribed" manner, by reference to "specific historical practices".[168] Kennedy counters that such an approach is inconsistent with the approach used when fundamental rights are at stake, such as the right to marry.[169] Kennedy cites *Loving* and *Lawrence* to elaborate on the limits of historical practices: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied".[170] Kennedy further invokes Justice Harlan's method of reasoned judgment and rejects the reduction of Due Process to a narrow formula. "History and tradition guide and discipline this inquiry [of identifying fundamental rights], but do not set its outer boundaries".[171]

The majority identifies four "underlying principles" that demonstrate that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples".[172] These principles about marriage stress both goods and rights; that marriage simultaneously has public and private dimensions.[173] So, too, Justice Kennedy affirms —as one principle— that marriage is an institution "at the center" of "many facets of the legal and social order" —a "keystone of our social order". Its very centrality makes exclusion from it all the more unjust and, to use another term favored by Kennedy, "urgent".[174] Taking a page from *Goodridge,* Justice Kennedy stresses that prior transformations of marriage in response to newly-perceived injustices have strengthened, not weakened it. He concludes that respondents have not shown a foundation for concluding that allowing same-sex marriage will cause the harmful outcomes they predict; while he does not explicitly predict the institution will

[168] *Obergefell,* 135 S. Ct. 2602.

[169] *Idem.*

[170] *Idem.*

[171] *Ibid.* 2598.

[172] *Ibid.* 2599.

[173] In other work, James Fleming and I point out the dual focus on rights (to autonomy and self-definition) and moral goods in *Goodridge* and in the California marriage case, *In re Marriage Cases,* 183 P.3d 384 (Cal. 2008). *See* James E. Fleming and Linda C. McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* (Harvard University Press 2013).

[174] *Obergefell,* 135 S. Ct. 2602.

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thrive with this new step, he certainly, in an allusion to *Lawrence*, makes clear that these new marriages "pose no risk of harm," including to third parties.[175] This discussion of what marriage is and what its purposes are contrasts sharply with the more truncated view offered in Chief Justice Roberts's dissent (and in the Sixth Circuit majority opinion). The *Obergefell* majority observes that, as marriage has evolved over time, so too have understandings of its purposes. Kennedy's elaboration of the four principles emphasizes rights and their gradual extension to those previously excluded, another way in which he offers a moral reading of the Constitution.

IV. Conclusion

To return to my opening questions: what's in a name? Why do definitions matter? At issue in this symposium are the boundaries of competing approaches to constitutional interpretation and what the respective promise of moral readings and originalisms are for controversies like this marriage definition battle. One aim of Fleming's book is to point out that new originalists are moving in directions that seem to embrace methods that old (and some new) originalists condemned —when practiced by moral reader— as out of bounds.[176] The move to "original meaning" or "original public meaning", for example, seeks to free interpreters from being bound by historical applications that were based on factual assumptions that later generations (and even some at the time) rightly view as incorrect. Certainly, feminists are acutely familiar with wrong-headed assumptions about women's capacities and roles and the way in which those assumptions have rationalized their inequality, over time, in the economic, familial, political, and legal spheres. Thus, it is certainly intriguing and worth noting when prominent originalist theorists wish to champion prohibiting sex discrimination as a proper aim of the Fourteenth Amendment, even if that aim was realized tardily. So, too, it was intriguing, as the Court considered *Obergefell,* to see that to learn of the attempts by some originalists to make a constitutional

[175] *Ibid.* 2607.
[176] Fleming (n 9) 3-19.

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"case" for same-sex marriage as flowing from the Fourteenth Amendment's original meaning prohibiting class or caste legislation. I shall not "rule" on whether these developments fit comfortably within a "big tent" originalism[177] or whether, as Fleming would likely argue, they are better seen as the incorporation of moral reading methods, such that these originalists should "reconceive their projects as being in support of the moral reading" —rather than as "offering alternatives to it"— and join the moral reading big tent.[178] As Fleming observes, while "there is no hope" of reconciling old originalism —of the sort evident in Judge Sutton's opinion and some of the *Obergefell* dissents— with moral reading, the "prospects for reconciliation" of new originalism and moral readings are more promising.[179] These arguments about new appreciation of the proper application of constitutional principles as new understandings dawn bring to mind the theme of generational and moral progress sounded at the end of *Lawrence v. Texas* and echoed in a number of post-*Windsor* opinions: "As the Constitution endures persons in every generation can invoke its principles in their own search for greater freedom".[180] Fittingly, Fleming closes his book with this passage, urging citizens, scholars, and judges to be moral readers who are mindful that the Constitution establishes a "framework for a self-governing people to build out over time in light of experience together with moral and political learning". [181]

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[177] *Cf.* Lawrence Solum, 'What Should Count as an Originalist Case for a Right to Same Sex Marriage' (*Legal Theory Blog* 28 Jan. 2015), *http://lsolum.typepad.com/legaltheory/2015/01/what-should-count-as-an-originalist-case-for-a-right-to-same-sex-marriage.htm accessed [ ]*

[178] Fleming (n 9) 97.

[179] *Ibid.* 48-49.

[180] *Lawrence,* 539 U.S. 578-89.

[181] Fleming (n 9) 191.

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